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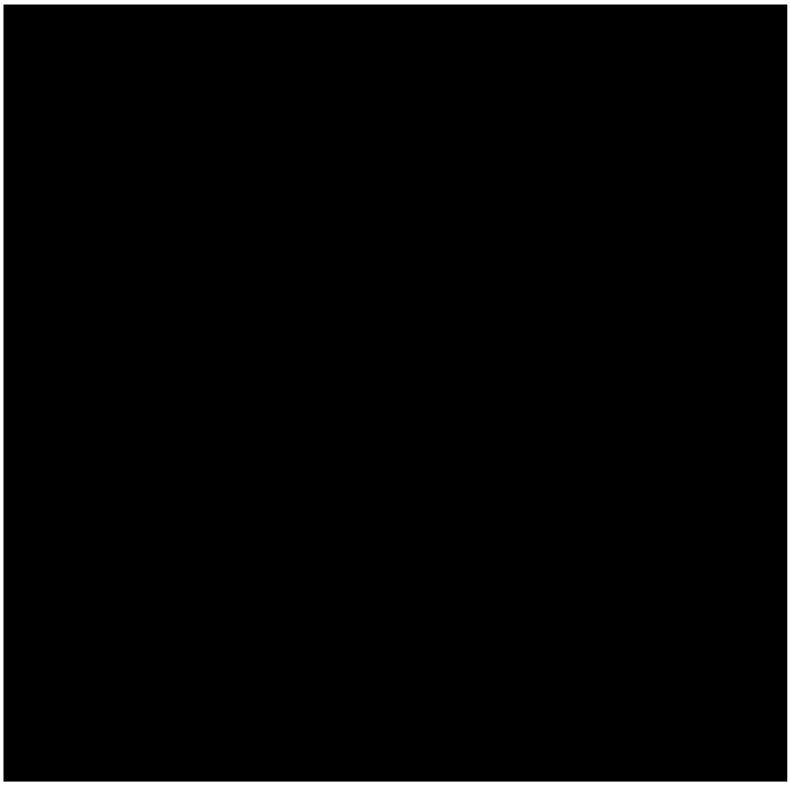

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Viola LEDFORD *v.* GAS MART CO., INC.

75-193 531 S.W. 2d 11

Opinion delivered December 22, 1975

Robert E. Irwin, for appellant.

Laser, Sharp, Haley, Young & Boswell, for appellee.

CARLETON HARRIS, Chief Justice. Appellant, Viola Ledford, brought this negligence action, seeking to recover for a "slip and fall" on the premises of appellee's self-service gas station. Appellant contended that the fall was caused by

appellee's negligence in leaving oil on the driveway where appellant fell. At the close of appellant's evidence, the trial court directed a verdict for appellee on the grounds that appellant had sued the wrong entity — Gas Mart Co., Inc., rather than Gas Mart Co., the actual name of appellee — and that in any event appellant had failed to present any substantial evidence of appellee's alleged negligence. From the judgment so entered, appellant appeals, arguing that the trial court erred by directing a verdict on these two grounds.

Since we are of the view that there was no substantial evidence presented with reference to negligence on the part of appellee, there is no need to discuss the first ground for granting the directed verdict. Ms. Ledford, a resident of Atkins, testified that she went to the Gas Mart on December 18, 1968, for the purpose of putting gasoline in her automobile . . . it had rained, but was not raining at the time. She got out of her car, picked up the nozzle on the machine . . . pumped the gas into her car . . . walked back to the pump and hung the nozzle on the hanger . . . then started back to her car and fell. She did not observe any grease before she fell, but after falling, observed a space with grease or oil on it.[1] She also observed grease on her blue jeans where she had fallen. Appellant then paid the office attendant for the gasoline, commenting to him, "You got some grease on your driveway. You ought to put something on it." This constituted all of the evidence offered on behalf of appellant as far as the manner in which the fall occurred. No evidence was presented that showed any employee of appellee was responsible for the oil or grease spot on which she slipped, or that the oil or grease had been on the driveway for such a length of time that the operator should have known of its presence. Appellant recognizes that under our cases, she has the burden to show either that the employee placed a substance which caused her injury on the driveway, or that it had been there for a sufficient length of time that the operator should have known of its presence. However, it is contended that since appellee is a self-service station, and the customers serve themselves, the usual rule should not apply. From the brief:

[1]The size of the space cannot be determined from the record, the testimony reflecting, "Approximately that much space with grease or oil or something on it."

"By the very nature of this business the jury could have inferred that to let customers pour oil and pump gas into their own cars was conducting a dangerous business operation."

No compelling reasons are offered to support this argument. Appellant did not call the supervisor or operator of the station as a witness to determine whether any effort was made to keep the premises safe, nor did appellant offer any evidence from other witnesses that the driveways of the station were regularly covered with oil and grease. In *Moore* v. *Willis*, 244 Ark. 614, 426 S.W. 2d 372, this court said:

> "No presumption of negligence arises from the mere fact that a customer sustains a fall while in a store. *Miller* v. *F. W. Woolworth Co.*, 238 Ark. 709, 384 S.W. 2d 947. A storekeeper is not an insurer of his patrons against any and all hazards which may be encountered on his premises. *Kroger Grocery & Baking Co.* v. *Dempsey*, 201 Ark. 71, 143 S.W. 2d 564. He is liable to a patron who is injured as a result of slipping on some foreign substance or object on the floor where it is shown by the evidence, or is reasonably inferable therefrom, that the foreign matter was negligently placed or left on the floor by the storekeeper or one for whose acts he is responsible, or that the matter had remained on the floor a sufficient length of time that the storekeeper knew, or, in the exercise of ordinary care, should have known of its presence. *Kroger Grocery & Baking Co.* v. *Dempsey, supra; Deason* v. *Boston Store Dry Goods Company*, 226 Ark. 667, 292 S.W. 2d 261, 61 ALR 2d 170."

As stated, we presently see no reason why a different rule should apply to the case before us than was applied in the cases cited.[2]

Affirmed.

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[2]Cases cited by appellant deal with the constitutionality of city ordinances in two sister states which prohibit the operation of self-service filling stations, and have no application to the facts at hand.

Florence SCHUMAN et al *v.* Virginia MARTIN et al

75-194 531 S.W. 2d 26

Opinion delivered December 22, 1975

Frank H. Cox, for appellants.

Troy R. Douglas and *Hardin, Jesson & Dowson*, for appellees.

GEORGE ROSE SMITH, Justice. The appellees, claiming ownership by inheritance from their mother, brought this suit to quiet their title to two city lots in Forth Smith and to cancel a State tax deed issued to the appellants in 1949. The defendants did not rely upon their tax deed as being valid, but they did assert title as a result of having paid the taxes for more than seven successive years. After a trial the chancellor

entered a decree granting the relief sought by the plaintiffs, subject to their reimbursing the defendants for the amount of their tax payments, with interest. For reversal the appellants rely, as they did below, upon the superiority of their title.

That the appellees originally acquired title by adverse possession is shown by the weight of the evidence. Their mother bought the property in 1945 or 1946 and occupied a small house upon it until her death in 1947. Possession was continued either by some of the plaintiffs themselves or by tenants until the house burned in 1955. Hence there was continuous possession for more than seven years, which of course ripened into title.

The appellants, however, paid the taxes annually from 1949 to 1972, with the exception of the year 1964, when the appellees paid them. It is now insisted that, after the house burned, the appellants acquired title by the payment of taxes, under color of title, upon unimproved and unenclosed land for seven successive years. Ark. Stat. Ann. § 37-102 (Repl. 1962).

The appellants are mistaken in their understanding of what constitutes "unimproved and unenclosed" land. Those words are used in Section 37-102, which requires payment of taxes for seven years under color of title. The companion statute, Section 37-103, requires payment of taxes for fifteen years without color of title and refers to "wild and unimproved" land. We have repeatedly held that the two statutes refer to the same conditions, "unimproved and unenclosed" being used interchangeably with "wild and unimproved." See the discussion in *Schmeltzer* v. *Scheid*, 203 Ark. 274, 157 S.W. 2d 193 (1941). It is also settled that lands which have been improved cannot be said to be "wild and unimproved" until they have been allowed to revert to the wild state that existed before the improvements were made. *Weston* v. *Hilliard*, 232 Ark. 535, 338 S.W. 2d 926 (1960); *Moore* v. *Morris*, 118 Ark. 516, 177 S.W. 6 (1915).

Here the two city lots in question did not revert to their original wild state. After the house burned the appellees paid someone to level off the lots. Thereafter a relative who lived

next door to the property looked after it, keeping the grass mowed. There is no proof that the property was allowed to return to its natural state. Consequently the appellants cannot prevail upon the theory that they were paying taxes upon unimproved and unenclosed land, as that phrase has been interpreted through the years.

Affirmed.

Virginia CROCKETT *v.* Ralph JOHNSON et al

75-199 530 S.W. 2d 671

Opinion delivered December 22, 1975

Blankenship & Jarboe, for appellant.

H. David Blair, for appellees.

GEORGE ROSE SMITH, Justice. The issue here is the validity of a default judgment entered by the circuit court of Lawrence county against a resident of Sharp county, over whom the court acquired no personal jurisdiction. The trial court was right in setting aside the default judgment, on the ground that it was void.

The appellant brought suit in Lawrence county upon a $10,000 promissory note executed by the appellee Ralph Johnson, a long-time resident of Sharp county. The summons was served by the sheriff of Sharp county, in that county. No answer having been filed within the time allowed, the court entered a default judgment against Johnson. Later on, after a writ of execution had been sent to Sharp county without results, the plaintiff sought judgment against the Sharp county sheriff and his bondsman. Johnson and the sheriff then attacked the original judgment, which the trial court set aside.

For reversal the appellant relies upon a line of cases, beginning with *State* v. *Hill*, 50 Ark. 458, 8 S.W. 401 (1887), holding that one who attacks a judgment rendered in his absence must show not only that he was not properly summoned but also that he did not know about the proceeding in time to make his defense. Upon that theory it is argued that Johnson is bound by the judgment, because the service of summons in Sharp county gave him notice that he was being sued.

That line of authority is distinguishable; for in those cases the court *could* acquire personal jurisdiction over the defendant, there merely being some defect in the service of process. Here personal jurisdiction was lacking. Under our statutes an action upon a transitory cause of action cannot be maintained in one county upon service had in another county. *Chambers* v. *Gray*, 203 Ark. 858, 158 S.W. 2d 926 (1942). A default judgment in such a situation is necessarily void, for otherwise every court in the state would have statewide jurisdiction to compel residents of other counties either to defend a suit such as this one in the first place or to show a meritorious defense in order to attack the default judgment. That showing is unnecessary when the judgment is void. *Davis* v. *Schimmel*, 252 Ark. 1201, 482 S.W. 2d 785 (1972). The trial court was right in setting aside the void default judgment.

Affirmed.

Carl Albert COLLINS *v.* STATE of Arkansas

CR 75-110 531 S.W. 2d 13

Opinion delivered December 22, 1975
[Rehearing denied Jan. 19, 1976.]

John Barry Baker and *Robert R. Estes,* Public Defenders, Fayetteville, for appellant.

Jim Guy Tucker, Atty. Gen., by: *Robert A. Newcomb*, Asst. Atty. Gen., for appellee.

Beryl Anthony, 13th Circuit Prosecuting Atty; *Lee A. Munson*, 6th Circuit Pros., Atty., *John Wesley Hall Jr* and *Fred Hunt Jr.*, Deputies, Amius Curie.

GEORGE ROSE SMITH, Justice. The appellant, Carl Albert Collins, was convicted of a capital felony, the murder of John Welch, and was sentenced by the jury to death by electrocution. The principal issue is the validity of Act 438 of 1973, which reinstated the death penalty after the decision in *Furman* v. *Georgia*, 408 U.S. 238 (1972). Ark. Stat. Ann., Title 41, Ch. 47 (Supp. 1973). We find the statute to be constitutional.

John and Gertrude Welch, an elderly couple who had been married for 54 years, were living at the time of the crime in a rural home in Washington county. Carl Collins, aged 20, had been working for the Welches for a month, helping Mr. Welch build a barn. On the evening of August 12, 1974, as Carl was being given his wages, he evidently learned that Mr. Welch had several twenty-dollar bills in his wallet.

Carl's brother-in-law brought Carl to work early the next morning. At about 9:15 Carl came from the barn to the house to get the morning's ice water, which was ready. Mrs. Welch testified that Carl suddenly attacked her and struck her repeatedly and painfully on the head with some object she could not identify. Mrs. Welch's screams apparently brought her husband to the house. As he entered he said: "Carl, what is the matter with you?" At that point Mrs. Welch blacked out. When she came to, Carl was running out with a shotgun and a box of shells. He slammed the door behind him and started the Welches' truck.

Welch sustained a mortal shotgun wound. He said:

"Carl shot me and took my billfold. I am not going to make it. Can you make it?" Mrs. Welch answered: "I don't think so. I am bleeding too much." At her husband's suggestion Mrs. Welch crawled to the bathroom and tried to stop the flow of blood by resting her head on a bathmat and applying a towel to her head. She lay there for several hours, getting weaker and thinking that she was dying. Whenever she raised her head she would black out completely.

Help finally arrived at about 2:00 p.m., when a passing telephone repairman happened to come to the house. By then Mr. Welch was dead; the court admitted his statements as a dying declaration. Mrs. Welch testified that her husband's wallet was gone, that the money in her purse was taken, and that the telephone was torn from the wall.

Apart from Mrs. Welch's testimony the State's proof of Carl's guilt was conclusive. The Welches' truck was found abandoned in a wooded area in Madison county. Near it were a hacksaw and the sawed-off end of a double-barreled shotgun. On August 13, the day of the murder, a Volkswagen automobile was stolen in Madison county. That night an officer, who did not know of the theft, saw Carl standing by that car in North Little Rock. When the stolen Volkswagen was recovered by the state police one of Carl's fingerprints was on the steering wheel. In the back seat was the rest of the sawed-off shotgun, which was identified as having come from the Welch home and which matched the portion found near the abandoned truck in Madison county.

In *Furman* v. *Georgia*, *supra*, the five-judge majority, in five separate and to some extent conflicting opinions, held that the Georgia and Texas capital punishment statutes were invalid as imposing cruel and unusual punishment. Only two of those five thought that every form of capital punishment is necessarily unconstitutional. The other seven members of the court took the opposite view, which obviously finds support not only in our history but also in the fact that both the Fifth and the Fourteenth Amendments provide that no person shall be deprived of his life without due process of law. Thus the power of the sovereign, both national and state, to take life is recognized by the constitution itself. The fact, as

pointed out by the Oklahoma Court of Criminal Appeals, that Congress and at least 32 states have reinstated capital punishment in the wake of *Furman* effectively rebuts the argument that public opinion with regard to capital punishment has completely changed since the Bill of Rights and the Fourteenth Amendment were adopted. *Williams* v. *State,* 542 P. 2d 554 (Okla. Crim. App., 1975).

The essence of the majority view in the *Furman* case seems to be that capital punishment is constitutionally forbidden whenever the system allows a jury to impose the death penalty in one case and, with no disclosed reason, elect not to impose it in another apparently similar case. Except for that generalization the *Furman* opinions supply little guidance for the lawmakers or for the courts.

The several states have sought to meet the issue in various ways. A number of them, either by legislative or by judicial decision, have concluded that a mandatory death penalty for certain offenses is a permissible form of capital punishment. *State* v. *Sheppard*, 331 A. 2d 142 (Del., 1974); *State* v. *Selman*, 300 So. 2d 467 (La., 1974); *Fowler* v. *State*, 285 N.C. 90, 203 S.E. 2d 803 (1974), cert. granted, 419 U.S. 963 (1974); *Williams* v. *State*, *supra* (Okla.); *Jefferson* v. *Commonwealth*, 214 Va. 747, 204 S.E. 2d 258 (1974).

Other states, including Arkansas, have taken what seems to us to be a reasonable view not precluded by *Furman*. That view is that all serious felonies of the same kind, such as murder, are not identical either as to the gravity of the offense or as to the moral culpability of the offender. Statutes defining non-capital offenses customarily allow the jury some discretion in the assessment of punishment, such as a sentence to imprisonment ranging from one to twenty-one years. We do not understand *Furman* to prohibit an exercise of discretion in the imposition or non-imposition of capital punishment, if the choice is made reasonably.

Act 438 requires that the jury first determine whether the defendant is guilty of capital felony. If there is a finding of guilt the jury then hears evidence of aggravating or mitigating circumstances, which are enumerated in the act. (All those

circumstances are set forth and discussed in *Neal* v. *State*, also decided today.) The jury then retires again and decides whether the punishment is to be death or life imprisonment without parole. The jury must make a written finding with respect to the various aggravating and mitigating circumstances. Hence the basis for the verdict is known and can be compared with the punishment imposed in other cases. That general approach to the problem has been upheld in other states. *State* v. *Dixon*, 283 So. 2d 1 (Fla., 1973); *Coley* v. *State*, 231 Ga. 829, 204 S.E. 2d 612 (1974); *Jurek* v. *State*, 522 S.W. 2d 934 (Tex. Crim. App., 1975). We agree with their reasoning.

In the case at bar the jury found three aggravating circumstances: (1) That the defendant was previously convicted of another capital felony or of a felony (in this instance, armed robbery) involving the use or threat of violence to the person; (2) that the defendant in the commission of the capital felony knowingly created a great risk of death to one or more persons in addition to the victim; and (3) that the capital felony was committed for pecuniary gain. The jury found one mitigating circumstance: The youth of the defendant at the time of the commission of the capital felony.

Although the court's instructions gave the jury the opportunity to find mitigating circumstances other than those enumerated in the statute, no such finding was made. The court also explained that the jury's decision was not to be based solely upon the number of either aggravating or mitigating circumstance, the court observing that just one mitigating circumstance might offset three or more aggravating circumstances. The ultimate issue submitted was whether the jury found beyond a reasonable doubt that sufficient aggravating circumstances existed to justify a sentence of death. We conclude that Act 438 is valid, that the issues were properly submitted to the jury, and that the verdict is sustained by the evidence.

In a related point for reversal the appellant argues that death by electrocution is unconstitutionally cruel. Counsel concede that the Supreme Court has upheld this method of capital punishment. *Louisiana ex rel. Francis* v. *Resweber*, 329

U.S. 459 (1947); *In re Kemmler*, 136 U.S. 436 (1890). It is insisted, however, on the basis of books or articles having to do with capital punishment, that death by electrocution is not necessarily instantaneous and may subject the condemned person to extreme pain.

We are not convinced by this argument. As the court indicated in *Kemmler*, *supra*, the constitution prohibits punishments involving torture or other *unnecessary* cruelty. It is doubtless true that some pain my attend any form of execution, whether by electrocution, hanging, the gas chamber, or the firing squad. But the record contains no proof on the subject, as it did in *Kemmler*, and we certainly cannot take judicial notice that electrocution is needlessly cruel.

We find no merit in appellant's argument that the trial judge, in submitting the issue of guilt or innocence, indicated to the jury that he believed the defendant to be guilty. The court's remarks, taken as a whole, fairly submitted the issue. Specifically, the court correctly stated to the jury that their initial determination "does not fix the punishment, whatsoever. It merely establishes the degree of guilt, if any." The court went on to add, upon the objection being made: "It [the verdict] can be not guilty, second degree, or capital offense. Return one of those." Suffice it to say, we do not find the court's instructions to have been misleading.

On redirect examination Mrs. Welch testified that she thought she was dying, "so I took the blood—I took my finger and I took the blood [Objection by defense counsel] from my body and wrote, 'Carl killed us.' " The trial court sustained the objection and instructed the jury to disregard the statement. It is now contended that the witness's testimony was so inflammatory that a mistrial should have been declared.

We are not impressed by this argument. In fact, the court's ruling was more favorable to the defendant than it need have been. The testimony was competent, as bearing upon the admissibility of Welch's dying declaration. Moreover, Mrs. Welch was narrating an unbroken sequence of events, beginning with the vicious, unprovoked, murderous attack upon her and her husband and continuing until she

was discovered by the telephone repairman, who had already testified. We do not think the trial court was called upon to interrupt the narration at the point of counsel's objection, on the premise that part of the unbroken sequence of events was too inflammatory to be heard by the jury. For that matter, what the jury had already heard seems to us to be more inflammatory than the testimony now in question.

We find no error in the trial court's refusal to allow the defense to have the opening and closing argument upon the issue of the punishment to be imposed. The State sought the death penalty. The statute allows that penalty only when the jury finds beyond a reasonable doubt that the aggravating circumstances justify it. Section 41-4710. Hence the State had the burden of proof, which carried the right to open and close. The California case relied upon by the appellant, *People* v. *Bandhauer*, 58 Cal. Rptr. 332, 426 P. 2d 900 (1967), is distinguishable, for there the court said that neither side had the burden of proving "that one or the other penalty is the proper one." We construe our statute as casting the burden of proof upon the State, for if the jury is not convinced beyond a reasonable doubt that capital punishment is justified the sentence to life imprisonment without parole is automatic. Thus the defense has no burden of proof upon the issue.

Finally, it is argued, under the rule laid down in *Gerstein* v. *Pugh*, 420 U.S. 103 (1975), that the appellant's liberty was unlawfully restricted after his arrest, because there was no judicial determination of probable cause for the arrest. Even so, the *Gerstein* case expressly holds that a conviction will not be vacated on the ground that the defendant was detained pending the trial without a determination of probable cause.

We have, as the statute requires, examined all possible errors that might be prejudicial. Ark. Stat. Ann. § 43-2725 (Supp. 1973). We find that the defendant received a fair trial, free from prejudicial error.

Affirmed.

Claire Leone RAMSEY *v.* John Kelmer RAMSEY

75-95 531 S.W. 2d 28

Opinion delivered December 22, 1975

H. David Blair, for appellant.

Reed & Blackburn, for appellee.

JOHN A. FOGLEMAN, Justice. Appellant was granted a divorce by decree which ordered a property division. She appeals from that portion of the decree which relates to the division of property.

Her first complaint relates to the treatment of certain promissory notes. There were three notes which were made payable to both parties, arising out of the sale of a farm, cattle and equipment to Dr. L. G. Moody and Paul Strecker. In the transaction, the purchasers paid $30,000 cash and the

balance of $125,000 was evidenced by promissory notes, secured by a mortgage on the land, cattle and equipment. The notes were payable in annual installments of $6,250 over a period of 20 years. Appellee testified that one note for $55,000 was for the land, the title to which had been held by the parties jointly before the sale. He contended that another $55,000 note was for cattle of which he was the sole owner. The remaining note for $15,000 was for equipment, according to appellee, who said that he was the sole owner of that, also. He testified that the balance remaining due on these notes was $118,750.

Appellee testified that, in spite of the different ownerships of the realty and personalty, all notes were payable to both appellant and appellee. Appellee had caused the attorney who represented him in the sale to redraft the notes several times before they were executed. Even though appellee testified that the notes for the cattle and equipment were erroneous in this respect, the necessity for correction of the earlier drafts seems to have been directed toward arranging for release of the cattle from the mortgage after five years and the equipment after seven years, without changing the identity of the payees. Apparently appellee took the notes to another attorney for examination before the divorce action was filed, but the record does not reveal that anything further was done about changing these notes.

The chancellor directed that the $55,000 note representing the balance due on the land be divided and awarded appellant one-half of the cattle note less $5,000 and held that appellee was entitled to the $15,000 note without any division. We agree with appellant that the chancellor erred in his treatment of these notes. The chancellor, in announcing his findings, stated that ordinarily a note made payable to a husband and wife jointly would entitle each to one-half on divorce and that he believed the parties were bound by the note, but noted that there was testimony that the cattle belonged to the husband and that the wife would have been entitled to only one-third of the cattle and, since there seemed to be some question about the matter, he allowed the husband one-half of the cattle note plus $5,000 and the wife the balance. He also stated that under a strict construction of the

law the parties would each be entitled to one-half of the equipment note, but, since in all probability the equipment was purchased by the husband, he was entitled to the entire note. Later the court said that this was done to compensate for the disparity in value of real estate awarded the respective parties.

These notes, in spite of appellee's protestations, were held as a tenancy by the entirety. We have long recognized that there may be a tenancy by the entirety in personal property, including choses in action. *Union & Mercantile Trust Co.* v. *Hudson*, 147 Ark. 7, 227 S.W. 1; *Ratliff* v. *Ratliff*, 237 Ark. 191, 372 S.W. 2d 216; *Cross* v. *Pharr*, 215 Ark. 463, 221 S.W. 2d 24. Of course, notes fall within this classification. *Jordan* v. *Jordan*, 217 Ark. 30, 228 S.W. 2d 636; *Terral* v. *Terral*, 212 Ark. 221, 205 S.W. 2d 198, 1 ALR 2d 1092.

The acquisition of property, whether realty or personalty, by persons who are husband and wife by an instrument running to them conjunctively, without specification of the manner in which they take, usually results in a tenancy by the entirety. *Terral* v. *Terral*, supra. See, *Jordan* v. *Jordan*, supra. See also, *Gladowski* v. *Felczak*, 346 Pa. 660, 31 A. 2d 718, 151 ALR 418 (1943); *American Central Insurance Co.* v. *Whitlock*, 122 Fla. 363, 165 S. 380 (1936); *Craig* v. *Bradley*, 153 Mo. App. 586, 134 S.W. 1081 (1911); *In re Greenwood's Estate*, 201 Mo. App. 39, 208 S.W. 635 (1919); *Boland* v. *McKowen*, 189 Mass. 563, 76 N.E. 206 (1905). There is at least a presumption that the taking in such circumstances is by the entirety. *In re Holmes' Estate*, 414 Pa. 403, 200 A. 2d 745 (1964); *Splaine* v. *Morrissey*, 282 Mass. 217, 184 N.E. 670 (1933); *Simon* v. *St. Louis Union Trust Co.*, 346 Mo. 146, 139 S.W. 2d 1002 (1940). The fact that the consideration given for the property taken in the two names belonged to the husband only is of little, if any, significance where he is responsible for the property being taken in both names as the presumption is that there was a gift of an interest by the husband to the wife, even though the wife may have no knowledge of the transaction. *Lauderdale* v. *Lauderdale*, 96 S. 2d 663 (Fla. App. 1957); *In re Parry's Estate*, 188 Pa. 33, 41 A. 448 (1898); *In re Holmes' Estate*, supra; *Lutticke* v. *Lutticke*, 406 Ill. 181, 92 N.E. 2d 754 (1950); *Donovan* v. *Donovan*, 223 Cal. App.

2d 691, 36 Cal. Rptr. 225 (1964). See *Terral* v. *Terral*, supra; *Dickson* v. *Jonesboro Trust Co.*, 154 Ark. 155, 242 S.W. 57; *Black* v. *Black*, 199 Ark. 609, 135 S.W. 2d 837. See also, *Harrison* v. *Knott*, 219 Ark. 565, 243 S.W. 2d 642.

Some courts base the tenancy upon an implied consideration that a wife who does not furnish any of the consideration to the third party executing the instrument or conveyance will faithfully perform the marriage vows as long as the marital status exists. *King* v. *King*, 286 A. 2d 234 (D.C. Ct. App., 1972); *Oxley* v. *Oxley*, 81 U.S. App. D.C. 346, 159 F. 2d 10 (1946); *Sebold* v. *Sebold*, 143 U.S. App. D.C. 406, 444 F. 2d 864 (1971). See also, *Tingle* v. *Hornsby*, 111 S. 2d 274 (Fla. App., 1959). But it seems that a decree of divorce awarded to the wife in such cases is conclusive of the fact that the consideration has been fully performed. *Sebold* v. *Sebold*, supra. Others base the tenancy upon the husband's obligation, both legal and moral, to provide for the wife. *Green* v. *Green*, 237 S.C. 424, 117 S.E. 2d 583 (1960); *Darden* v. *Meadows*, 259 Ala. 676, 68 S. 2d 709 (1953); Accord, *Carpenter* v. *Gibson*, 104 Ark. 32, 148 S.W. 508; *Collins* v. *Collins*, 176 Ark. 12, 2 S.W. 2d 41; *Hill* v. *Hopkins*, 198 Ark. 1049, 133 S.W. 2d 634; *Spradling* v. *Spradling*, 101 Ark. 451, 142 S.W. 848.

The presumption is strong, and it can be overcome only by clear, positive, unequivocal, unmistakable, strong, and convincing evidence, partially because the alternative is a resulting trust the establishment of which, under such circumstances, requires that degree of proof. *Honeycutt* v. *Citizens National Bank in Gastonia*, 242 N.C. 734, 89 S.E. 2d 598 (1955); *In re Parry's Estate*, supra; *Simon* v. *St. Louis Union Trust Co.*, supra; *Lauderdale* v. *Lauderdale*, supra; *Powell* v. *Metz*, 55 S. 2d 915 (1952); *In re Holmes' Estate*, supra; *Lutticke* v. *Lutticke*, supra. See *Stanridge* v. *Stanridge*, 253 Ark. 1004, 490 S.W. 125; *Simpson* v. *Thayer*, 214 Ark. 566, 217 S.W. 2d 354; *Hubbard* v. *McMahon*, 117 Ark. 563, 176 S.W. 122; *Carpenter* v. *Gibson*, supra; *Hall* v. *Cox*, 104 Ark. 303, 149 S.W. 80; *Mayers* v. *Lark*, 113 Ark. 207, 168 S.W. 1093; Ann. Cas. 1915 C 1094.

Where a note, or a note and mortgage, are made payable to a husband and wife, the same rules and presumptions apply. *Salvation Army, Inc.* v. *Hart*, 239 Ind. 1, 154 N.E. 2d 487

(1958); *Powell* v. *Metz*, supra; *Burke* v. *Coons*, 136 S. 2d 235 (Fla. App. 1962). Delivery to the husband is considered to be delivery to both husband and wife sufficient to make the gift complete. *In re Holmes' Estate*, supra. There being no evidence of fraud, appellee is charged with the knowledge of the legal effect of the instruments. *Hampshire* v. *Hampshire*, 485 S.W. 2d 314 (Tex. Civ. App. 1972). See also, *Donovan* v. *Donovan*, supra; Accord, *Belew* v. *Griffis*, 249 Ark. 589, 460 S.W. 2d 80; *Pratt* v. *Metzger*, 78 Ark. 177, 95 S.W. 451.

We certainly cannot agree with appellee that his testimony was clear, convincing or cogent evidence that the insertion of appellant's name on these notes was only a clerical error. Nor do we agree that the notes should be reformed. In the first place, clear, convincing, unequivocal and decisive evidence is required for reformation. *McIntyre* v. *McIntyre*, 241 Ark. 623, 410 S.W. 2d 117. In the next place, reformation was not sought in the trial court and the suggestion that the trial court should have reformed the notes first appeared in the brief of appellee, who did not cross-appeal. Since reformation was not an issue in the trial court and is not an issue here, we cannot consider it, and appellee's right to that relief is doubtful, had the question been timely raised. See *Darden* v. *Meadows*, 259 Ala. 676, 68 S. 2d 709 (1953). The failure to correct the note as to payee when the contract drafts were being revised may well have been taken to be a ratification by appellee. See *Bogard* v. *Powell*, 209 Ark. 714, 192 S.W. 2d 518.

The chancery court had no power to do anything with the property held by the entirety except to convert it into a tenancy in common. In most states, a decree of divorce in and of itself operates to convert a tenancy by the entirety into a tenancy in common. But this has never been the case in Arkansas. *Jenkins* v. *Jenkins*, 219 Ark. 219, 242 S.W. 2d 124. Ark. Stat. Ann. §34-1215 (Repl. 1962), adopted in 1947 to alter this rule of property, only authorizes the chancery court to dissolve such estates upon the rendition of a final decree of divorce. See *Killgo* v. *James*, 236 Ark. 537, 367 S.W. 2d 228. The same statute requires that the court, in the division of property so held, treat the parties as tenants in common. We have not countenanced any other disposition of such an estate and have construed the statute rather strictly. See *McIntyre* v.

McIntyre, supra; *Yancey* v. *Yancey*, 234 Ark. 1046, 356 S.W. 2d 649; *Bebout* v. *Bebout*, 241 Ark. 291, 408 S.W. 2d 480.

It logically follows that the chancellor erred in awarding one party a greater interest than the other in these notes made payable to both. See *Yancey* v. *Yancey*, supra. The effect of such a dissolution of an estate by the entirety was treated extensively and logically by the Supreme Court of Oregon in *Schafer* v. *Schafer*, 122 Or. 620, 260 Pac. 206, 59 ALR 707 (1927). Even though the decree of divorce in and of itself automatically effected the dissolution in that state, the statute governing the rights of the wife obtaining the divorce in the husband's property was strikingly similar.[1] That court concluded that to allow the court to do more than convert the tenancy from one by the entirety to one in common, would mutilate or change the legal effect of the decree, which itself was the dissolution of the estate. The Oregon court reasoned that the change in the estate was but the working out of a legal and equitable distribution of property held by the spouses during the existence of the marriage relation, holding that the wife could not be awarded one-third of the one-half interest of the husband as a tenant in common.

Insofar as the Moody and Strecker notes are concerned, the decree is modified to award appellant a one-half interest in each of said notes.

Appellant alleges that there were other errors in the property awards. She points out that she was given no interest in a promissory note of J. P. Davidson and that the chancellor did not take into consideration an indebtedness owed by one Tucker. She correctly asserts that she was entitled to a full one-third of appellee's property. Ark. Stat. Ann. §34-1214 (Repl. 1962); *Bowling* v. *Bowling*, 237 Ark. 199, 372 S.W. 2d 239. She testified that the Davidson note, which was awarded to appellee in the court's decree, was made to the parties jointly and that W. P. Tucker owed $2,000 for cattle sold him on open account. Appellee testified

[1]The effect of *Schafer* and the validity of its rationale is not affected by such later decisions as *Siebert* v. *Siebert*, 184 Or. 496, 199 P. 2d 659 (1948) and *Morrow* v. *Morrow*, 187 Or. 161, 210 P. 2d 101 (1949), because of intervening significant statutory changes in that state.

that he was sole owner of the cattle for which the Davidson note was given as well as that sold to Tucker. What we have already said about jointly held notes applies to the Davidson note with equal effect. The chancellor's effort to equalize a difference between the value of Florida real property awarded the husband and Arkansas real property awarded the wife, all of which had been held as a tenancy by the entirety, by awarding appellee the entire note was inappropriate. The decree is modified to award each of the parties an equal interest in this note.

We cannot say on the record before us that the court erred in failing to award appellant an interest in the Tucker debt. Appellant was awarded certain furniture, household goods and funds in a bank account. Since we are unable to say from the record that appellant did not receive one-third in value of the personal property and since the court specifically asked the attorneys for both parties if he had overlooked anything, and received a negative response, we cannot say that appellant has demonstrated error in this regard.

We do, however, agree that there was a preponderance of the evidence to show that there was a wrongful disposition of personal property by appellee to defeat appellant's marital interest and that it was error for the court to refuse to consider or make any order concerning items removed by appellee. An extensive enumeration of these items was made by appellant and it was not substantially contradicted. See *Carr* v. *Carr*, 226 Ark. 355, 289 S.W. 2d 899. See also, *Austin* v. *Austin*, 143 Ark. 222, 220 S.W. 46, *Wilson* v. *Wilson*, 163 Ark. 294, 259 S.W. 742.

The real estate in Arkansas and that in Florida were disposed of by the requirement that the parties execute quitclaim deeds consistent with the court's findings. Appellant has expressed her satisfaction with this dissolution of these estates by the entirety. We are in no position on de novo review to direct the particular disposition to be made of the real estate on the record before us on this appeal.

We have attempted to arrive at a satisfactory modification of the court's decree to avoid a remand. We are unable to

do so because the trial court attempted to do equity between the parties by adjusting differences in real estate values by allowances of personal property and are unable to say what additional allowance should be made on account of property removed by appellee. We are further aware of the fact that payments on the jointly owned notes may have been made during the pendency of this litigation and that some accounting between the parties will be necessary. We have no satisfactory alternative to a remand of this case for the entry of a decree and further proceedings consistent with this opinion and for a determination what additional personal property award should be made to appellant and whether a different decree should be entered as to the Arkansas and Florida real estate. Cf. *Yancey* v. *Yancey*, supra.

The decree is reversed and the cause remanded.

LITTLE ROCK DISTRIBUTING COMPANY
v. OUACHITA COUNTY CIRCUIT COURT,
Second Division, Melvin Mayfield, Judge

75-177 531 S.W. 2d 33

Opinion delivered December 22, 1975

Barber, McCaskill, Amsler & Jones, for petitioner.

Streett & Faulkner, P.A., for respondent.

CONLEY BYRD, Justice. At issue in this petition for writ of prohibition is the sufficiency of the service of summons upon petitioner, Little Rock Distributing Company. The trial court denied petitioner's motion to quash the service.

The record shows that a summons was issued from the

Circuit Court of Ouachita County directing the Sheriff of Pulaski County to summons "Little Rock Distributing Company, by serving Warren E. Wood, agent for service for Little Rock Distributing Company." The process deputy did not serve the summons upon Warren E. Wood but instead went to the office of Little Rock Distributing Company and served the same upon one Loneita Shoemaker. The return on the summons, signed by "George Garrett, D.S." stated that the summons had been served by "delivering a copy, and stating the substance thereof, to the within named Little Rock Distributing Company by serving Mrs. Shoemaker V-Pres. at her usual place of employment."

Mrs. Shoemaker testified for the plaintiff. She stated that she earns $180 per week. She types, does data processing, bookkeeping, filing and answers the telephone. She also takes orders on the telephone and occasionally opens the mail. She is not an officer of the corporation. Mr. Leibs, the president of Little Rock Distributing Company, is her boss, and when he is not there, a Mr. Nazari is the one in charge. Mr. Leibs does not notify her when he leaves the office, and she did not know where he was on the day the process was served. When Mr. Leibs leaves town he makes his own travel arrangements. She admitted receiving the summons from the deputy sheriff on September 17, 1974. She said the deputy first tried to hand it to another girl and then told her that one of them had to accept it. Not knowing what to do with the process, which she did not read, she laid it on Mr. Leibs' desk. Subsequently, when she found the paper back on her desk, she filed it in the insurance file. She does not know who put it on her desk. Thereafter, she took it upon herself to ignore the summons. She did not classify herself as an office manager.

Mr. Leibs did not know about the summons until April 14, 1975. At that time he could not state whether he had been in or out of the office on September 17, 1974, when the summons was served. He said Mrs. Shoemaker was only an employee. She was not and had never been an officer or director in the company.

The respondent, to sustain the sufficiency of the service of the summons, relies upon Ark. Stat. Ann. § 27-610 (Repl. 1962), which provides:

> "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 making this argument, however, the respondent concedes that the term "any agent who is a regular employee" contemplates something more than a mere "employee." With this concession we must agree, for the general rule is "that when the Legislature uses words which have received a judicial interpretation, words which have a fixed and well-known legal significance, they are presumed to have been used in that sense," *State* v. *Jones*, 91 Ark. 5, 120 S.W. 154 (1909). In *Parker* v. *Wilson*, 99 Ark. 344, 137 S.W. 926 (1911), we defined agency as follows:

> ". . . An agency is defined to be 'a contract, either express or implied, by which one of the parties confides to the other the management of some business to be transacted in his name, or on his account, by which that other assumes to do the business, and to render an account of it'."

In 53 Am. Jur. 2d *Master and Servant* §3 (1970), the distinction between an agent and a servant is stated in this language:

> "As a general rule, a servant is employed to perform certain acts in a way that is or may be specified, and he may not use his discretion as to the means to accomplish the end for which he is employed. This being so, the service performable by a servant for his employer may be inferior in degree to work done by an agent for his principal."

As can be seen from the foregoing, the issue of whether the summons should be quashed turns upon a question of

fact. In such situations we have consistently held that prohibition will not lie even though this Court "might differ most seriously from the view taken by the trial court." See *Robinson* v. *Means, Judge*, 192 Ark. 816, 95 S.W. 2d 98 (1936). See also *Robinson* v. *Bossinger*, 195 Ark. 445, 112 S.W. 2d 637 (1938), which quashed the service of process on appeal.

For the reasons stated the Writ is denied.

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

JOHN A. FOGLEMAN, Justice, dissenting. I would grant the writ because I consider the facts and the evidence to be uncontested and find no substantial evidence that Mrs. Shoemaker is an agent of petitioner in the sense of Ark. Stat. Ann. § 27-610 (Repl. 1962). The rule applied in the cases cited in the majority opinion governs only those cases in which there is a contested question of fact or in which the fact finder may draw different inferences from undisputed evidence. See *Arkansas Democrat* v. *Means, Judge*, 190 Ark. 948, 82 S.W. 2d 856; *Finley* v. *Moose*, 74 Ark. 217, 85 S.W. 238. It seems to me that it should be a different matter in a case such as this and the writ should issue. *Equitable Assurance Soc.* v. *Mann*, 189 Ark. 751, 755 S.W. 2d 232. See also, 73 CJS 118, Prohibition § 37.

I am authorized to state that Chief Justice Harris and Mr. Justice Jones join in this opinion.

Charles NEAL *v.* STATE of Arkansas

CR 75-115 531 S.W. 2d 17

Opinion delivered December 22, 1975
[Rehearing denied Jan. 26, 1976.]

[redacted]

Laster & Lane, for appellant.

Jim Guy Tucker, Atty. Gen., by: *Robert A. Newcomb*, Asst. Atty. Gen., for appellee.

FRANK HOLT, Justice. The appellant was convicted by a jury of a capital felony murder in violation of Ark. Stat. Ann. § 41-4702 (a) (Supp. 1973) and sentenced to death by electrocution. Appellant, aided by another man during the robbery of a service station attendant, bound the victim's hands and feet and then shot him. After leaving the station they returned a short time later and, upon discovering the wounded attendant using the phone, the appellant shot him again. Death resulted from a total of seven pistol wounds.

Appellant first contends for reversal that Ark. Stat. Ann. §§ 41-4711 and 41-4712 (Supp. 1973), which permit the jury to consider aggravating and mitigating circumstances, are so vague as to be constitutionally defective. Appellant argues that "[I]n attempting to overcome the discretionary application of the death penalty proscribed in *Furman* v. *Georgia*, 408 U.S. 238, 92 S. Ct. 2726, 33 L. Ed. 2d 346 (1972), the Arkansas legislature specified what matters of mitigation and

aggravation the jury is limited to considering in rendering a decision as to the sentence." Appellant asserts that these provisions are "so vague, indefinite and open to reasonably different subjective interpretations and understandings on the part of a jury that these sections are constitutionally defective." We cannot agree.

§ 41-4711 provides:

Aggravating circumstances shall be limited to the following:

(a) the capital felony was committed by a person under sentence of imprisonment;
(b) the defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person;
(c) the defendant in the commission of the capital felony knowingly created a great risk of death to one (1) or more persons in addition to the victim;
(d) the capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody;
(e) the capital felony was committed for pecuniary gain; and
(f) the capital felony was committed for the purpose of disrupting or hindering the lawful exercise of any enforcement of laws.

§ 41-4712 provides:

Mitigating circumstances shall be the following:

(a) the capital felony was committed while the defendant was under extreme mental or emotional disturbance;
(b) the capital felony was committed while the defendant was acting under unusual pressures or influences, or under the domination of another person;
(c) the capital felony was committed while the capacity of the defendant to appreciate the wrongfulness of his conduct, or to conform his conduct to the requirements

of law was impaired as a result of mental disease or defect, intoxication or drug abuse;
(d) the youth of the defendant at the time of the commission of the capital felony; or
(e) the capital felony was committed by another person and the defendant was an accomplice or his participation relatively minor.

The thrust of appellant's argument is that "a criminal statute must be sufficiently specific to inform men of reasonable intelligence of the criminal act or omission." Therefore, "[I]f men of reasonable intelligence should not be required to speculate as to the act or omission proscribed in a criminal statute, [then] as criminal defendants they must be sentenced by jurors who also are not required to speculate as to the matters of aggravation and mitigation set out in the statute." The standard of specificity is defined succinctly in *United States* v. *Petrillo*, 332 U.S. 1 (1946). There the court said:

> The Constitution has erected procedural safeguards to protect against conviction for crime except for violation of laws which have clearly defined conduct thereafter to be punished; but the Constitution does not require impossible standards. The language here challenged conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices. The Constitution requires no more.

In the case at bar the jury found in the bifurcated trial that only one aggravating circumstance existed; i.e, the offense was committed for a "pecuniary gain." In our view that terminology or phrase is a matter of such *common understanding and practice* that it cannot be said an ordinary man or juror would have to speculate as to its meaning. Likewise, we hold that the other aggravating factors enumerated in § 41-4711 meet this standard. Further, since the jury did not find that any other aggravated circumstance attended the offense, the appellant cannot complain. His exoneration as to the other factors obviously removed any possible prejudicial effect asserted as to them.

We turn now to the mitigating factors listed in § 41-

4712. (The jury found none existed.) As to the meaning of the phrase, "extreme mental or emotional disturbance,"' we observe that the jury had the benefit of proof adduced on that subject by the appellant and the state because the appellant interposed the defense of insanity. We are unable to perceive that any of the terminology used by the legislature in naming the various elements of mitigation can be said to be vague and beyond the "common understanding and practices" of the ordinary man or juror. The language used by our legislature is in terms sufficiently distinct and understandable for a fair administration of the law. As stated in *Petrillo, supra*, our federal constitution does not require "impossible standards" of certainty in a statute which defines criminal responsibility. This is likewise applicable to a statute which specifies aggravating or mitigating circumstances. In summary our view is that the concepts enumerated as mitigating circumstance by the legislature are reaonable and easily understood by the average individual or juror without speculation. *State* v. *Dixon*, 283 So. 2d 1 (Fla. 1973).

Appellant contends that Act 438 of 1973, Ark. Stat. Ann. §§ 41-4701 through 41-4716, is unconstitutional in that by imposing the death penalty for certain crimes on a discretionary basis it violates the prohibition against cruel and unusual punishment which is proscribed by the Eighth and Fourteenth Amendments to the United States Constitution. We cannot agree for the reasons stated in *Collins* v. *State* also decided today.

Appellant next contends that the court erred in excluding from the jury panel veniremen who expressed general objections to the death penalty. Appellant cites *Witherspoon* v. *Illinois*, 391 U.S. 510 (1968). *Witherspoon* only forbids the exclusion from juries of those veniremen who simply voice general objections to the death penalty and express concientious or religious scruples against its infliction. In the case at bar the court excused for cause those prospective jurors who made known that "regardless of the facts" they "would be unable to consider the death penalty." Consequently, the court's ruling comports with *Witherspoon* v. *Illionis, supra; Montgomery* v. *State*, 251 Ark. 645, 473 S.W. 2d 885 (1971); *Davis* v. *State,* 246 Ark. 838, 440 S.W. 2d 244 (1969); and *O'Neal* v. *State*, 253 Ark. 574, 487 S.W. 2d 618 (1972).

Appellant next contends that there was no evidence to support the jury's verdict as to aggravating circumstances. We disagree. The jury found that a "capital felony was committed for, or in the attempt for pecuniary gain." Appellant argues that in determining sentence the jury can consider only that evidence presented in the sentencing proceeding which follows the finding of guilty. Therefore, appellant asserts that since the state presented no evidence during the sentencing proceeding, there was a total failure of proof. Ark. Stat. Ann. § 41-4710 (Supp. 1973) provides:

> In the proceeding to determine sentence, evidence *may* be presented as to any matters relevant to sentence and shall include matters relating to any of the aggravating or mitigating circumstances enumerated in Sections 11 [§ 41-4711] and 12 [§ 41-4712] of this act. The State and the defendant or his counsel shall be permitted to present argument for or against the sentence of death. (Emphasis ours.)

Appellant argues that "shall" has to be read as "must" and that by this reading it is incumbent upon the state to introduce its evidence, if any, as to aggravating circumstances during the proceeding to determine the sentence, even if the same evidence, as here, was presented to the jury during the guilty or innocence phase of the trial. We construe this section to provide that at the penalty stage of the trial the state "may" produce evidence of aggravating circumstances in addition to any evidence of that nature previously adduced. In other words, it need not repeat that type of evidence. This construction is supported by the fact that no where in § 47-4710 does the legislature direct that the jury, in reaching their decision as to punishment, be instructed to disregard evidence pertinent to the listed aggravating circumstances that were presented during the guilty phase of the trial.

As to the sufficiency of the evidence with respect to the jury's finding of an aggravating circumstance, i.e, that the felony murder was committed "for pecuniary gain," it is well established that upon appellate review we consider only that evidence which is most favorable to the appellee and affirm if it is substantial. *Haynie* v. *State*, 257 Ark. 542, 518 S.W. 2d 492

(1975). Here there was evidence that appellant actively participated in the robbery murder and received approximately $100 as his part of the robbery proceeds. This evidence was amply substantial to support the jury's finding that a felony murder was committed "for pecuniary gain."

Appellant next contends that the jury's finding of no mitigating circumstances was contrary to the preponderance of the evidence. That was the evidentiary test according to the court's instruction. In support of this contention appellant relies on the argument previously discussed that the jury can consider only that evidence introduced in the sentencing proceeding. As we have just said, we do not deem it was the legislature's intent to so limit the jury and, consequently, it could consider all the evidence adduced at each bifurcated phase of the trial. Appellant argues that his unrefuted evidence, at the sentencing proceeding, by a psychologist that mitigating circumstances existed because of appellant's incapacity to understand the wrongfulness of his conduct and he was mentally impaired and emotionally disturbed was ignored by the jury. However, as indicated, at the guilty or innocent phase of the trial, the state, in response to appellant's evidence of insanity, adduced evidence from a State Hospital psychiatrist that appellant was examined there by him and the staff pursuant to a court order and appellant was found without psychosis. He testified that appellant "was not psychotic and knew right from wrong at the time I examined him **** and was capable of assisting in his defense and in his trial. . . ." The jury is the trier of the facts and it is solely within its function and province to resolve the conflicting evidence. *Simmons* v. *State*, 255 Ark. 82, 498 S.W. 2d 870 (1973); and *Clark* v. *State*, 246 Ark. 1151, 442 S.W. 2d 225 (1969). In the case at bar the state's evidence was amply sufficient to justify the jury's finding that no mitigating circumstances existed.

Appellant next contends that the court erred in giving the state's requested instruction No. 22, given as the court's instruction No. 17. Appellant argues that the instruction tells the jury how to impose the death sentence and the effect of the instruction is to usurp the prerogative of the jury and gives undue prominence to the state's request for the imposi-

tion of the death penalty. Suffice it to say that appellant made no objection to the instruction nor offered one. Therefore, he cannot now raise the objection for the first time on appeal. Rule XIII of the Uniform Rules for Circuit and Chancery Courts, Vol. 3A, Ark. Stat. Ann. (Supp. 1973); *Cassidy* v. *State*, 254 Ark. 814, 496 S.W. 2d 376 (1973); and *Griffin* v. *State*, 248 Ark. 1223, 455 S.W. 2d 882 (1970). The fact that this is a capital case does not change the rule. *Fields* v. *State*, 235 Ark. 986, 363 S.W. 2d 905 (1963); and *Johnson* v. *State*, 127 Ark. 516, 192 S.W. 895 (1917).

Appellant next contends for reversal that the court erred in finding that the appellant's confession was voluntary and admissible. Whenever the voluntariness of a defendant's confession is disputed on federal constitutional grounds, we make an independent determination from a review of the entire record. *Degler* v. *State*, 257 Ark. 388, 517 S.W. 2d 515 (1974); *Davis* v. *North Carolina*, 384 U.S. 737, 86 S. Ct. 1761, 16 L. Ed. 2d 895 (1966); and *Harris* v. *State*, 244 Ark. 314, 425 S.W. 2d 293 (1968). In doing so, however, we do not set aside a trial court's finding of voluntariness unless the finding is "clearly erroneous." *Degler* v. *State*, *supra*. This standard of review is in accord with that of the federal courts. *United States* v. *United States Gypsum Co.*, 333 U. S. 364 (1948); and *Maple Island Farm* v. *Bitterling*, 209 F. 2d 867 (8th Cir. 1954).

At the pretrial proceeding the 19½ year old appellant, represented by his then counsel, told the court his confession was true; he actively participated in the alleged crime, he was guilty of the offense and desired to plead guilty and receive a life sentence without parole. (Appellant later revoked his guilty plea to one of not guilty by reason of insanity and present counsel was then appointed.) However, he told the court that although his statement was true, it was made "out of fear" of the threat of the electric chair made to him by an officer. There is no contention that all of the officers who were material witnesses during his confession did not appear and testify at the Denno hearing. They testified that during the approximate two hours appellant was interrogated, he was first apprised of his constitutional or Miranda rights and signed a "standard rights form" to that effect. Appellant's narration as to his presence and active participation in the

robbery murder was reduced to writing and signed by him. He claimed the actual shooting was done by his confederate. This man testified, however, that the appellant did the shooting. As indicated previously, appellant adduced evidence of diminished mental capacity. A psychologist (who had not observed or tested appellant during the last five years) testified that appellant's maximum educational attainment would be sixth grade level, his judgment is limited and he is mentally and emotionally disturbed. A school official corroborated this evaluation. However, as indicated, the state adduced evidence from a psychiatrist at the State Hospital, where appellant was examined by the staff pursuant to a court order, that appellant was without psychosis, is responsible for his acts, and knows right from wrong. Furthermore, appellant's signed confession was uncontroverted at the Denno hearing and there was no objection to its admissibility before the jury. In the circumstances and after a review of the entire record, we cannot say that the court's finding that appellant's confession was voluntary is clearly erroneous and, therefore, against the preponderance of the evidence. *Degler* v. *State*, *supra*. See also *Leasure* v. *State*, 251 Ark. 887, 475 S.W. 2d 535 (1972); and *Mosley* v. *State*, 246 Ark. 358, 438 S.W. 2d 311 (1969).

The court was correct in denying appellant's motion for a directed verdict at the close of the state's case in chief. Appellant's confession connects him with the robbery murder. "That is all the law requires, it being sufficient for the other proof to show that the offense charged was committed by someone." *Mosley* v. *State*, 246 Ark. 358, 438 S.W. 2d 311 (1969); *Mosby* v. *State*, 253 Ark. 904, 489 S.W. 2d 799 (1973); Ark. Stat. Ann. § 43-2115 (Repl. 1964). In the case at bar the testimony of appellant's acquaintance that appellant had told him he had committed the offense and shot the victim seven times; the testimony of appellant's accomplice; and the medical evidence that the decedent suffered seven gunshot wounds was abundantly sufficient to meet the statutory requirements of sufficiency of the evidence. Further, a motion for a directed verdict at the close of the state's case is waived when, as here, the appellant did not stand upon the motion and proceeds to introduce evidence to establish his defense. *Brewer* v. *State*, 257 Ark. 51, 513 S.W. 2d 914 (1974).

The appellant objected to the court's instruction No. 8 which defines an accessory to an offense. The instruction was correct and in conformity with Ark. Stat. Ann. § 41-118 (Repl. 1964). *Fleeman and Williams* v. *State*, 204 Ark. 772, 165 S.W. 2d 62 (1942); and *Roberts* v. *State*, 254 Ark. 39, 491 S.W. 2d 390 (1973).

After considering every objection and assignment of error, which is required by Ark. Stat. Ann. § 43-2725 (Supp. 1973), and finding no error, the judgment is affirmed.

Affirmed.

FARMERS BANK, Hamburg, Arkansas *v.* FUQUA HOMES, INC.

75-202 531 S.W. 2d 23

Opinion delivered December 22, 1975
[Rehearing denied Jan. 26, 1976.]

W. E. Johnson, for appellant.

Arnold, Hamilton & Streetman, for appellee.

ELSIJANE T. ROY, Justice. This appeal follows the trial court's dismissal of appellant's complaint for lack of proper venue in Ashley County. The case was presented to the court on the pleadings and a stipulation entered into by the parties. Appellee, Fuqua Homes, a corporation not qualified to do business in Arkansas, sold a number of mobile homes to a John Anthony, d/b/a A & B Mobile Homes in Ashley, Drew and Union counties. The transaction at issue involved a mobile home on which Anthony obtained financing from appellant Farmers Bank. At that time he gave the bank a statement or certificate of origin which was issued by appellee Fuqua on the mobile home and on which the bank relied as security for the loan. Anthony then disappeared, owing Farmers $7,690.21 on the mobile home.

Pleading alternative theories of tort and contract in both the original and amended complaints against appellee, appellant Farmers invoked the provisions of Ark. Stat. Ann. § 27-619 (Supp. 1973) to establish venue in Ashley County. The statute provides:

> Contract actions against a non-resident of this State or a foreign corporation may be brought in the County in which the plaintiff resided at the time the cause of action arose.

More particularly the appellant alleged that appellee was negligent in handling the statement of origin (on which it relied in making the loan) resulting in breach of implied warranties in connection with the title to the mobile home; that appellee had breached an implied and constructive contract which existed by reason of the circumstances of this case and the prior course of dealings between the parties.

Appellee in turn filed three separate "Special Appearance and Motion to Quash" pleadings alleging that Ashley County Circuit Court had neither jurisdiction nor venue under Ark. Stat. Ann. § 27-619 (Supp. 1973) and furthermore that any statute under which venue might be upheld in Ashley County was unconstitutional.

It was stipulated *inter alia* by the parties:

> That appellee is a foreign corporation not qualified to do business in Arkansas and has no property, nor employee, nor office in the State;
>
> That appellee manufactured and sold mobile homes in Arkansas and sold to John Anthony, d/b/a A & B Mobile Homes, at his places of business in Ashley and other counties during 1973 and 1974 at least 75 units;
>
> That the mobile home in question was sold to John Anthony, d/b/a A & B Mobile Homes, and delivered at his place of business at El Dorado, Arkansas;
>
> That Farmers Bank is an Arkansas corporation with its only places of business in Ashley County, Arkansas, and its resident agent for service and officers reside in Ashley County;
>
> That appellee's activities included salesmen and representatives calling on dealers, taking orders and entering contracts for the sale of units to dealers, visits to dealers to assist in setting up and marketing units, delivery of units to dealers in Arkansas, delivery of certificates of origin and acceptance of payment for units in Arkansas and advertising in Arkansas through a program whereby they would pay a portion of the dealer's cost of advertisements for their products.

Appellee contends that all the allegations of the complaint are conclusory and no facts are plead which indicate a contract action. It is true the transcript reveals more detailed facts concerning the negligent handling of the certificate or

origin and the warranty issued with it than appellant abstracted for the court. For that reason we are not considering them in reaching our conclusion, although more details would have been helpful. However, since the question is presented to us on motion to quash service we find sufficient facts abstracted in the briefs to withstand appellee's motion to quash.

In *Mack Trucks* v. *Jet Asphalt, et al*, 246 Ark. 101, 437 S.W. 2d 459 (1969), we said:

> Unless the pleadings on their face show that an action was commenced in the wrong county, a defendant objecting to the venue has the burden of proving the essential facts. 92. C.J.S. 772, §74; *Tribune Company* v. *Approved Personnel, Inc.*, 115 S. 2d 170 (Fla. 1959); *Cohen* v. *Commodity Credit Corp.*, 172 F. Supp. 803 (W.D. Ark. 1959); *Werner* v. *Braunstein*, 20 Misc. Rep. 341, 45 N.Y.S. 757.

We find that the stipulated facts in conjunction with the pleadings reflect that the cause of the action sounds in contract as well as tort. The complaint alleged breach of express and implied warranties. The following is a quote from 77 C.J.S. (Sales) § 302, p. 1117:

> A warranty is contractual in nature, ... *** Warranties may be either express or implied, but in either event the relations between the parties arise out of contract and are not based on what is known as tort or on duties imposed by law on any theory unrelated to contract.

See also *Downtowner Corp.* v. *Commonwealth Securities Corp.*, 243 Ark. 122, 419 S.W. 2d 126 (1967).

Since we determine a contract action is involved, appellee, admittedly a foreign corporation, clearly falls within the provisions of Ark. Stat. Ann. § 27-619 (Supp. 1973), and venue would lie in Ashley County, unless the statute is unconstitutional.

In support of its position that the statute is unconstitutional, appellee places great reliance upon the case of

Power Manufacturing Company v. *Saunders,* 274 U.S. 490, 47 S. Ct. 678, 71 L. Ed. 1165 (1927). However, *Saunders* is distinguishable from the case at bar because it involved *a foreign corporation qualified to do business in Arkansas.*

In *Kelso* v. *Bush*, 191 Ark. 1044, 89 S.W. 2d 594 (1935), we said:

> The difference between petitioner's status and that of appellant in *Power Manufacturing Company* v. *Saunders, supra*, is that petitioner has no place of business or domicile in this State at which to fix local venue or by which to compare her status with that of a domestic corporation or a natural person, and we believe that this difference is substantial and controlling.
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> * * *
>
> The Fourteenth Amendment to the United States Constitution, as construed by the Supreme Court of the United States, does not prevent or restrict a State from adjusting its legislation to differences in situations, neither does it forbid classification to that end, but only requires that such classification be not arbitrary. (Citations omitted) The necessary requirement is that the classification be pertinent to the subject of classification. As we have heretofore pointed out, *petitioner does not occupy the status of a foreign corporation doing business in this State with a local domicile or place of business*, and she does not occupy the status of a domestic corporation or natural person domiciled in this State, therefore she is subject to a separate classification as to venue in the courts of this State, and such classification does not offend against the Fourteenth Amendment or deny her equal protection of the law, as it is not arbitrary or without substance. (Emphasis supplied)

Appellee is a foreign corporation not qualified to do business in Arkansas so it is subject to "a separate classification as to venue."

Nor can appellee be heard to complain because the

statute makes no distinction between foreign corporations which are qualified to do business in Arkansas and those which are not since it has no standing to raise this issue. In *Carter* v. *State*, 255 Ark. 225, 500 S.W. 2d 368 (1973), certiorari denied 416 U.S. 905, 94 S. Ct. 1610, 40 L. Ed. 2d 110, we stated:

> It is a long-standing rule of this court, and generally of other courts, that in order for one to have standing to challenge the constitutionality of a legislative act, *the act must be unconstitutional as applied to him.* (Emphasis supplied)

See also the case of *May* v. *State*, 254 Ark. 194, 492 S.W. 2d 888 (1973), certiorari denied 414 U.S. 1024, 94 S. Ct. 448, 38 L. Ed. 2d 315, in which this court held that although the statute might be void as to one party, the party as to whom it was not void had no right to challenge the constitutionality of the legislative enactment.

Accordingly, we find the trial court erred in dismissing the complaint for lack of proper venue.

Carolyn Dianne ZACHRY *v.* STATE of Arkansas

75-131

PER CURIAM

December 22, 1975

After denying appellant's application to file in this Court a supplemental transcript of the sentencing of Charles Watson Bean, an acknowledged accomplice that testified on behalf of the State at appellant's trial, appellant filed a petition for reconsideration or a request in the alternative for us to reinvest the trial court with jurisdiction to hear the matter. We are granting appellant's alternative request upon the condition that she promptly make application to the trial court within 30 days from the date hereof for a new trial.

FOGLEMAN, J., dissents.

JOHN A. FOGLEMAN, Justice, dissenting. I feel compelled to decline to join in what I take to be an exercise in futility. The time for filing and presenting a motion for new trial in this case has long since passed. A motion for new trial *must* be made at the same term at which the verdict is rendered, unless the judgment is postponed to another term, in which case it may be made at any time before judgment. Ark. Stat. Ann. § 43-2202 (Repl. 1964). The matter of timely filing and considering the motion is jurisdictional. *Gross* v. *State*, 242 Ark. 142, 412 S.W. 2d 279; *State* v. *Neil*, 189 Ark. 324, 71 S.W. 2d 700; *Delaney* v. *State*, 212 Ark. 622, 207 S.W. 2d 37; *State* v. *Martineau*, 149 Ark. 237, 232 S.W. 609; *Thomas* v. *State*, 136 Ark. 290, 206 S.W. 435; *Incorporated Town of Corning* v. *Thompson*, 113 Ark. 237, 168 S.W. 128. See also, Comment, *New Trial in Arkansas on Basis of Newly Discovered Evidence*, 4 Ark. Law Rev. 60.

The verdict was rendered on April 12, 1975. The judgment was entered on the same day. A new term of the Circuit Court of Little River County, in which appellant was tried, commenced on the 19th day of May, 1975. Ark. Stat. Ann. § 22-310 (Supp. 1973). The sentencing of Charles Watson Bean took place on May 23, 1975, on which date he entered a plea of guilty. There is no way the trial court can have

jurisdiction to entertain a motion for new trial at this late date.

Furthermore, it appears from the motions herein that the matter would constitute impeaching testimony only. Testimony which merely tends to impeach the credibility of a state's witness is not a ground for a new trial. *Cooper* v. *State*, 246 Ark. 368, 438 S.W. 2d 681; *Therman* v. *State*, 205 Ark. 376, 168 S.W. 2d 833; *Norrid* v. *State*, 188 Ark. 32, 63 S.W. 2d 526; *Hayes* v. *State*, 169 Ark. 883, 277 S.W. 2d 36. A case particularly appropriate here is *Foster* v. *State*, 45 Ark. 328.

Appellant's remedy, if any she has, is by post-conviction relief under Criminal Procedure Rule 1, which is presently inappropriate.

CITY OF ROGERS *v.* MUNICIPAL COURT OF ROGERS

75-206 531 S.W. 2d 257

Opinion delivered January 12, 1976

J. Wesley Sampier, City Atty., for appellant.

No brief for appellee.

GEORGE ROSE SMITH, Justice. Barry Pyeatt was charged in the Rogers municipal court with the offense of drunken driving. On motion the court directed the city to turn over to Pyeatt's attorney, for additional testing, a perchlorate tube (with its contents) which the city police had used in making a blood-alcohol test to determine Pyeatt's asserted intoxication. The city attorney, contending that the order was beyond the municipal court's jurisdiction, sought a writ of prohibition in the circuit court. This appeal is from a denial of that writ.

The circuit court was right in refusing to intervene. In 1957, in a civil case, we held that under our discovery procedure the circuit court can direct the plaintiff in a personal injury case to turn over to the defendant, for examination and testing, automobile parts that are alleged to be defective. *Vale* v. *Huff*, 228 Ark. 272, 306 S.W. 2d 861 (1957). There we said that the trial court has wide discretion in fixing the terms upon which the examination is to be made.

In 1971 the General Assembly adopted a discovery statute for criminal cases. It provides that upon a defendant's motion the court may order the prosecuting attorney to permit the defendant to inspect tangible objects within the State's possession "upon a showing of materiality . . . and that the request is reasonable." Ark. Stat. Ann. § 43-2011.2

(Supp. 1973). By its terms the act applies to municipal courts. § 43-2011.4. The act uses the word "inspect." "Inspection is not necessarily confined to optical observation, but is ordinarily understood to embrace tests and examinations." *O'Hare* v. *Peacock Dairies*, 79 P. 2d 433 (Calif. App., 1938), citing several cases. Hence the statute authorizes testing in a case such as this one.

The city insists, however, that the court should not have ordered the police to turn over the perchlorate tube to the defendant's attorney. Under the *Vale* case the court might have required a bond to insure the return of the tube, but apparently the city made no such request. In any event, the writ of prohibition goes only to the issue of jurisdiction, and as we have seen, the court had statutory authority for its order. Finally, we think it obvious that the statute prohibiting the giving away of municipal property except upon payment at the usual and regular rates has no application to this transaction. Ark. Stat. Ann. § 19-917 (Repl. 1968).

Affirmed.

Janet KNIGHT, Family & Children's Services of Arkansas Social Services, and Wanda HALL *v.* Delbert R. DEAVERS and Mary Betha DEAVERS

75-152 531 S.W. 2d 252

Opinion delivered January 12, 1976

Highsmith, Tatum, Highsmith, Gregg & Hart, for appellants.

Murphy & Blair, for appellees.

JOHN A. FOGLEMAN, Justice. This appeal comes from the refusal of the chancery court to specifically enforce an agreement by foster parents with whom the Family & Children's

Services of the Arkansas Social Services had placed Kimmi Jo Bullock. We find no error and affirm.

The litigation was spawned by the filing of a petition on September 5, 1974 by appellees Delbert R. Deavers and his wife Mary Betha Deavers to adopt Kimmi, who was born August 23, 1969. It was alleged in the petition that the whereabouts of Kimmi's mother were unknown. A written consent to the adoption by R. C. Bullock, her father, was filed with the petition. Appellant filed an intervention in the adoption proceeding on October 3, 1974. She alleged that the consent of of neither the mother, the father nor Arkansas Social Services, to whom the custody of Kimmi had been awarded by the Juvenile Court of Sharp County on October 2, 1972, had been obtained, that the petitioners had agreed in writing, when the child was placed in their home on or about June 22, 1972, that they would not attempt to adopt the child and that the petitioners were not financially able to adopt or properly care for the child. On October 5, 1974, a written consent of Kathy Bullock, the child's mother was filed. Appellees responded to the intervention, alleging that the agreement relied upon by appellant was invalid because it contravened public policy and constituted an attempt to contract away the jurisdiction of the probate court over the matter of adoption.

On January 13, 1975, a written revocation by R. C. Bullock of his consent to the adoption was filed. It was stated therein that Bullock did not comprehend or understand the nature and contents of the consent he had signed. Appellees responded by amending their petition to allege that R. C. Bullock had abandoned Kimmi for more than six months prior to the filing of the petition for adoption, so his consent was not necessary. Appellant denied the allegations of this amendment.

On October 16, 1974, the Family & Children's Services of Arkansas Social Services filed a complaint in the Chancery Court of Fulton County asking that appellees be enjoined from seeking the adoption or mandatorily enjoined to specifically perform their contract that they would not attempt to adopt Kimmi. The allegations of appellant's intervention in the adoption proceeding were repeated in this

complaint with the additional allegation that the agency had been awarded custody of Kimmi prior to June 22, 1972, by emergency order of the Juvenile Court of Sharp County and that the child was then placed in the home of appellees, as foster parents on the basis of the contract relied upon. It was also alleged that the final award of custody by the juvenile court made her a ward of the state, as a dependent and neglected child. After appellees demurred to this complaint, the causes in the probate and chancery courts were consolidated for hearing. R. C. Bullock was granted permission to intervene. Bullock denied that he had abandoned the child and asked custody of her. While the hearing was in progress, Family & Children's Services filed a petition alleging that a guardian of the person and estate of Kimmi should be appointed and nominated Wanda J. Hall, a service specialist with Arkansas Social Services in Fulton County.

An interlocutory decree of adoption was entered in February 1975, after the chancellor had heard both the probate and the chancery case simultaneously. In the same order he denied the petition for guardianship, held the contract between the Arkansas Social Services and appellees void, declined to decree specific performance of the contract, saying that, even if it was valid, specific performance, under the circumstances of the case, would be against public policy. He also found appellees morally fit and physically and financially able to furnish suitable nurture and education for Kimmi. Appeal from the interlocutory decree of adoption is not before us, and it may have been premature. Appellants have confined their attack here to the chancery court's order denying specific performance on the following point:

> THE TRIAL COURT ERRED IN REFUSING TO SPECIFICALLY ENFORCE THE FOSTER CARE PLACEMENT AGREEMENT AND IN DENYING THE GUARDIANSHIP TO ARKANSAS SOCIAL SERVICES.

Delbert Deavers is 61 years of age and Mrs. Deavers is 59. They have been married for 40 years and have resided in Mammoth Spring since 1962. He has been a Baptist minister since October 2, 1948 and the pastor of the Mammoth Spring

Central Baptist Church since September 3, 1961. He also had full-time outside employment until July 3, 1974, but not thereafter. Except for a year and a half that he lived at Thayer, Missouri, Delbert Deavers has lived in Arkansas approximately a quarter of a century. Other places of residence were at Walnut Ridge and Salem. He owns his dwelling house valued at $22,000 and has a total monthly income of $390 - 395 with no obligations other than normal living expenses. A substantial part of this income is interest on savings of $17,000 and another portion from "odd job" employment. Fifty-seven dollars a month was unemployment compensation. Neither of the appellees has any significant health problem. They have no living children. Their only child died when about five months old. During the time Kimmi was in their home, appellees usually received $70 to $86 per month from Arkansas Social Services. This was not a part of the income of Rev. Deavers. He will begin drawing Social Security in January 1976.

There is rather convincing evidence that a good relationship exists between Kimmi and appellees. The strongest evidence of reciprocal love was contained in a report by an Assistant Regional Administrator of Arkansas Social Services. He stated that Kimmi "is definitely their 'baby'" and that she is "a quiet, shy little girl who seems to thrive on the attention given her by the Deaverses." The chancellor stated that the affection for the Deaverses shown by the child when she was in the courtroom was impressive. There was testimony from neighbors and acquaintances tending to show that Kimmi was a highly nervous child when she came to the Deavers home, but that she now seems happy and well adjusted and that she is well cared for. The Deavers home is adequately furnished and is equipped with a washer, dryer and deep freeze. Mrs. Deavers does much of her own canning. The child is in kindergarten, where she is doing well, and has several playmates in the immediate vicinity of the Deavers dwelling. She attends Sunday school and church regularly, and goes to the mid-week services in the church Rev. Deavers serves.

In spite of the agreement, appellees both thought they had been assured that foster parents had been permitted to

later adopt children placed in their homes if they otherwise met the requirements of the Social Services Agency. There was some justification for this belief. Delbert Deavers denied signing the agreement, but we agree with the chancellor that the preponderance of the evidence shows that he did, even though he may have forgotten having done so, or may have misunderstood the language.

An adoption specialist for Arkansas Social Services testified that none of the proposed adoptive parents in Fulton County, who had been approved, would be acceptable for a five-year-old child. She stated that the experts on the subject say that the period between the ages of two and four years is very important in a child's personality and general psychic development and that a major change in its living arrangements was disturbing to its sense of security, but her own opinion was at variance with this commonly accepted expertise.

The major objections of the Arkansas Social Services to the adoption are the age differential between the child and the Deaverses, the prospect of overstrictness on the part of the prospective parents because of their religious convictions, and an inclination of the Deaverses to be overprotective. On the other hand, the Family & Children's Services plan to take the child from the h me in which she had been for more than two years before the application for guardianship was filed and place her in another foster home without placing her for adoption for a period of one year. She would be placed under a visitation program calculated to build up a relationship between her and her natural father. The agency would be acting in cooperation with the father in his regaining custody of the child. During the hearing, it was disclosed that Bullock had withdrawn his consent to the adoption after a visit by the proposed guardian. She told him that his consent was the same as saying he did not want the child, prepared and made available to him a form for revocation of this consent, and encouraged him to believe that a plan could be worked out under which he could make a suitable home for the child and regain her custody. This was done with full knowledge that Bullock had previously failed to appear in response to a summons to answer the charge that he had neglected the child

and that he was openly living in Thayer, Missouri, in a meritricious relationship with a woman, even though neither of them had been divorced from a living spouse. An investigation requested by Arkansas Social Services revealed that the woman's two children were already living in that home, that neither Bullock nor the woman seemed ashamed of the situation and that the woman seemed to be quite happy with it. The agency was also aware of the circumstances that caused the chancellor to find that Bullock had abandoned Kimmi. With this knowledge, the nominated guardian promised Bullock that, if he planned to get a divorce and remarry she would ask the Arkansas Social Services to hold up the guardianship for a year, to enable him to make a home for the child. Even in their brief here, appellants say:

> ***The record in this case is replete with the efforts of appellants to return Kimmi Bullock to her natural father, who in this proceeding made an effort to regain his child.

In this case, we do not go so far as to say that the contract clause by which appellees agreed "that we will not attempt to obtain legal custody or adopt this child" is void, as the chancellor did, or that it would not, under any circumstances, be enforceable. We cannot say, however, that the chancellor erred in declining specific performance of this contract. Specific performance is an equitable remedy and courts of equity have some latitude of discretion in granting or withholding that relief, depending upon the equities of the particular case. *James* v. *Medford*, 256 Ark. 1002, 512 S.W. 2d 545; *Cole* v. *Salyers*, 190 Ark. 53, 76 S.W. 2d 669. See also, *Jones* v. *Byrne*, 149 F. 457 (W.D. Ark. 1906), rev. on other points, 159 F. 321 (8th Cir., 1908).

The fact that the agencies involved do allow adoptions by foster parents, and did indicate to appellees that they did, coupled with their circulation of a newsletter to foster parents in the form of a letter from a foster child containing a plea for adoption shows clearly that this particular term of a contract for foster care placement is not always enforced by them. This is a clear recognition that there may be conditions which justify the denial of specific performance of the clause. The

question of enforcement should not be left to the uncontrolled discretion of the contracting agencies. In considering the equities, the chancellor correctly stated that the matter should not be viewed as if the child were a chattel, and that no one, not even a parent, has a proprietary right in the custody of a child. *Larkin* v. *Pridgett,* 241 Ark. 193, 407 S.W. 2d 374; *Woodson* v. *Lee,* 221 Ark. 517, 254 S.W. 2d 326; *Coulter* v. *Sypert,* 78 Ark. 193, 95 S.W. 457. See also, *Mantooth* v. *Hopkins,* 106 Ark. 197, 153 S.W. 95; *In re Giurbino,* 258 Ark. 277, 524 S.W. 2d 236 (1975). In every case in which the chancery court deals with child custody, even as between parents, the polestar is the best welfare of the child. *Haller* v. *Haller,* 234 Ark. 984, 356 S.W. 2d 9. As demonstrated by the cited cases and many others, this factor may not be totally conclusive, but it is certainly dominant, and the sovereign power of the state as parens patriae may be exercised through the chancellor to see that the child's interests are protected. When it came to the point of determining whether this child, who came to the Deavers home neglected, abandoned, apparently unloved and mistreated, and highly nervous, be taken from a home where she had been for more than two of the most formative years of her life, where strong ties of love and affection had grown and where she was happy and apparently well adjusted, or whether she be snatched away and kept away from this environment in the fragile hope that the home of her father would become a suitable place for her, we are inclined to believe that the chancellor did act, as he stated, in the child's best interests. We certainly are unable and unwilling to say that his findings in that regard were clearly against the preponderance of the evidence, which we would have to do in order to reverse his decree. We have repeatedly emphasized that there is no case in which the chancellor's superior position, arising from his ability to view the parties involved, is to be accorded greater weight that those in which the future custody of the child is to be determined. *Perez* v. *Perez,* 256 Ark. 639, 509 S.W. 2d 531; *Cousins* v. *Smith,* 254 Ark. 28, 491 S.W. 2d 587; *Wilson* v. *Wilson,* 228 Ark. 789; 310 S.W. 2d 500.

Of course, what we have said has been directed primarily to the chancery court's denial of specific performance, but it applies with almost equal force to the probate court judgment

denying appointment of a guardian of Kimmi. True enough, the probate court is a court of law, not equity, but it is also true that a probate judge is invested with a sound legal discretion in the matter of the appointment of a guardian for a minor, and his action will not be overturned except in case of manifest abuse. *Sadler* v. *Rose*, 18 Ark. 600, *Nelson* v. *Green*, 22 Ark. 367.

Although the statutes are somewhat different from those in effect when the cited cases were decided, the present statutes indicate that the probate court still has discretion in the matter. The petition for appointment of a guardian must state the reasons why the appointment is sought and the interest of the petitioner. Ark. Stat. Ann. § 57-609 (Repl. 1971). The probate court must be satisfied after a hearing that a guardianship is desirable to protect the interests of the incompetent. Ark. Stat. Ann. § 57-614, 616 (Repl. 1971). The scope of our review is the same as it would have been in an equity case. Ark. Stat. Ann. § 62-2016 g (Repl. 1971). The pertinent statutes are indicative of a recognition of discretion in the probate court. We certainly would not reverse an equity case involving an application for guardianship in the absence of a manifest abuse of discretion. We find no abuse here, so we affirm the judgment of the probate court, as well as the decree of the chancery court.

VOLKSWAGENWERK AKTIENGESELLSCHAFT *v.* Michael Raymond MERRITT

75-28 531 S.W. 2d 938

Opinion delivered January 12, 1976
[Supplemental Opinion on Denial of Rehearing
Feb. 17, 1976, P. 58A.]

Barber, McCaskill, Amsler & Jones and *Herzfeld & Rabin, P.C.*, New York, N.Y., for appellant.

Hall, Tucker & Lovell and *Patton & Brown,* for appellee.

J. FRED JONES, Justice. This is an appeal by Volkswagenwerk Aktiengesellschaft, hereafter referred to as VWAG, from a circuit court judgment in favor of the plaintiff-appellee, Michael Raymond Merritt, in a suit for personal injuries allegedly caused by the negligent design of a Volkswagen automobile.

The facts appear as follows: Mr. Jeffus, Mr. Rickett and the appellee, Mr. Merritt, were friends and neighbors living in and near Benton, Arkansas. Mr. Rickett operated a dog kennel and had arranged to obtain some young dogs for his kennel from an individual in Shreveport, Louisiana. Mr. Jeffus owned a "squareback" station wagon type Volkswagen automobile and by prearrangement he was to drive it in taking Mr. Rickett to Shreveport to pick up the dogs, and Mr. Merritt was going along just for the trip. A wire dog crate was placed behind the back seat practically filling the cargo space in the rear portion of the Volkswagen. The three men left Benton before daylight with Mr. Jeffus driving and with Mr.

Rickett in the front seat beside him on the passenger side and with Mr. Merritt sitting on the back seat behind Mr. Rickett.

As Mr. Jeffus drove his automobile at about 45 miles per hour into a curve to his right on the blacktop highway, he was met by a vehicle traveling in the opposite direction on his side of the highway. Mr. Jeffus was blinded by the lights of the oncoming vehicle and in order to avoid a head-on collision, he steered the automobile to his right and drove it off the highway. The automobile rolled completely over and came to rest in an upright position about 140 feet from where it left the highway. Mr. Rickett was thrown from the vehicle and died as a result of injuries he sustained, Mr. Jeffus only sustained bruises and Mr. Merritt sustained a compression fracture to the twelfth thoracic vertebra in his spine resulting in complete, and apparently permanent, paraplegia with all its grievous side effects.

Mr. Merritt filed suit for personal injuries against the local dealer and the national distributor of the Volkswagen automobile and also against VWAG, the manufacturer. The trial court directed verdicts for the local dealer and the national distributor and the case proceeded to trial against the appellant-defendant manufacturer. The case was tried on the theory and allegations that the upset of the automobile and resulting injuries to Mr. Merritt were the direct and proximate result of the negligence of VWAG in several respects as to the design of the automobile; the principal ones being a high and misplaced center of gravity, narrow wheel base, over and under steering and a sharp and unpadded metal top of the back of the rear seat. The appellant has designated several points on which it relies for reversal, but we find it unnecessary to discuss all of them because we conclude the judgment must be reversed under the appellant's first contention that the trial court should have directed a verdict for the appellant.

There was some evidence that the center of gravity in the automobile here involved was slightly (about two inches) higher than the average American made automobile, but there was no substantial evidence that the center of gravity had anything to do with the automobile turning over in this

case. According to Mr. Jeffus' testimony he was driving about 40 miles per hour when he was forced off the highway by an on-coming vehicle with blinding lights. He turned his automobile suddenly to his right and left the highway to avoid a head-on collision. The automobile skidded sharply to the right into a ditch where it turned over according to the police investigator. The ditch was approximately three feet deep according to a civil engineer who testified. The automobile turned completely over at least one time and then continued to roll on its wheels through stumps and bushes until it came to rest in an upright position among the trees, clear off the highway right-of-way 140 feet from where it first left the highway.

According to Mr. Jeffus' testimony his automobile had been driven 32,000 miles when he purchased it and he had driven it approximately 24,000 miles. He said that when he drove the automobile from the highway, it steered properly; that "it did what he asked it to do." He said his hands froze to the steering wheel after he drove from the highway and he did not remember whether he turned to the right or left after he left the highway. He said he thought the automobile turned over to his left.

Officer Lawson said each lane of the blacktop highway was 12 feet wide; that there was about six feet of pea gravel with an oil base on the shoulder of the highway adjacent to the blacktop, and that there was evidence the automobile turned over in the ditch.

Mr. Johnny Jones testified that he drove an ambulance to the scene of the accident. He said he found Mr. Rickett lying approximately five feet from the rear of the automobile, and found Mr. Merritt lying in the cargo area of the Volkswagen. He did not recall Mr. Merritt's exact position in the automobile.

Mr. Merritt's own testimony is significant. He testified that when Mr. Jeffus swerved to miss the on-coming automobile, he, Merritt, might have blacked out for a few seconds. He said when he came to, he was jammed down into the approximate one-foot space between the dog cage and the

back seat. He said he was doubled up with his back against the dog cage and with his knees up against his chest, with his legs at the knees hanging over the back of the rear seat. He said that when the ambulance arrived, someone removed the dog cage from the automobile and that he lay on his back in the rear of the automobile with his legs still over the top of the back of the rear seat until the ambulance took Mr. Rickett to the hospital and returned for him.

Mr. Merritt then testified as to his hospitalization, surgery and attempts at rehabilitation. His testimony as to his present condition, especially as it relates to the well-known side effects of paraplegia, could arouse nothing but sympathy from anyone not void of human emotions, but the question here is not the extent of Mr. Merritt's injuries. The question is whether his injuries were brought about by the negligence of the appellant in the design and manufacture of the automobile in which Mr. Merritt was riding.

The back of the rear seat in the vehicle here involved had a metal top edge with little upholstering or padding. Mr. Joseph Harris, a consulting physicist, testified as an expert for the appellee. He attempted to reconstruct the accident and demonstrate to the jury the exact position of Mr. Merritt's body at all times while the automobile was in motion after it left the highway. He described in graphic detail the exact position of Mr. Merritt's body at all times while the automobile was rolling completely over. We are not impressed by this witness's testimony. He winds up by saying there was no real impact between Mr. Merritt and any part of the automobile until the very last moment when Mr. Merritt's back impacted across the sharp metal top of the back seat rest, thus causing his *compression* fracture. He said Mr. Merritt *probably* knocked the dog cage back as he fell on his back across the sharp edge of the back seat rest. We can only conclude that this witness's conclusion was pure speculation. It is in contradiction to Mr. Merritt's own testimony that he was wedged into the narrow space between the dog cage and the back seat, and it is in contradiction to the simple mechanics of a *compression* type fracture of a spinal vertebra described by the neurosurgeon who did a laminectomy on Mr. Merritt's spine.

Dr. Adametz, the neurosurgeon who attended Mr. Merritt, testified that Mr. Merritt sustained a *compression* type fracture of the twelfth thoracic vertebral body. He described the fracture as being compressed into a wedge shape on the front side of the vertebral body. He said the back, or posterior portion, of the vertebral body had "exploded" and pushed back into the spinal canal. He said this type injury could only have occurred as a result of *acute flexion* or bending forward.

Dr. Simmons, a practicing physician, examined the back rest of the back seat of the automobile exhibited in evidence, and also examined the x-rays made of Mr. Merritt's injured back. He was then permitted, over objections, to express an opinion as to how the injury occurred. He agreed that the x-rays showed a compression type fracture with displacement. He said that in his opinion the vertebral body came in contact with a rather sharp edge while in a *hyperflexed position* to cause the compression. On cross-examination Dr. Simmons said such contact would be with the "belly" rather than the "back of the back." Dr. Adametz examined Mr. Merritt for internal abdominal injuries and found none. He found abrasions to the anterior and posterior portion of the chest area but there was no mention of abrasions or contusions to the abdomen or to the back adjacent to the twelfth thoracic vertebral body. We conclude that Dr. Simmons' opinion was pure speculation without foundation and we conclude that the jury verdict in this case rested wholly on surmise and conjecture unsupported by any substantial evidence, and that the judgment rendered thereon must be reversed.

We see no reason to discuss the two lines of cases represented by such cases as *Evans* v. *General Motors Corp.*, 359 F. 2d 822 (7th Cir. 1966), and *Larsen* v. *General Motors Corp.*, 391 F. 2d 495 (8th Cir. 1968). The evidence in the case at bar does not bring it within the purview of either *Evans* or *Larsen.* The evidence as to negligence in design of the automobile is thin enough in the case at bar, but there is simply no substantial evidence that the alleged negligence in design was a proximate cause of the automobile's overturn or of Mr. Merritt's injuries. We can only conclude, from the evidence of record, that Mr. Jeffus simply cut his automobile too short for the speed he was traveling and when it hit the ditch, it simply

turned over and Mr. Merritt sustained his compression fracture by acute flexion. There was no evidence to the contrary.

The judgment is reversed and the cause dismissed.

Supplemental Opinion on Denial of Rehearing
delivered February 17, 1976

J. FRED JONES, Justice. On petition for rehearing the appellant makes two contentions we consider worthy of further comment by way of clarification of our original opinion. The appellant states:

> "The court did not consider the issue of the seat belts, which was independent of the issue of the *cause of the* roll over.
>
> The court did not consider the film of a demonstration of a roll over and the exactness of the science of physics on the rear seat projection issue."

We did consider the seat belt issue on appeal but failed to separately comment on it in our original opinion.

Seat belts were optional with the purchase of new Volkswagens of the type and at the time the vehicle in this case was manufactured. The front seat was equipped with seat belts which were not in use at the time of the wreck, and the rear seat had brackets for the attachment of seat belts at

the option of the purchaser. The vehicle involved in this case was a previously used vehicle and had been driven 32,000 miles by a previous owner before Mr. Jeffus purchased it. There was no evidence as to whether the rear seat had *ever* been equipped with seat belts. In any event, we found no evidence that the manufacturer was negligent in designing and manufacturing the automobile without rear seat belts, or that their absence was a proximate cause of the appellant's injuries.

We did not consider the roll-over film as substantial evidence of what occurred to the appellant in the case at bar. The roll-over film was produced under more or less controlled conditions and the wreck of Mr. Jeffus's automobile was not. We did thoroughly consider the back seat extension in our original opinion but found no substantial evidence that it contributed in any manner to the appellant's injuries.

The judgment is reversed and the cause dismissed.

Forrest PARKMAN *v.* Harry HASTINGS Sr. et al

75-209 531 S.W. 2d 481

Opinion delivered January 12, 1976

McArthur, Lofton & Wilson, for appellant.

House, Holmes & Jewell, for appellees.

J. FRED JONES, Justice. This is an appeal by Forrest Parkman from circuit court orders dismissing his complaint in a damage suit he filed for defamation of character and reputation against the defendant-appellees, Harry Hastings, Sr., Cecil Hill, Sr., John Wilkins and Gail Ferguson. The complaint was dismissed by the trial court on Hastings' motion for dismissal and for summary judgment and on the other appellees' motion for dismissal because the complaint stated a cause of action for slander and was barred by the one-year statute of limitations. Ark. Stat. Ann. § 37-201 (Repl. 1962).

The appellant contends that his complaint stated a cause of action for libel; that his suit was commenced well within the three year statutory period fixed by Ark. Stat. Ann. § 37-206 (Repl. 1962), and that "the trial court erred in ruling that the appellant's cause of action was slander."

The complaint is abstracted in the appellant's brief in narrative statement form but, as taken from the record, the pertinent portions recite as follows:

> "That on the 30th day of January, 1974, the Plaintiff learned of the fact that the Defendants, acting on concert, had maliciously accused the Plaintiff of having raped two females against their will. * * * The Defendants made these statements to inspector K. D. Pearson of the Little Rock Police Department. Furthermore the Defendants made these statements as aforementioned knowing the same to be false and untrue.
>
> That the matter published or communicated to a third person as aforementioned did in fact tend to lower the reputation of the Plaintiff, Forrest Parkman.
>
> That inspector Pearson understood the statements made by the Defendants to be in fact an allegation that the Plaintiff, Forrest Parkman, had committed rape upon women against their will on two different occasions. Inspector Pearson understood this statement to refer to the Plaintiff, Forrest Parkman, and he further

understood the charges to be that the Plaintiff had committed a serious, morally reprehensible crimes [sic] including rape.

The Defendants intentionally indicated these allegations to inspector Pearson knowing the same to be false and untrue or in the alternative the Defendants failed to exercise due care and hence were negligent in their communicating these allegations to officer Pearson.

That these false and untrue allegations, which were known to be false and untrue by the Defendants, were communicated to a third person and as such were the cause in fact and the proximate cause of damages to the Plaintiff, Forrest Parkman.

The Plaintiff has suffered extreme mental anguish, his reputation in the community has been lowered, and the Plaintiff has been damaged in the amount of One Hundred Thousand Dollars ($100,000.00).

That in this case the Defendants have alleged that the Plaintiff has committed a serious, morally reprehensible crime and the Plaintiff should be awarded punitive damages in the amount of One Million Dollars ($1,000,000.00) from each Defendant.

WHEREFORE, The Plaintiff, Forrest Parkman, by and through his attorneys, McArthur & Lofton, pray judgment against each Defendant for One Million Twenty-Five Thousand Dollars ($1,025,000.00), for costs and all proper relief."

It is abundantly clear that the complaint on its face states a cause of action for defamation by slander rather than libel. Black's Law Dictionary defines defamation, libel and slander as follows:

"DEFAMATION: The taking from one's reputation. The offense of injuring a person's character, fame, or reputation by false and malicious statements. The term seems to include both libel and slander.

LIBEL: In Torts. A method of defamation expressed by print, writings, pictures, or signs. *Spence* v. *Johnson,* 142 Ga. 267, 82 S.E. 646, 647, Ann. Cas. 1916A, 1195. In its most general sense any publication that is injurious to the reputation of another. *Ajouelo* v. *Auto-Soler Co.,* 61 Ga. App. 216, 6 S.E. 2d 415, 418. *Flake* v. *Greensboro News Co.,* 212 N.C. 780, 195 S.E. 55, 60. Libel is written defamation. *Locke* v. *Gibbons,* 299 N.Y.S. 188, 192, 193, 164 Misc. 877.

SLANDER: The speaking of base and defamatory words tending to prejudice another in his reputation, office, trade, business, or means of livelihood. *Little Stores* v. *Isenberg,* 26 Tenn. App. 357, 172 S.W. 2d 13, 16. *Harbison* v. *Chicago R.I. & P. Ry.,* 327 Mo. 440, 37 S.W. 2d 609, 616. Oral defamation; the speaking of false and malicious words concerning another, whereby injury results to his reputation. *Pollard* v. *Lyon,* 91 U.S. 227, 23 L. Ed. 308; *Fredrickson* v. *Johnson,* 60 Minn. 337, 62 N.W. 388; *Johnston* v. *Savings Trust Co. of St. Louis, Mo.,* 66 S.W. 2d 113, 114; *Lloyd* v. *Commissioner of Internal Revenue,* C.C.A. 7, 55 F. 2d 842, 844."

In Prosser (4th Ed. 1971), Law of Torts, §§ 111, 112, at pages 737 and 751, is found the following:

"Defamation is made up of the twin torts of libel and slander — the one being, in general, written, while the other in general is oral. . .

The erratic and anomalous historical development of the law of defamation has led to the survival until the present day of two forms of action for defamatory publications. One is libel, which originally concerned written or printed words; the other slander, which might be, and usually was, of an oral character."

In Restatement of Torts, § 568 (1938), libel and slander are distinguished as follows:

"(1) Libel consists of the publication of defamatory matter by written or printed words, by its embodiment

in physical form, or by any other form of communication which has the potentially harmful qualities characteristic of written or printed words.

(2) Slander consists of the publication of defamatory matter by spoken words, transitory gestures, or by any form of communication other than those stated in Subsection (1).

(3) The area of dissemination, the deliberate and premediated character of its publication, and the persistence of the defamatory conduct are factors to be considered in determining whether a publication is a libel rather than a slander."

The Arkansas criminal libel and slander statute, Ark. Stat. Ann. § 41-2401 (Repl. 1964) defines libel as "a malicious defamation, expressed either by writing, printing, or by signs or pictures, or the like," and Ark. Stat. Ann. § 41-2409 (Repl. 1964) provides in part as follows:

"It shall be deemed slander to falsely use, utter or publish words, which, in their common acceptation, shall amount to charge any person with having been guilty of any other crime or misdemeanor not mentioned in this act [§§ 41-2405 — 41-2412]." (1)

Ark. Stat. Ann. § 37-201 (Repl. 1962) provides that actions for slander must be brought within one year from the date the cause of action accrued, and § 37-206 provides that actions for libel must be brought within three years from the date the cause of action accrued.

The complaint, as filed by the appellant, does not state when his alleged cause of action accrued; it only states the date upon which he learned of it. The complaint does not state or indicate that the alleged defamation was placed on electronic tape or reduced to writing, but apparently the appellees were aware that the alleged statements were preserved on tape because on February 19, 1975, the appellee Hastings filed a motion stating that the alleged cause of ac-

(1) Rape is not among the other crimes mentioned.

tion stated in the complaint was based on a complaint lodged by the appellee-defendants to Inspector D. K. Pearson of the Little Rock Police Department on January 9, 1974; that the conversation that contained the alleged slanderous material was recorded on magnetic tape with the knowledge of all parties to the conversation; that the tape upon which the conversation was recorded was in the possession of the chief of police of the Little Rock Police Department; that the chief of police refused to voluntarily relinquish the tape for examination by the appellee without court order, and the motion prayed an order for the release of the tape. The motion was granted by order of the court on the same day it was filed.

On February 29, 1975, the other appellees, Hill, Wilkins and Ferguson, filed a motion to make the complaint more definite and certain by setting out, among other matters, the actual date, time and place the alleged statements were made. The record does not indicate that this motion was ever acted on by the trial court or ever complied with by the appellant.

On March 18, 1975, the appellee Hastings gave notice of the taking of the deposition of Inspector Kenneth D. Pearson. Apparently the deposition of Inspector Pearson was taken [2] because in his "Motion to Dismiss and for Summary Judgment"[3] Hastings stated that it was based upon evidence introduced in the deposition of Inspector Pearson. In his "Motion to Dismiss and for Summary Judgment" Hastings stated that the court lacked jurisdiction to entertain the action because it was barred by the statute of limitations. The motion then stated that the defendant's actions, which constituted the plaintiff's alleged cause of action, accrued on January 16, 1974, and that the suit was commenced on January 30, 1975. The motion then stated as follows:

> "This motion is based upon evidence introduced in the deposition of Inspector K. D. Pearson, Little Rock Police Department, which was taken March 21, 1975, to be presented to the Court for inspection, in camera, at

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[2] The deposition or its contents do not appear in the record.

[3] The filing date does not appear on the instrument.

the hearing on this motion; the Affidavit of Roger McNair, Circuit Clerk of Pulaski County, Arkansas, attached hereto as Exhibit A; and the Affidavit of Monroe Love, Sheriff of Pulaski County, Arkansas, attached hereto as Exhibit B; such evidence may be considered by the Court in a decision on this motion as contemplated by Rule 56 (a) (2) [sic] of the Federal Rules of Civil Procedure.

If the foregoing be uncontroverted, there would be no genuine issue as to any material issue of fact with respect to the instant action being barred by the stated statute of limitations and that this Defendant is entitled to judgment as a matter of law.

WHEREFORE, Movant and Defendant, Harry Hastings, Sr., moves the Court, after hearing on this motion for appropriate granting of this motion, for dismissal of the complaint herein against this Defendant and for entry of summary judgment thereon in favor of this Defendant, and for all other proper relief to which this Defendant may be entitled."

In support of his motion the appellee Hastings filed the affidavit of the circuit clerk, Roger McNair, certifying that the complaint was filed and summons issued on January 29, 1975, and also filed the affidavit of Sheriff Monroe Love certifying that summons was placed in his hands for service on January 30, 1975, at 9:19 A.M.

On April 22, 1975, the appellant filed a response to Hastings' motion to dismiss and for summary judgment. In his response the appellant admitted "that the action of the Defendants out of which Plaintiff's cause of action arose initially occurred on January 16, 1974, although there were subsequent publications." He also admitted that his suit was commenced on January 30, 1974. The appellant in his response then quoted the three-year statute of limitations from § 37-206, *supra*, and then stated as follows:

"This response is based on evidence produced in the disposition [sic] of Inspector K. D. Pearson of the Little

Rock Police Department, which was taken March 21, 1975, wherein the Deponent testified that the Defendants came to him with their complaint, that the Deponent informed the Defendants that he was recording their statements on magnetic tape to preserve their testimony, and that the Defendants knew or should have known that this magnetic tape would later be transcribed, and the tape heard by other people as well as the transcript read by other people.

That the facts as stated in the original complaint and in this motion adequately state a cause of action for defamation, libleless [libelous] defamation.

WHEREFORE, The Plaintiff prays that this Court deny the motions of the Defendant, Harry Hastings, Sr., give the Plaintiff time to respond to the motion to make more definite and certain filed herein, and to amend its complaint if necessary, and for all other proper relief to which he may be entitled."

On May 19, 1975, the appellees Hill, Wilkins and Ferguson filed their motion to dismiss the complaint because it was barred by the one-year statute of limitations. On May 16, 1975, the trial court entered its order finding that the cause of action asserted against Hastings was barred by the statute of limitations and the complaint against him was dismissed with prejudice. On May 20, 1975, the trial court entered an order of dismissal as to the appellee-defendants Hill, Wilkins and Ferguson for the same reason.

As already stated, it is clear that the appellant's complaint stated a cause of action for slander rather than libel. Even under the allegations as to the hearsay evidence in the deposition of Inspector Pearson, there is no contention that the alleged defaming statements were ever reduced to print or writing; or that such statements that may have been recorded on the electronic tape, to preserve the testimony, were ever transcribed or heard by anyone other than Inspector Pearson to whom the alleged statements were allegedly addressed. Summary judgment is proper where a claim is barred by the statute of limitations. *Norwood* v. *Allen*, 240 Ark. 232, 398 S.W.

2d 684 (1966). According to the appellant's own admission in his response to the motion for summary judgment, his suit was not commenced within the applicable statutory period of one year after his cause of action accrued.

In the light of what we have already said, we deem it unnecessary to discuss the judicial decisions on the subject including *Dunaway* v. *Troutt*, 232 Ark. 615, 339 S.W. 2d 613 (1960), in which the defamatory statements were not only placed on electronic tape, but were also published in a printed newspaper.

The judgment is affirmed.

Daniel Albert HOCK *v.* STATE of Arkansas

CR 75-123 531 S.W. 2d 701

Opinion delivered January 12, 1976

Holloway & Haddock, for appellant.

Jim Guy Tucker, Atty. Gen., by: *Michael G. Epley*, Asst. Atty. Gen., for appellee.

CONLEY BYRD, Justice. Appellant Daniel Albert Hock was tried and found guilty of the felonious possession of 24 pounds of marijuana for the purpose and with the intent to sell in violation of Ark. Stat. Ann. § 82-2614.2 (Supp. 1973). For reversal of his three year sentence, he makes the contentions hereinafter discussed.

We find no merit to the contention that his in-custody confession was invalidated because of the officers' failure to give proper *Miranda* warnings. The warning given to appellant, in so far as here applicable, was as follows:

> ". . . You have the right to talk to a lawyer for advice before we ask you any questions and to have him with you during questioning. You have the right to the advice and presence of a lawyer even if you cannot afford to hire one. We have no way of giving you a lawyer, *but one will be appointed you, if you wish, if and when you go to Court . . . .*"

Appellant points to *Reed* v. *State*, 255 Ark. 63, 498 S.W. 2d 877 (1973), and contends that the italicized portion of the warning is deficient. However, in *Moore* v. *State*, 251 Ark. 436, 472 S.W. 2d 940 (1971), we had before us this same identical warning, and we there pointed out that, while the warning

was deficient to an indigent, it would not be deficient to one who could afford to employ counsel. The record here shows that appellant had funds for the employment of counsel. Consequently, it follows that he is not entitled to complain.

Appellant points to our holding in *Northern* v. *State,* 257 Ark. 549, 518 S.W. 2d 482 (1975), and suggests that the State did not meet its burden of proving the voluntariness of his confession because it did not call all of the officers present when his confession was given. We find no merit to this contention. Appellant failed to offer any testimony that his confession was induced by violence, threats, coercion or offers of reward.

Appellant confessed that he had brought 34 pounds of marijuana with him on his trip and that he had already sold 10 pounds to one Jo Jo Alexander. He contends that such evidence should not have been submitted to the jury because it involved prior crimes. We find no merit to this contention. Such evidence was admissible to show the purpose for which appellant possessed the marijuana — a material element of the crime.

The record shows that prior to contacting appellant, Sheriff Max Brown obtained a search warrant, and that armed with the search warrant, the sheriff with deputies Smith and Talkington went to Lake Chicot State Park looking for the person or persons fitting the descriptions given them by a confidential informant. After finding appellant and his codefendant and making a search of appellant's automobile and Cabin #5, the sheriff made the following return on the search warrant, to-wit:

> No. . . . . .
>
> SEARCH WARRANT
> State of Arkansas
> County of CHICOT
>
> I have this 20 day of March 1975, made diligent search of the described (time Approx. 4:00 p.m.) premises, and searched Cabin #5 at Chicot State Park

occupied by Daniel A. Hock & Richard Martin Dickman & Black Pont. Auto — belonging to Daniel Hock — found approx. 24 lbs. Marijuana under sink in two suitcases in Cabin #5 Sheriff Returned and filed 20 March 1975.

At trial on May 15, 1975, the State did not rely upon the validity of the search warrant but, instead, relied upon a consent to search. In that connection during an in-chambers hearing it offered the testimony of the sheriff and Deputies Smith and Coalter.

Samuel Smith, Jr., Deputy Sheriff, testified as follows:

"A. Well, we pulled up at this cabin and there was some men working on the building. And, we asked them if the boys were there, or the people there. They said they were down there fishing. We walked down there where they was. The Sheriff introduced us. Told them that he had heard that they had some of that funny stuff, and he wanted to search the building. And, the boys was so calm, to tell you the truth, I started to come back and not even—

Q. Didn't Max have the Search Warrant with him?

A. I presumed he did.

Q. Did you see it?

A. I didn't see him show it to them. No sir.

. . .

Q. Now, Mr. Smith, isn't it true that Max had this Search Warrant in his hand, and said we have a Search Warrant? Didn't he say that?

A. I can't remember. I mean, if he did, I can't remember.

Q. But he did have a Search Warrant in his hand, didn't

he?

A. No, I couldn't say that.

Q. You don't know?

A. I don't know."

Lewis Colater, Deputy Sheriff, testified that he got there late and the search was already in progress when he arrived.

Sheriff Brown testified as follows:

"Q. What happened when you went to the State Park?

A. We got to the State Park, came out in a couple of automobiles. At that particular time of the year, the cabins were being remodeled. Air-conditioning units, and one thing and another, being put in them. And, there was workmen working on nearly all of the cabins, including this particular cabin. And, there was cars and pickup trucks parked all along in front of the cabin. Based on the informant, there was a black automobile involved, and it was parked in front of cabin number five. I asked the workmen if it was occupied, and they said that it was. I asked them where the occupants were, and they advised that they were on the lake bank fishing. Clyde Talkington, Samuel Smith and myself walked down to the lake bank where Daniel Hock and Richard Dickman were standing. Dickman was fishing and Daniel Hock was just standing there with him. I introduced myself to him, and showed him my credentials. I introduced them to Deputy Talkington and Deputy Smith. *Told him that I had information that there might possibly be some marijuana concealed in his cabin or automobile, and asked him if he minded if I looked for it. At that time, he gave me oral permission to search.* I asked him to go to the cabin with me so that he could see just what I was doing. I got back up to the cabin, and at that time Lewis Coalter drove up. He didn't go out there with us, but he came up at that time. He and Deputy Smith searched inside the cabin while Deputy Talkington and myself searched the automobile. Daniel

Hock was very cooperative. He asked if I wanted to look in the turtle hull, and I advised him that I did. He got the keys and opened the turtle hull. We didn't find anything in the car, but before we finished completely searching the car, Deputy Smith came back outside and told us we had better hold him, and that he was going down on the lake bank and pick up Richard Dickman, which he did. I went in the cabin and they found two suit cases full of marijuana under the sink in the cabin. At that time, I advised them of their rights and told them the charges.

Q. You have got on your Search Warrant where you served the Search Warrant and made your Return on it.

A. I returned it back to the J.P. The circumstances and what I found up there, and so forth.

Q. Did you tell Mr. Hock that you had a Search Warrant?

A. No. He never asked for it.

Q. He just told you to go on in and have at it as you pleased?

A. As a matter of fact, if I were a betting man, I would have said at that particular point that there wasn't any marijuana anywhere around, because of his attitude."

In chambers appellant testified on direct examination that the sheriff, after introducing himself, said:

". . . He said he had a search warrant, you know, to search the place. I first asked him if he wanted to search me, and he said no, and he pulled out his search warrant. He pulled it out, and I got a brief look at it, and he stuck it back in his pocket and turned right around and walked, you know, walked off. . . ."

Appellant's cross-examination left much to be desired with respect to credibility.

The latest expression with reference to the burden cast upon the State to show consent to search is contained in *Bumper* v. *North Carolina*, 391 U.S. 543, 88 S. Ct. 1788, 20 L. Ed. 2d 797 (1968), where it is stated:

> "When a prosecutor seeks to rely upon consent to justify the lawfulness of a search, he has the burden of proving that the consent was, in fact, freely and voluntarily given. This burden cannot be discharged by showing no more than acquiescence to a claim of lawful authority. A search conducted in reliance upon a warrant cannot later be justified on the basis of consent if it turns out that the warrant was invalid. The result can be no different when it turns out that the State does not even attempt to rely upon the validity of the warrant, or fails to show that there was, in fact, any warrant at all."

The Supreme Court, in *Bumper, supra,* cited *Judd* v. *United States*, 190 F. 2d 649 (D.C. Cir. 1951), favorably as indicating the extent of the burden placed upon the State to show consent. With reference to searches and seizures made without a proper warrant, the Court in *Judd* v. *United States, supra* said:

> "Searches and seizures made without a proper warrant are generally to be regarded as unreasonable and violative of the Fourth Amendment. True, the obtaining of the warrant may on occasion be waived by the individual; he may give his consent to the search and seizure. But such a waiver or consent must be proved by clear and positive testimony, and it must be established that there was no duress or coercion, actual or implied. *Amos* v. *United States*, 255 U.S. 313, 41 S. Ct. 266, 65 L. Ed. 654; *United States* v. *Kelih*, D.C.S.D. Ill. 1921, 272 F. 484. The Government must show a consent that is 'unequivocal and specific' (Karwicki v. United States, 4 Cir. 55 F. 2d 225, 226), 'freely and intelligently given.' Kovach v. United States, 6 Cir., 52 F. 2d 639. Thus 'invitations' to enter one's house, extended to armed officers of the law who demand entrance, are usually to be considered as invitations secured by force. *United States* v. *Marquette*, D.C.N.D. Cal. 1920, 271 F. 120. A like view

has been taken where an officer displays his badge and declares that he has come to make a search (*United States* v. *Slusser*, D.C.S.D. Ohio 1921, 270 F. 818), even where the householder replies 'All right.' *United States* v. *Marra*, D.C.W.D.N.Y. 1930, 40 F. 2d 271. A finding of consent in such circumstances has been held to be 'unfounded in reason'. *Herter* v. *United States*, 9 Cir., 27 F. 2d 521. Intimidation and duress are almost necessarily implicit in such situations; if the Government alleges their absence, it has the burden of convincing the court that they are in fact absent."

The search warrant that the sheriff obtained and upon which he made his return is obviously invalid. Thus, we must determine, under the foregoing decisions, whether the State has met its burden of proving a consent to search — *i.e.* the issue is not whether one should believe either the sheriff or appellant but whether the showing made by the State was sufficiently clear and positive to sustain its burden of proof. On this issue we really have only the testimony of the sheriff and appellant, for Smith, the deputy, could not state positively that the sheriff showed or did not show appellant the search warrant. As between the testimony of the sheriff and appellant, the appellant's testimony is much lacking in credibility. Yet, the return on the search warrant tends to corroborate appellant's version. Based upon the whole record, we cannot say that the State met its burden of proving consent by clear and positive testimony. It follows that the trial court should have suppressed the evidence obtained in the search.

Reversed and remanded.

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

J. FRED JONES, Justice, dissenting. It is my opinion that the judgment in this case should be affirmed.

The validity of the search in this case turns on whether the search was conducted with the voluntary consent of the appellant rather than under the search warrant. Sheriff Brown said that although he had the warrant in his posses-

sion, he did not present it to the appellant or use it at all in connection with the search. He said he did not find it necessary to use the search warrant, in that the appellant readily agreed for him to make the search and even assisted in searching the automobile. Sheriff Brown's testimony on this point was confirmed by the testimony of Deputy Sheriffs Smith and Talkington, but this was denied by the appellant. There is no evidence in the record that the appellant had a key to the cabin in which the marijuana was found and there is actually no evidence that any of the appellant's personal effects were in the cabin or as for that matter, that he had even rented the cabin. There was evidence that there were several cabins in the state park and that the appellant's automobile was parked in front of cabin No. 5. Sheriff Brown said the cabin door was unlocked and that workmen were working in, around and on the cabin and no one testified to the contrary. In any event, I conclude that the trial court in resolving this fact issue was justified in believing the sheriff's testimony in regard to the appellant consenting to the search, and that the search was made under such consent. From the testimony of the parties concerned, the court could have easily concluded that it was a part of the appellant's strategy, in concealing the marijuana from detection, to be so entirely agreeable to a search that it would disarm suspicion and lessen the thoroughness of any search made, and that in the event the contraband was found, the appellant could more convincingly deny his knowledge of its existence. From the testimony of the officers it would appear that if such was the strategy of the appellant, it almost succeeded.

On cross-examination Sheriff Brown testified before the jury as follows:

"Q. Sheriff, what cabin did ya'll wind up searching?

A. Number five.

Q. You stated that people were working around that particular cabin?

A. They were. Around, on and in.

Q. Around, on and in? Was the door locked or unlocked?

A. No, it was unlocked.

Q. You state that Mr. Hock voluntarily allowed you to search anything you wanted to?

A. He did.

Q. Why, do you suppose, if he had contraband in his room, he would tell you to go on in and search it?

A. I really don't know sir. I was, at the time he told me, I really didn't think he had anything from his attitude."

Sheriff Brown made a return on the warrant but it only stated where he searched and what he found. It did not say or indicate that he served it on the appellant or showed it to him.

I would affirm.

I am authorized to state HARRIS, C.J., joins this dissent.

BURKS, INC. and ROCKWOOD INSURANCE COMPANY *v.* Joe BLANCHARD, et al

75-197 531 S.W. 2d 465

Opinion delivered January 12, 1976

Shackleford, Shackleford & Phillips, for appellants.

Bridges, Young, Matthews & Davis, for appellees.

ELSIJANE T. ROY, Justice. This appeal involves a Workmen's Compensation Commission award. Appellee, Joe Blanchard, recovered permanent partial disability for injuries received on October 20, 1970, while in the scope of his employment with Burks, Inc. (Also appellant herein is the insurance carrier, Rockwood Insurance Company). Appellee was conservatively treated by two physicians for injuries to his right leg and back. Finding himself unable to continue his former job skidding logs, appellee thereafter sought the medical services of Dr. Harold Chakales. Dr. Chakales' examination revealed a ruptured disc and corrective surgery was performed on March 14, 1972. In a report dated June 15, 1972, appellee was rated by Dr. Chakales as having a 10 to 15 percent physical impairment to the body as a whole. Appellants paid temporary total disability for a period of time following the surgery and began paying permanent partial disability based on the 15 percent disability established by Dr. Chakales.

Appellee thereafter pursued other employment and, on November 25, 1972, again suffered injury to his back while working for Holloway and Hicks Texaco Station. The Commission concluded that appellee had suffered a recurrence of his pre-existing back injury and increased his permanent par-

tial disability award from 15 to 35 percent. Based on finding of recurrence, liability for the increase was assessed against appellants, and the claims against Holloway and Hicks Texaco Station were dismissed.

For reversal appellants contend that there was no substantial evidence to support an increased percentage disability award; that there was no substantial evidence to support the finding that the injury was a recurrence, as opposed to an aggravation, of the pre-existing injury; and that responsibility for disability benefits after the November 25, 1972 injury should be assessed against Holloway and Hicks Texaco Station.

On appeal if there is any substantial evidence to sustain the finding and award of the Workmen's Compensation Commission, this court will affirm. *Vaccaro-Grobmeyer Co.* v. *McGarity*, 249 Ark. 1132, 463 S.W. 2d 372 (1971).

Appellants place great reliance on the case of *Ray* v. *Shellnutt Nursing Home*, 246 Ark. 575, 439 S.W. 2d 41 (1969) in support of their position that there should be no increase in the percentage disability award. However, we find more apposite the case of *Wilson & Co.* v. *Christman*, 244 Ark. 132, 424 S.W. 2d 863 (1968), which is cited with approval in *Ray*. In *Christman* we held that upon consideration of all pertinent factors including age, education, experience and other matters affecting claimant's incapacity to earn the same wages, the Commission's award of 60% permanent disability was supported by substantial evidence even though the highest percentage disability indicated by the medical evidence alone was 30%.

For other cases approving disability ratings in excess of the percentage of disability based on medical evidence alone see *Dacus Casket Co.* v. *Hardy*, 250 Ark. 886, 467 S.W. 2d 713 (1971), and *Royal Shoe Mfg. Co.* v. *Armstrong*, 252 Ark. 1002, 481 S.W. 2d 737 (1972).

Appellee's testimony reveals a pattern of physical disability stemming from his October 20, 1970 injury and the recurrence of the injury on November 25, 1972. This

testimony is corroborated by the medical observations of Dr. Chakales, appellee's treating physician. Dr. Chakales' several reports reflect that appellee will be susceptible to continued problems and that excessive manual labor would probably result in "repetitive flare-ups and low back trouble, and will require further treatment." From the record it is clear that appellee was at the time of his initial injury a 36 year old male who had a tenth grade education. His previous work experience involved manual labor only, and he was not trained for any other kind of work.

The testimony of appellee shows that following his injury of November 25, 1972, he has been unable to hold employment for any length of time. Appellee's employment was soon terminated when his physical limitations became apparent at Darco Steel, Blue Grass Shows (a carnival) and as a driver for a pulpwood contractor. The limitations involved at these places of employment were appellee's inability to lift heavy objects or to handle the driving of heavy equipment, which tasks he had been able to perform previously. The Commission in evaluating the full extent of appellee's handicap conformed to the test noted with approval in *Christmas*, supra, and in *Glass* v. *Edens*, 233 Ark. 786, 346 S.W. 2d 685 (1961), where we held consideration should be given not only to medical evidence but also to the claimant's "age, education, experience and other matters affecting wage loss." In view of the record here we find substantial evidence to support the award of 35% permanent partial disability.

We now consider whether substantial evidence supports the Commission's determination that appellee suffered a recurrence, rather than an aggravation, of his pre-existing condition. Appellants allude to the findings of the Commission referee who concluded that the second injury was an aggravation, rather than a recurrence, of the first injury. This finding was reversed by the full Commission. On appeal we consider the findings of the Commission, not of the referee, to ascertain if the award is supported by substantial evidence. *Lane Poultry Farms* v. *Wagoner*, 248 Ark. 661, 453 S.W. 2d 43 (1970).

Pertinent to the case at bar is § 95.12 of Larson on

Workmen's Compensation, which reads as follows:

> If the second injury takes the form merely of a recurrence of the first, and if the second incident does not contribute even slightly to the causation of the disabling condition, the insurer on the risk at the time of the original injury remains liable for the second. * * * This group . . . includes the kind of case in which a man has suffered a back strain, followed by a period of work with continuing symptoms indicating that the original condition persists and culminating in a second period of disability precipitated by some lift or exertion.

In determining whether the second injury represented a recurrence of the first we note appellee, subsequent to his October 20, 1972 accident, had frequent trouble with his back. Following his surgery appellee began driving a tractor but was unable to continue doing so because his back began bothering him again. It was during this period that appellee was readmitted to the hospital for treatment. Shortly after discharge appellee testified that he began work for Holloway and Hicks Texaco Station mainly greasing big trucks where he had to bend his neck and back considerably. He worked there until November 25, 1972, when, as the apparent result of strenuous exertion, he reinjured his back and was unable to work further.

It is appellants' contention that the injury occurred when appellee was forced to catch a large tire to prevent its fall from the service station wall. However, appellee stated that he did not notice anything wrong with his back at that time or suffer any unusual pain. Appellee thereafter went underneath a truck to grease it and, upon emergence, was unable to straighten up because his back was hurting so much. That an injury did indeed occur is corroborated by Dr. Chakales, who states in a medical report that appellee was hospitalized the day after he complained of injury. Moreover, in another medical report taking cognizance of this injury, Dr. Chakales stated "there is no doubt that the working, stooping and bending while working at the service station precipitated this *recurrent* back trouble." (emphasis supplied) Contrary to appellants' contention that the Commission bas-

ed its conclusion only upon Dr. Chakales' chacterization of the injury as recurrent, it can be seen that there is additional evidence sufficient to establish the plausibility of such a finding.

As a result of thorough review, we find substantial competent evidence to support the Commission's order on the recurrence issue as well as disability and the judgment of the circuit court approving same is affirmed.

George HILLIARD *v.* STATE of Arkansas

CR 75-150 531 S.W. 2d 463

Opinion delivered January 12, 1976

Skillman, Dawtt & Davis, for appellant.

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

ELSIJANE T. ROY, Justice. The appellant, George Hilliard, was charged with the crimes of grand larceny, forgery and uttering. These charges arose as a result of appellant purportedly taking, endorsing and negotiating the Arkansas Social Services check of Patsy Hill. On trial, appellant was found guilty of the offenses charged and from that conviction comes this appeal.

Appellant first assigns as error the allowance by the trial court of the prosecuting attorney's interrogation relating to prior felony and misdemeanor charges and convictions of the appellant. The record discloses that at trial the prosecuting attorney asked a number of questions dealing with appellant's past criminal activity. Appellant contends that evidence of other offenses cannot be introduced absent any "permissible relevancy" to the crime at issue when their introduction could only be for the purpose of persuading a jury that the commission of a similar offense indicates likely guilt of the crime charged. When the accused elects to take the stand in his own behalf, as here, his credibility becomes an element to be tested by proper questioning on cross-examination. *Edens* v. *State*, 235 Ark. 178, 359 S.W. 2d 432 (1962), cert. denied, 371 U.S. 968 (1965). The record reflects the prosecutor's queries were for the purpose of attacking appellant's credibility which is permissible, *Williams* v. *State*, 257 Ark. 8, 513 S.W. 2d 793 (1974), and thus considered present no basis for reversal on this appeal.

Appellant's second assignment of error is his contention that his conviction was based solely on the testimony of an accomplice, Theresa Whittier, contrary to Arkansas law; and

that the court erred in failing to give an instruction regarding this testimony. Theresa Whittier was in the company of appellant and George Allen on the day the check was stolen. Ms. Whittier admitted she forged the signature of Patsy Hill on the check and subsequently negotiated the instrument at a West Memphis supermarket, but she testified that appellant forced her to do this, while Hilliard testified he had no part in the crime. An eyewitness to the theft, Michael Minnis, was visiting his mother, Louelle Minnis in West Memphis on the day the theft took place. Louella Minnis is a next door neighbor of Patsy Hill. Minnis testified that on the day in question he saw the appellant take the welfare check from Patsy Hill's mailbox and begin to run with it. The witness was able to identify the appellant in court as the person he saw commit the theft.

Appellant's own testimony is that he stopped the car and got out in the vicinity of the offense allegedly to see an "old man" who mysteriously disappeared and appellant did not see him. However, the jury may not have believed this explanation since his proximity to the residence from which the check was stolen accorded with the time at which the theft occurred. Coupled with this was the fact that Hilliard admittedly received money from Theresa Whittier shortly after the time the theft and negotiation took place. Other testimony from James Presley, the arresting officer, and Louelle Minnis, the next door neighbor of Patsy Hill, serves to show the involvement of the appellant in the expropriation of the check. Thus we find there was available a plethora of evidence apart from the testimony of Ms. Whittier upon which the jury could predicate a finding of guilt. *Pitts* v. *State,* 247 Ark. 434, 446 S.W. 2d 222 (1969), *King* v. *State,* 254 Ark. 509, 494 S.W. 2d 476 (1973).

Since no instruction was requested it was not error for the court to fail to give an instruction on the testimony of an accomplice pursuant to Ark. Stat. Ann. § 43-2116 (Repl. 1964) which prohibits a conviction based on the statement of an accomplice uncorroborated by other evidence which tends to connect the defendant with the offense.

In dealing with this point the court in *Morris* v. *State,* 197

Ark. 778, 126 S.W. 2d 93 (1939), said:

> Appellant did not request an instruction under this statute, but he contented himself with requesting an instructed verdict on the whole case. If appellant had desired an instruction under the statute it was his duty to have made such a request and as he failed to do so it is now too late to complain on the appeal of his case. *Slinkard* v. *State*, 193 Ark. 765, 103 S.W. 2d 50.

Appellant's concluding assignment of error is that inadequate representation was afforded him by his retained counsel in the trial. However, this issue was not raised in the trial court and we will not consider it here since the trial court has not had an opportunity to pass upon the appellant's contention.

No motion for new trial was filed and the trial court is in a better position to assess the quality of legal representation through a motion for a new trial or a motion for post conviction relief than we are on appellate review. Under either method the circuit court then has the opportunity to consider many facets of the cause that by necessity are denied us on appeal. An evidentiary hearing of this caliber would better equip us on review to examine in detail the sufficiency of the representation below. To this effect see *Preston* v. *State of Delaware*, 306 A. 2d 712 (1973), and *Cross* v. *U.S.*, 392 F. 2d 360 (8th Cir. 1968). If the accused did not have adequate opportunity to raise the question in the trial court before appeal, he can raise the question by motion for post conviction relief. *Leasure* v. *State*, 254 Ark. 961, 497 S.W. 2d 1 (1973), and *Franklin* v. *State*, 251 Ark. 223, 471 S.W. 2d 760 (1971).

Finding no reversible error, this cause is affirmed.

Joseph William MASSEY et al *v.* W. H. ENFIELD, Judge

CR 75-143 531 S.W. 2d 706

Opinion delivered January 19, 1976

Jim H. Boyd, for appellants.

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

GEORGE ROSE SMITH, Justice. The three petitioners were convicted in the circuit court upon charges involving the possession of marijuana. Joseph William Massey and his wife were each sentenced to a year in jail and a $250 fine. The third petitioner, James Ray McInish, was sentenced to three years' confinement in the penitentiary. Notice of appeal was filed by defense counsel.

Thereafter the three petitioners filed a declaration of indigency and a request that they be supplied with an appellate record at state expense. The declaration of indigency, which is sworn to, states that the petitioners have expended all their funds in their defense, that they are indigent, and that they are free on bond paid for by their parents, but their parents are unable and unwilling to provide further legal assistance. On August 13, 1975, the circuit court denied the request for a free record, finding that the defendants had been employed since January of 1975 and are not indigent. The petitioners then filed this application for a writ of mandamus to compel the circuit court to provide them with an appellate record at public expense.

The petition must be denied. Mandamus cannot be used to control a trial court's discretion. We can issue the writ to require a trial judge to hear a case, but we cannot tell him how to decide it. *Wirges* v. *Bean, Judge,* 238 Ark. 104, 378 S.W. 2d 641 (1964). Hence the writ does not lie when a question of fact is presented. *Mothershead* v. *Ponder, Chancellor,* 220 Ark. 816, 250 S.W. 2d 121 (1952).

Here the record presented such a question. At their trial both Massey and McInish testified that they were employed. Massey was also receiving $100 a month as child support. He further stated that he and his wife had paid their rent for six months in advance from proceeds derived from the sale of a house. On the other side, the petitioners' verified declaration of indigency merely states, as a conclusion, that they have spent their funds in their defense and are indigent. Such conclusory allegations might or might not be a sound basis for a charge of perjury if the State thought them to be false. In any event, however, the issue in the trial court was one of fact, not to be reviewed by mandamus.

Petition denied.

Theotis MAXWELL *v.* STATE of Arkansas

CR 75-36 531 S.W. 2d 468

Opinion delivered January 19, 1976

Robert E. Irwin, for appellant.

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

JOHN A. FOGLEMAN, Justice. This case was tried on a capital felony murder charge. It was alleged that appellant Theotis Maxwell and one Lee Otis Harris had beaten Ellis Robb, an elderly storekeeper to death during a robbery at his store. On appeal from a sentence to life imprisonment without parole, Maxwell originally asserted only two points, both having to do with procedures pertaining to the selection of the jury which found him guilty and fixed the sentence. We find that there was substantial compliance with the requirements of the governing statute, as against the objections made by appellant.

The jury wheel was quashed on motion of appellant and his co-defendant, who was tried separately. The circuit judge discharged the commissioners who had selected the names placed in that wheel and named four new commissioners,

who selected approximately 600 names for a new wheel, from which the panel of jurors for the trial of Maxwell was drawn. Appellant objected specifically to three persons whose names were included in both wheels. Appellant challenged two of these peremptorily, but the third was seated after appellant had exhausted all his peremptory challenges. Appellant did, however, object to the procedure, contending that, when the original jury wheel was quashed, the court was required to select a panel of jurors for the trial of the particular case. Ark. Stat. Ann. § 39-214 (Supp. 1973) provides, in pertinent part:

> If the trial judge sustains the challenge to the use of the names in the jury wheel or box for the drawing of trial jurors, he shall appoint a jury commission of not less than three persons, qualified and sworn as commissioners under the requirements of this Act [§§ 39-101 — 39-108, 39-201 — 39-220], to select a sufficient number of persons possessing the qualifications of jurors as set forth in this Act §§ 39-101 — 39-108, 39-201 — 39-220], and in such numbers as the Judge shall designate, which list of persons upon being summoned shall constitute the panel of jurors for the trial of the cause. If such panel is exhausted prior to the formation of the trial jury for any reason, the commission shall be reconvened and additional names placed on the list to be summoned as special jurors in such numbers as is deemed necessary to complete the jury for the trial of the cause.

The four newly appointed jury commissioners were instructed by the circuit judge to select 600 to 625 names for jury service. It does not appear that they were told that the list would be used for any particular trial or trials. Some of them knew that a previous jury panel had been quashed, but there was no evidence that they knew any of the names on that panel. The list prepared was sealed by the commissioners and delivered to the circuit court clerk. It was stipulated that these commissioners were not furnished a list of the names of the persons constituting the quashed jury wheel, but the names of all jurors on the panel which had been drawn from the quashed wheel, who had actually served as jurors, were included in the list of persons ineligible

because of previous jury service.

It is the clear intent of the section of the statute upon which appellant Maxwell relies to leave to the discretion of the trial judge the number of persons to be selected by newly appointed jury commissioners to constitute the panel for the trial of a case after the jury wheel has been quashed. The naming of the commissioners was in compliance with the statute. It was not an abuse of discretion for the trial judge to require a list of 600 or more names in a case in which the jury was to be qualified for the death penalty. The names called to be qualified as jurors in the case were apparently drawn at random from this list and the jury chosen from 148 names so drawn. Appellant has not shown how he was prejudiced by the procedure followed, and we cannot conceive of any prejudice that might have resulted.

It does not clearly appear whether the three jurors were on the original panel drawn from the jury wheel or whether they were merely included on the master list constituting the jury wheel. At least, the objection to the juror seated was stated as being based on the fact that her name was on the panel. The matter is of no consequence, however, because there is no prohibition against selection of any particular name which may have appeared in either the wheel or the panel, nor do we know of any reason why there should be. The persons disqualified are those who have served as jurors during the preceding two years. Ark. Stat. Ann. § 39-103 (Supp. 1973).

The record does not disclose the particular ground on which the jury wheel was quashed, but, as we understand the record, it was on a basis that invalidated the entire wheel, and not just the panel drawn from it. The appearance of only three names on either the new list of 600 or on the first group drawn from it certainly is not indicative of a subversion of the process such as that condemned in *Thomas* v. *State*, 238 Ark. 201, 379 S.W. 2d 26, where, before the enactment of the Jury Wheel Act [Ark. Stat. Ann. § 39-201, et. seq. (Supp. 1973)] a panel summoned by the sheriff consisted of 32 of the 38 members of the panel which had just been quashed.

Other objections made but not originally argued by appellant have given us some concern, but we find no reversible error.

An objection was made to a search warrant for the residence in which appellant Maxwell lived because the supporting affidavit stated only the conclusions of the officer making it, without giving his basis for believing them to be true when not all of them could have been within the personal knowledge of the affiant. If this affidavit had been the only record of the evidence before the municipal judge who issued the warrant, we would have no alternative to quashing the warrant and the evidence disclosed by the search. But this is not the case. The municipal judge properly examined the affiant under oath and the questions and answers were recorded and signed by the officer. The officer testified that a person named Harris who had been arrested for the crime, had informed the officer of the description and location of clothing he had worn during the commission of the crime and the description of the clothing worn by Maxwell. He also said that Harris had told him that he had seen Maxwell hide $400 and a quantity of change between the mattresses of Maxwell's bed and that the clothing Maxwell had worn during the commission of the crime was at Maxwell's home. The officer testified that Maxwell's home was the residence of his stepfather, Tolley McVey, Jr. This was the house for which the search warrant was issued and from which the incriminating evidence was seized.

Ark. Stat. Ann. § 43-205 (Supp. 1973) authorizing the issuance of search warrants is not so restrictive as to require that the finding of probable cause by the magistrate be based solely on a single affidavit originally presented. We have said that the act eliminates from consideration any oral testimony unless it is reduced to writing and accompanied by affidavit. *Cockrell* v. *State*, 256 Ark. 19, 505 S.W. 2d 204. In order to be an affidavit an instrument must be reduced to writing and sworn to or affirmed before some person legally authorized to administer oaths. *Thompson* v. *Self*, 197 Ark. 70, 122 S.W. 2d 182. The procedure followed here complies with the requirements of the statute. In *Thompson*, we quoted with approval a definition of an affidavit as "any voluntary ex parte

statement reduced to writing and sworn to or affirmed before some person authorized to administer an oath or affirmation."

Appellant argues that the reliability and credibility of the officer's informant was not sufficiently established to support a finding of probable cause for the search based upon statements made by him to the officer. We unhesitatingly find that the mere fact that Harris's statement was self-incriminating was an adequate basis for according reliability and credibility to the informant and a logical basis for the hearsay statements of the officer and his conclusions. *Flaherty & Whipple* v. *State*, 255 Ark. 187, 500 S.W. 2d 87. There was sufficient basis for the municipal judge's finding of probable cause.

Appellant seems to have asserted objections to the list of jurors from which the jury was drawn on the basis of discrimination against members of the black race and people of all races under the age of 22 years. We are not favored with the makeup of the jury or the list of 148 names from which it was drawn. There was evidence from some of the commissioners that some persons aged 18, 19, 20 and 21 years were included in the list of 600. There was also testimony that the names of a number of black persons were included, and that black persons under the age of 21 years were on the list. The commissioners were properly instructed and knew that persons of the age of 18 years and over were eligible to serve, and that people of all races, creeds and colors should be selected by them. At least one of the commissioners was a member of the black race, had acquaintances aged 18 to 21 years who were black, and submitted the names of at least ten such persons (along with a number of names of white persons in that age group) which were included on the list.

The evidence falls far short of the quantum of proof required for the prima facie showing of discrimination in the jury selection, which would place the burden of proof on the state to show the contrary.

An oral confession by appellant was introduced. A Denno hearing was held and the confession admitted as volun-

tary. At the hearing it was disclosed that:

> On the morning following the crime, he was arrested at his home without a warrant and informed that the arrest was for robbery and murder. The arrest was based upon collective information gathered by the investigating officers of the Conway County Sheriff's office and the Arkansas State Police. The confession was given by Maxwell a short time after he had signed a waiver of constitutional rights at 7:30 p.m. on the day of his arrest. Prior to the signing of the waiver, the Miranda rights had been explained to Maxwell in great detail by Sgt. Lester of the Arkansas State Police and he clearly appeared to understand. Police interrogation commenced immediately after the waiver was signed. Sgt. Lester took written notes of Maxwell's answers. Sgt. Baker and Lt. Evans of the Arkansas State Police were present. According to Sgt. Baker, a summary of Maxwell's statement, omitting irrelevant parts, was dictated in Baker's presence shortly after the interview was concluded by Sgt. Lester from the notes Lester had prepared during the interview. The summary was thereafter transcribed and typed in state police headquarters.

Baker, Lester and Evans all testified during the Denno hearing. Although Maxwell later took the witness stand during the trial and controverted, not only the confession, but the testimony about its voluntariness, the testimony of the officers was not controverted at the Denno hearing in any way. Perhaps appellant's attorney felt that there would be a tactical advantage in submitting the question to the jury without the prosecuting attorney having previously heard Maxwell's version at the Denno hearing. At any rate, we can find no evidence at this hearing to contradict the undisputed evidence that the statements were made to the officers voluntarily and that Maxwell knowingly and intelligently waived his constitutional right to the assistance of counsel and his privilege against self-incrimination. We certainly cannot say that the trial court's finding that the presumption of involuntariness had been overcome was clearly against the preponderance of the evidence.

There are several written motions by appellant in the record. One of them requested that the court assign three unbiased investigators to assist in the defense but to be paid by the state. This seems to have resulted in a pretrial enhancement of the fees allowed to appellant's appointed counsel, but no other action was indicated. Another motion asked that a private psychologist be provided to test Maxwell's mental capacity. We have heretofore sustained the denial of such requests. *Hale* v. *State*, 246 Ark. 989, 440 S.W. 2d 550; *Grissom* v. *State*, 254 Ark. 81, 491 S.W. 2d 595; Cf. *Alexander* v. *State*, 257 Ark. 343, 516 S.W. 2d 368. For the same reasons, we sustain this one. We add that a defense of insanity was not asserted and that a complete mental observation had been made by the staff of the Arkansas State Hospital.

Obviously, appellant's objection to the sustaining of the state's challenges for cause to jurors who would not consider the death penalty was rendered moot by the jury verdict.

The court denied a motion for mistrial based upon the fact that the victim's daughter, who discovered his body and evidence of the robbery, disclosed that she and an employee of one of the jurors had arrived at the scene simultaneously and that he had remained at the store while she went home to better clothe herself and report the matter to her husband and until an ambulance and the officers arrived. It was established on cross-examination that she saw no one other than this employee near the scene before the officers arrived. The name of this person had not been furnished to appellant on the list of state's witnesses requested by him. We find no abuse of discretion for the reason that, when the motion was not made until after appellant's attorney had cross-examined the witness about the matter, the prosecuting attorney explained that the name had not been furnished because the state did not intend to call the employee due to the fact his testimony would have been cumulative only and for the further reason that the court permitted appellant's attorney to question the juror extensively about the possible prejudice. During this examination in chambers, it was actually disclosed that both the person named in the testimony and the juror were among approximately 50 employees of the same corporation, and that both worked directly under the supervi-

sion of the juror's father. The juror stated that the employee had never discussed the matter with him, and that he had not known that this employee was a witness or had anything to do with the matter. In response to the judge's questioning, he stated that he would not give this person's testimony any more credence than that of any other witness if he should be called as a witness by either side.

There were numerous objections to the introduction of evidence to which we have given our attention, but we find no reversible error in any of them and no purpose in discussion of most of them. Appellant objected to the introduction of a billfold found in the attic of his grandfather's home in the execution of the search on the ground that it was not listed on the return as an item seized. Yet Sgt. Baker, who made the search, positively identified it as an item found in the search and in which he said he found $392 in currency. The contents of the billfold were listed on the return. This omission went only to the credibility of the witness and the weight to be given his testimony and not to admissibility of the evidence, and admission of the evidence was not violative of due process, since the making of the return is only a ministerial act. *People* v. *Schmidt*, 172 Colo. 285, 473 P. 2d 698 (1970); *Williams* v. *State*, 95 Okla. Cr. 131, 240 P. 2d 1132, 31 ALR 2d 851 (1952); *United States* v. *Greene*, 141 F.S. 856 (1956); *Evans* v. *United States*, 242 F. 2d 534, cert. den. 353 U.S. 976, 77 S. Ct. 1059, 1 L. Ed. 2d 1137 (1957).

We have reviewed other objections made by appellant during the course of the trial, as we do in cases where life imprisonment is imposed. We do not find any prejudicial error and see no purpose in discussing each such objection at length.

Since we find no prejudicial error the judgment is affirmed.

David Lynn GAMMEL and Eddie SPANN *v.*
STATE of Arkansas

CR 75-92 531 S.W. 2d 474

Opinion delivered January 19, 1976

Patrick D. O'Rourke, for appellants.

Jim Guy Tucker, Atty. Gen., by: *Michael G. Epley,* Asst. Atty. Gen., for appellee.

JOHN A. FOGLEMAN, Justice. Appellants Gammel and

Spann were found guilty of robbery with a firearm and sentenced to imprisonment for 25 years - 15 for robbery and 10 for the use of a firearm. We find no reversible error on the five points for reversal listed by appellants and affirm. We will discuss these points in the order they are argued by appellants.

THE TRIAL COURT ERRED BY NOT CHALLENGING FOR CAUSE A JUROR WHO EXHIBITED ACTUAL BIAS DURING VOIR DIRE, THEREBY EFFECTIVELY DENYING THE DEFENDANTS THEIR RIGHT TO A FAIR AND IMPARTIAL JURY.

Appellants challenged prospective juror Faris peremptorily when the court refused their challenge for cause, and contend that they were prejudiced because they had exhausted their peremptory challenges when the last juror was accepted, because they would have otherwise peremptorily challenged him. This juror was acquainted with one of the state's witnesses, Capt. Jim Bell of the West Memphis Police Department. When asked whether his relationship with the officer was such that he would tend to give more credence to what the officer said, Faris responded that he had known Bell to be an honest man and would tend to believe him. The circuit judge then stated that he would give an instruction on credibility of witnesses and the applicable rule on credibility and asked Faris if he would abide by that instruction and apply it to the facts. When Faris answered in the affirmative, the judge refused to allow the challenge for cause.

Either actual or implied bias is a ground for disqualification of a prospective juror. Ark. Stat. Ann. §§ 43-1919, 1920 (Repl. 1964). The determination of the existence of actual bias is a matter lying within the sound judicial discretion of the trial judge. We will not reverse the trial court's action on challenges for actual bias in the absence of an abuse of discretion. *Henslee* v. *State,* 251 Ark. 125, 471 S.W. 2d 352; *Lewis* v. *State,* 220 Ark. 914, 251 S.W. 2d 490; *Scifres* v. *State,* 228 Ark. 486, 308 S.W. 2d 815. The challenge here does not come within the scope of permissible challenges for implied bias. See Ark. Stat. Ann. § 43-1920.

In view of the statement by Faris that he would abide by and apply the court's instruction on the credibility of witnesses, we cannot say that there was an abuse of discretion in this instance.

THERE WAS INSUFFICIENT EVIDENCE TO SUPPORT THE VERDICT THAT APPELLANT GAMMEL USED A FIREARM IN THE COMMISSION OF THE ROBBERY.

Appellant Gammel points out that there was no evidence that he used a firearm in the robbery and that Danny Allen Jenkins, the manager of the Nic-Nac Grocery who was robbed, testified that Gammel did not at any time exhibit a firearm. Appellants state in their brief that there was no real evidence that a firearm was used by anyone during the robbery, but we disagree. As a matter of fact, Gammel stated in his motion for new trial that "all the proof showed that only his codefendant used a weapon and that there was no proof that [Gammel] knew or acquiesced in the use of a firearm." This concession that there was evidence to show that Spann used a firearm was fully warranted. Spann does not actually contend on this appeal that there was no evidence that he used a firearm. No useful purpose would be served by reviewing the testimony on this score.

The gist of Gammel's argument is that the enhancement of his 15 years' sentence by 10 years is invalid because there is not sufficient evidence that he used any firearm himself. This argument overlooks the impact of our law making an accessory who stands by, aids and assists in the commission of a felony a principal in the crime and punishable as such. See Ark. Stat. Ann. §§ 41-118, 119 (Repl. 1964).

Apparently we have not been called upon to decide this precise question where Ark. Stat. Ann. § 43-2336 (Supp. 1973) has been brought into play. There is some split of authority on the question. The New York rule is that one must personally use the firearm before he can be convicted of its use. *People* v. *Paradiso*, 248 N.Y. 123, 161 N.E. 443 (1928). We believe the California rule that an accomplice is just as guilty as his confederate who uses the firearm and is subject

to the same punishment is based upon sounder reason and logic[1] *People* v. *Stevens,* 32 Cal. App. 2d 666, 90 P. 2d 595 (1939). This is particularly so when appropriate consideration is given to a statute making an accessory who stands by, aids and assists in the crime *punishable* as a principal, as was the case in the state of Washington. *State* v. *Willis,* 5 Wash. App. 441, 487 P. 2d 648 (1971). Although the California court reached the same result without reliance on statutory language such as that in the Arkansas and Washington statutes, we unhesitatingly embrace the reason and result of the opinion of the Washington court in *Willis.*

THE STATE FAILED TO SHOW BY A PREPONDERANCE OF THE EVIDENCE THAT AN IN-CUSTODY CONFESSION WAS VOLUNTARILY GIVEN THEREFORE ADMISSION OF TESTIMONY OF SUCH INVOLUNTARY CONFESSION WAS REVERSIBLE ERROR.

As a part of its evidence-in-chief, the state offered the testimony of James Newton Skaggs, Jr., a 17-year-old misdemeanant, who was serving a 30-day sentence in the West Memphis jail when Gammel was incarcerated. He testified that Gammel had told him of being arrested for armed robbery, saying that he (Gammel) couldn't be identified because he had been wearing sun glasses and a hat and the lower part of his face was covered, but that he had gone in the store first and come back out and thereafter he and his friend had gone back to the store and robbed the place.

Appellant Gammel argues that this confession was obtained by the police by trickery and deceit, contending that Skaggs was placed in the cell where Gammel was incarcerated for the express purpose of eliciting a confession and that the statements attributed to Gammel were made without the warnings as to his constitutional rights required

[1]The California court pointed out that, if a murder occurred during a robbery, the unarmed bandit could not be absolved, but as an aider of the actual murderer would be equally guilty and equally liable to imposition of the extreme penalty. This is also the law in Arkansas. *Dorsey* v. *State,* 219 Ark. 101, 240 S.W. 2d 30, cert. den. 342 U.S. 851, 72 S. Ct. 80, 96 L. Ed. 642.

by *Miranda* v. *Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694, 10 ALR 3d 974 (1966) and its progeny. In advancing this argument Gammel relies solely on circumstances disclosed by Skaggs, the only witness on the subject, and argues that the only reasonable inference to be drawn from these circumstances is that the alleged confession was involuntary because of the trickery and deceit involved. We do not agree.

Gammel moved in limine to suppress the statements. Skaggs testified in camera, substantially as follows:

> He had served 10 or 11 days of his sentence at the time he was placed in the same two-man cell with Gammel, about 12 M on May 9, 1974. About an hour thereafter, when the two were alone in the cell, he started asking Gammel why Gammel was in jail and Gammel started in talking about it and made the incriminating statements; Skaggs had no conversation with any of the police officers before he was put in the cell; he asked Gammel "what he was in for" because that is a usual discussion when someone is brought into the jail; none of the police officers suggested that he talk to Gammel or ask Gammel what he had done; and none of them promised anything for his obtaining a statement from Gammel. Skaggs was not a trusty when he was placed in the cell with Gammel, but was made one that afternoon and allowed to go home the next morning; Skaggs had previously been kept in the "bull pen;" he never slept in the cell with Gammel, but was removed from it and returned to the "bull pen" on the same afternoon he had been placed there; he did not try to make a deal with the police in return for the information he gave them, but decided to tell them because Gammel had suggested to Skaggs that, whenever Skaggs became a trusty, he bring Gammel a hacksaw blade; Skaggs had previously been convicted of petit larceny, disorderly conduct, and possession of alcohol as a minor.

We make an independent determination of voluntariness of a confession based upon the totality of the circumstances, but do not overturn the finding of the trial court on the subject, unless it is clearly against the preponderance of the

evidence. *Degler* v. *State*, 257 Ark. 388, 517 S.W. 2d 515. When we consider that none of the testimony of Skaggs is contradicted in any way by anyone and that his testimony cannot be said to be inherently improbable or demonstrably incredible, we cannot say that the finding that Gammel's statements were not voluntary was clearly against the preponderance of the evidence. Gammel's argument that the very fact that Skaggs was made a trusty on the next day and released before the following nightfall can lead to no conclusion except that Skaggs was an agent of the police department placed in the cell to obtain a confession is fallacious. It is at least as likely that Skaggs was brought as he said, to report the conversation when he reflected upon the request that he bring hacksaw blades to Gammel and the potential consequences to him if indeed Gammel subsequently obtained hacksaw blades from some source. Gammel did not avail himself of the opportunity to testify in camera and deny the making of this proposal or to explain how it came to be made, but freely suggests here that Skaggs could not have testified as he did if he did not know that he was about to be made a trusty. It is certainly logical to assume that the officers were pleased to have all the information they received from Skaggs and that they would favor him if possible to do so, perhaps more readily if Skaggs voluntarily gave the information. We cannot help noting that there was evidence of Gammel's participation in the crime, other than the confession, upon which a finding of guilt might have been based. It is likely that the police officers in charge of the investigation were well aware of this before Skaggs was placed in the cell.

We do not agree with Gammel's contention that the state could not meet its burden of overcoming the presumption that the "in-custody" confession was involuntary without calling the jail or police officers to explain why Skaggs, a misdemeanant, was put in the cell with a suspected felon and why Skaggs was released on the following day with one half his sentence unserved or explaining its failure to do so. In advancing this argument, Gammel relies upon *Smith* v. *State*, 256 Ark. 67, 505 S.W. 2d 504, but we do not find the situation comparable to that in *Smith*. We have held "that whenever the accused offers testimony that his confession was induced by violence, threats, coercion, or offering of reward,

the burden is upon the state to produce all material witnesses who were connected with the controverted confession or give adequate explanation for the absence." *Smith* v. *State,* 254 Ark. 538, 494 S.W. 2d 489. But in *Smith* (254 Ark.) it was clearly established that the holding was based upon the necessity that evidence be introduced to refute testimony of the accused or of witnesses that there had been official inducements by way of coercion, physical abuse, fear, threats, promises of reward, leniency or assistance in order to discharge its burden, because otherwise the evidence supporting the involuntariness of a controverted confession stands uncontradicted. See also, *Russey* v. *State,* 257 Ark. 570, 519 S.W. 2d 751.

We have not extended the holding of *Smith* (254 Ark.) beyond its specific language. We see no reason to do so. Here, there was no testimony to refute, so the rule of the *Smith* cases is inapplicable.

THE COURT ERRED BY NOT ORDERING A MISTRIAL AFTER IT ALLOWED A WITNESS FOR THE STATE TO TESTIFY WHAT ONE DEFENDANT SAID ABOUT ANOTHER DEFENDANT, AFTER THE COURT SPECIFICALLY INSTRUCTED THE WITNESS THAT TO SO TESTIFY WOULD BE GROUNDS FOR A MISTRIAL.

After ruling in camera that the statements of Gammel to Skaggs were volunteered and, in part, of a spontaneous nature, the circuit judge added that Skaggs would be permitted to testify only as to his conversation with Gammel but not with regard to any codefendant or other parties. The judge then instructed the witness that he could not testify about anything Gammel had to say about the codefendant or any other party and not about anything Gammel may have said about a negro male helping Gammel, or any statement he may have made about some other party helping. The judge warned Skaggs that any such testimony would be ground for a mistrial. When the witness was asked, while testifying before the jury, what Gammel had told him, Skaggs answered, "He told me that he robbed the Nic-Nac, him and some other guy—." Before the answer was completed,

Spann's attorney interjected an objection which was overruled. The witness then stated that Gammel said that he (Gammel) "went in first and he came back out and they both went in and they robbed the place." Spann's attorney again objected and his motion for a mistrial was denied.

We find no error. Skaggs did not identify Spann in any way or even mention that Gammel had described the "other guy" as a negro male. This did not constitute the kind of cross-implicating confession condemned by *Bruton* v. *United States*, 391 U.S. 123, 88 S. Ct. 1620, 20 L. Ed. 2d 476. We have said that deletion of offending portions of a defendant's statement referring to a codefendant would meet the *Bruton* test, if it could be done without prejudice to the codefendant. *Byrd* v. *State*, 251 Ark. 149, 471 S.W. 2d 350; *Mosby* v. *State*, 246 Ark. 963, 440 S.W. 2d 230. Deletion of references to the codefendant is sufficient. *Miller* v. *State*, 250 Ark. 199, 464 S.W. 2d 594. See also, *Bailey* v. *U.S.*, 410 F. 2d 1209 (10 Cir., 1969), cert. den. 396 U.S. 933, 90 S. Ct. 276, 24 L. Ed. 2d 232. We find sufficient compliance with the *Bruton* rule.

Since Spann did not request that the trial judge admonish the jury relative to the testimony about "some other guy", he is in no position to argue his complaint on appeal based on the judge's failure to do so. Such an instruction would likely have tended to emphasize an otherwise innocuous statement. But more importantly, we find no reversible error because Gammel did testify and did deny making the statement and Spann was thereby afforded the opportunity for cross-examination. This takes the case outside the ambit of *Bruton*. *Nelson* v. *O'Neil*, 402 U.S. 622, 91 S. Ct. 1723, 29 L. Ed. 2d 222 (1971); *Jackson* v. *State*, 253 Ark. 1116, 491 S.W. 2d 581.

THE TRIAL COURT ERRED DENYING DEFENDANTS MOTIONS FOR A MISTRIAL, AFTER THE COURT ALLOWED THE PROSECUTING ATTORNEY TO ASK QUESTIONS OF DEFENSE WITNESS, THE SOLE PURPOSE OF THESE QUESTIONS BEING TO SHOW TO THE JURY THAT DEFENDANTS HAD CRIMINAL RECORDS OR WERE SOMEHOW

INVOLVED IN CRIMINAL ACTIVITY.

Delores Johnson was called by Spann in support of his alibi defense. On direct examination she had testified that Spann had arrived at her house at 9:00 P.M. on May 8, 1974, and spent the entire night there, except for an absence of about 20 minutes' duration after midnight. The robbery occurred about 11:00 P.M. on May 8, 1974. Her credibility and the weight to be given her testimony were important to the ultimate result of his trial. On cross-examination, the prosecuting attorney attempted to cast doubt upon the plausibility of her testimony. In the course of this examination, he asked the witness where Spann lived. Before she answered, appellants' attorneys sought to have her answer limited to the street address and specifically asked that no reference to its being a "Half-Way House," "Transition House" or "that type of place" be permitted. The circuit judge ruled that the witness would not be permitted to testify about prior convictions, charges or court appearances, but would be permitted to state where Spann lived. After she answered that he lived "on Peabody" at an address unknown to her, the prosecuting attorney asked her what type of place it was. Before the question was answered, appellants objected and moved for a mistrial. The objection was sustained, but the motion was denied. The prosecuting attorney then asked whether Spann was required to check in and be present at this place every night. The court sustained an objection, but denied a motion for mistrial. The motion for mistrial was renewed and denied in chambers.

Although the correctness of the trial court's ruling on the objections is not before us, appellants do assert that the questions were intended to appeal to the jury's prejudice against the accused, and argue that the prosecuting attorney was attempting by "sleazy tactics" to "sneak in a cheap shot at defendants" in an effort to prejudice the jury against them by introducing evidence of past crimes, and thus compelled appellants to testify. These charges are wholly unwarranted, and the record is so devoid of support for them that the propriety of stating them is questionable, to say the least.

Declaring a mistrial is an extreme remedy which should

be granted only where there has been an error so prejudicial that justice could not be served by continuation of the trial. *Hill* v. *State*, 255 Ark. 720, 502 S.W. 2d 649. It should not be granted when any possible prejudice could be removed by an admonition to the jury. *Russey* v. *State*, 257 Ark. 570, 519 S.W. 2d 751. It was certainly not called for in this case. Appellants did not seek an admonition to the jury to disregard the questions or any of their implications. The witness never testified on the subject and the prosecuting attorney's questions were not so suggestive that the place where Spann was living was a residence for persons convicted of crimes as to require the drastic remedy appellants sought.

As a matter of fact, Spann later testified that one did not have to be a convicted felon to live at the place he lived on Peabody Avenue in Memphis and that there were people living there who were not convicted felons. Gammel testified that it was a place where people stay until they get "their financial situation straight and back on their feet." He denied, on cross-examination, that he was living there and awaiting discharge back into society on parole because of a conviction on January 24, 1974. Furthermore, Bob Walsh, Executive Director of Transitional, Inc. at 1242 Peabody, the address at which both Spann and Gammel lived on May 8, 1974, was called as a witness by the state and testified that his records showed that Spann did return to the place at 12:45 A.M. on May 9. The testimony of Spann and Gammel about their residence at the place and its character was not contradicted on either direct or cross-examination of Walsh.

Since we find no reversible error, the judgment is affirmed.

STATE of Arkansas *v.* William KNIGHT

CR 75-125 533 S.W. 2d 488

Opinion delivered January 19, 1976
[Rehearing denied March 29, 1976.]

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

Rubens & Rubens, by: *Kent J. Rubens*, for appellee.

J. FRED JONES, Justice. This is an appeal by the State of Arkansas from an order in a circuit court judgment granting the appellee-defendant's motion for discharge and dismissal of felony charges against him, because he had been denied a speedy trial.

On July 5, 1974, the appellee William Knight was charged on information filed by the prosecuting attorney in Crittenden County with the crime of first degree murder. He was arraigned on September 4, 1974, at which time he entered a plea of not guilty. Knight was unable to make bond so he remained in jail while awaiting trial. For various reasons not germane to the issues here, and really not fully disclosed by the record, Knight's case did not come to trial until February 24, 1975.

When appellee Knight's case came to trial on February 24, 1975, he filed a motion to dismiss in compliance with Ark. Stat. Ann. § 43-1708 (Repl. 1964) because he was not given a speedy trial. Knight's case proceeded to jury trial on February 24, 1975. He was found guilty of murder in the second degree, and the jury imposed a sentence of 15 years in the Arkansas Department of Correction. On February 26, 1975, Knight filed a motion to postpone sentencing under the jury verdict until his motion to dismiss for want of a speedy trial could be heard and passed on by the trial court. Sentencing was postponed pursuant to Knight's motion and on May 15, 1975, a hearing was held on the motion to dismiss. On June 9, 1975, the trial court entered the judgment order appealed from as follows:

> "Now on this the 24th day of February, 1975, this cause comes on to be heard. The Plaintiff appears by David Burnett, Prosecuting Attorney within and for the Second Judicial District of Arkansas, and Joe Rogers, Deputy Prosecuting Attorney for Crittenden County, Arkansas. The Defendant appears in person and with his attorney, Kent J. Rubens. The Defendant, having previously waived a formal arraignment and enter[ed] his plea of NOT GUILTY to the charge of murder in the first degree, announced ready for trial subject to the Court's ruling on Defendant's Motion for Dismissal. A

jury of twelve (12) from the regular panel of petit jurors was impaneled and sworn to try the cause, and, having heard the evidence, the instructions of the Court, and argument of counsel, retired to consider its verdict of guilty of the lesser included crime of murder in the second degree and fixed his punishment for a term of fifteen (15) years in the State Penitentiary.

The Court informed the Defendant of the nature of the charge, his plea thereon and the verdict of the jury thereon, and asked if Defendant had any legal cause to show why judgment should not be pronounced against him, and the Defendant again argued that the Court consider his Motion for Dismissal for Failure to Grant Him a Speedy Trial.

Sentencing was postponed, and a hearing was held to determine the merit of Defendant's Motion, said hearing was held on May 15, 1975, with the Defendant appearing in person and by and through his attorney, Kent J. Rubens, and the State appearing by and through its attorney, David Burnett, Prosecuting Attorney within and for the Second Judicial District of Arkansas, together with Joe Rogers and James C. Hale, Jr., Deputy Prosecuting Attorneys for Crittenden County, Arkansas. The Court heard the evidence of the parties together with their witnesses, the arguments of counsel and the Brief submitted by Defendant.

On Monday, June 9, 1975, the Court by letter advised Defendant's attorney that the Motion should be granted and that the charge against the Defendant should be dismissed with prejudice and the verdict of the jury set aside.

IT IS, THEREFORE, BY THE COURT CONSIDERED AND ORDERED that the verdict of the jury should be and the same is now hereby set aside; that the Defendant, William Lee Knight, be discharged from the custody of the Sheriff of Crittenden County, Arkansas, and the charge of murder in the first degree filed against him dismissed with prejudice and costs

shall be taxed to the State.

ENTERED this 30th day of June, 1975."

On its appeal to this court the state contends that the ruling of the trial court was clearly erroneous both legally and factually. The appellee contends, however, that the appeal should be dismissed for failure of the state to comply with statutory requirements pertaining to appeals by the state. We shall first consider the appellee's contentions.

Ark. Stat. Ann. § 43-2720 (Repl. 1964) provides for appeal by the state and appears as follows:

> "Where an appeal on behalf of the State is desired, the prosecuting attorney shall pray the appeal during the term at which the decision is rendered, whereupon the clerk shall immediately make a transcript of the record and transmit the same to the attorney general, or deliver the transcript to the prosecuting attorney, to be transmitted by him. If the attorney general, on inspecting the record, is satisfied that error has been committed to the prejudice of the State, and upon which it is important to the correct and uniform administration of the criminal law that the Supreme Court should decide, he may by lodging the transcript in the clerk's office of the Supreme Court within sixty [60] days after the decision, take the appeal."

The appellee argues that strict compliance with the terms of the statute is jurisdictional and that under its terms the attorney "must endorse on the transcript a direction to the clerk of the Supreme Court to file same," citing *State* v. *Cox*, 29 Ark. 115. We find no language in the statute requiring the attorney general to endorse on the transcript any direction to the clerk of this court. Neither do we find such requirement in *State* v. *Cox*, *supra*. The *Cox* case presented a unique situation. In that case this court found from the exceptions taken by the prosecuting attorney that the trial court had excluded all evidence that seemed to have been offered by the state and, consequently, the defendant was found not guilty. This court in *Cox* then said:

> "How, the case got into this court does not appear. There is no record entry in the transcript before us, showing that an appeal was prayed by the state, in the circuit court, nor does the file mark of the clerk of this court show who filed the transcript in his office. It appears simply to have been filed, and the cause docketed and submitted.

This court in *Cox* then recited the statutory requirement, that where an appeal on behalf of the state is desired, the prosecuting attorney shall pray the appeal during the term at which the decision is rendered; whereupon, the clerk shall make a transcript of the record and transmit it to the attorney general or give it to the prosecuting attorney to be by him transmitted to the attorney general. This court then recited that portion of the statute providing that if the attorney general upon inspection of the record is satisfied that error had been committed to the prejudice of the state, etc., "he may, by lodging the transcript in the clerk's office of the Supreme Court within sixty days [60] days after the decision, take the appeal."

The prosecuting attorney in the case at bar did file notice of appeal on July 7, 1975, and designated for inclusion in the record on appeal "the complete record and all proceedings and evidence in the action." The transcript was filed with the clerk of this court on August 4, 1975. There is nothing in the record to indicate that the transcript was filed by anyone other than the attorney general and we deem it unnecessary for the record to show whether it was submitted to the attorney general by the clerk of the trial court or by the prosecuting attorney.

This court takes judicial notice of motions filed with its clerk and this court's actions pertaining thereto. Both the appellee-defendant and the state requested and were granted extensions of time for filing briefs. On September 10, 1975, the state,"by and through Jim Guy Tucker, Attorney General," filed a motion for extension of time to file appellant's brief and the motion was granted by this court. On November 26, 1975, the attorney general filed an additional motion for extension of time in which to file

appellant's reply brief and we granted that motion also. Furthermore, the docket sheet in the clerk's office of this court recites "Attorney General — State of Arkansas — Filed August 4, 1975." We conclude that the state of Arkansas sufficiently complied with the statutory requirements in perfecting the state's appeal to this court, and that this court has jurisdiction in connection therewith.

The appellee also contends and argues that the state failed to transmit the complete record on appeal in compliance with the prosecuting attorney's notice of appeal where he stated: "The plaintiff designated for inclusion in the record on the Appeal, the complete record and all proceedings and evidence in this action." Apparently the appellee is contending that the state should have filed the entire record of the *trial* which resulted in the appellee's conviction of murder in the second degree. We do not agree with the appellee in this contention. There is no appeal before this court pertaining to the appellee's conviction. The matter before us on this appeal pertains to the appellee's discharge and not to his conviction. We conclude that the record before us is entirely adequate and sufficient for our determination of the question here involved.

The appellee also argues that "the record discloses that no exceptions were made to the ruling of the court nor was a motion for new trial made." He argues that both of these procedural steps were necessary in order for this court to review the matter. A new trial is defined by statute, Ark. Stat. Ann. § 43-2201 Repl. 1964), as "the re-examination of an issue of fact in the same court by another jury after a verdict has been given." The purpose of a motion for a new trial is to call the alleged errors occurring during the trial to the attention of the court, and to afford an opportunity for correction by granting a new trial if the errors may not otherwise be corrected. *Nordin* v. *State,* 143 Ark. 364, 220 S.W. 473 (1920); *State* v. *Wilhite*, 211 Ark. 1065, 204 S.W. 2d 562 (1947). In the case at bar there is no allegation or contention that error occurred in the *trial* of the appellee. The contention is that error occurred in granting the appellee's motion for discharge, thereby voiding the trial and the jury verdict.

The appellee erroneously concludes that no part of Act 333 of 1971 is available to the state on this appeal. It is true that § 43-2720, *supra*, provides the only manner by which the state may perfect an appeal to this court, and it is also true that Act 333 of 1971, Ark. Stat. Ann. § 43-2720.1 (Supp. 1973), provides that the *manner* in which the state or other prosecuting party may appeal in a criminal case is not altered thereby. Act 333, Ark. Stat. Ann. § 43-2725.1 (Supp. 1973), provides that exceptions and motions for new trial are no longer necessary to preserve an error for review on appeal and we are of the opinion that this section applies to the state the same as to individuals, and that this section does not conflict with or change the *manner* by which the state may appeal as set forth in § 43-2720, *supra*.

Furthermore, the error complained of by the state in the case at bar appears on the face of the record before us. The terms of the trial courts are fixed by statute and the record is clear as to when the appellee was informed against and when he was brought to trial. The record is also clear that he remained in jail between those dates.

Turning now to the appellant's contentions, the only question before us is whether the trial court erred in granting the appellee's motion for discharge on the ground that he had not been given a speedy trial under the provisions of Ark. Stat. Ann. § 43-1708 (Repl. 1964), which reads as follows:

> "If any person indicted for any offense, and committed to prison, shall not be brought to trial before the end of the second term of the court having jurisdiction of the offense, which shall be held after the finding of such indictment, he shall be discharged so far as relates to the offense for which he was committed, unless the delay shall happen on the application of the prisoner."

Thus, it is seen that § 43-1708 pertains to an accused who is incarcerated in jail. The next section of the statute, § 43-1709, pertains to an accused who is free on bond, and provides for discharge if not brought to trial by the end of the *third* term of the court having jurisdiction of the offense, which shall be held after the finding of such indictment. Then the

following section, § 43-1710, provides as follows:

> "Nothing in the two preceding sections shall be so construed, as to discharge any person who may have been indicted for any criminal offense, on account of the failure of the judge to hold any term of the court, or for the want of time to try such person at any term of the court."

It is conceded that the appellee-defendant remained in the Crittenden County jail during the entire time his case was pending. Consequently, his motion for discharge was governed by § 43-1708, *supra*, so the precise question before us on this appeal is whether the appellee was brought to trial before the end of the second term of the court having jurisdiction of the offense, which was held after the filing of the information charging him with the crime of murder. It would appear that any additional question that might have arisen under § 43-1710, *supra*, was rendered more or less inapplicable to this case because the trial court's act in granting the motion to discharge would indicate that the delay in bringing the appellee to trial was not "on account of the failure of the judge to hold any term of court, or for the want of time to try such person at any term of court." The statutory terms of the three divisions of the Crittenden County Circuit Court are set out in Ark. Stat. Ann. § 22-310 (Supp. 1973) as follows:

> "Terms, 1st division (criminal), on the 3rd Monday in February and the 3rd Monday in September; 2nd division (civil), on the 4th Monday in January and the 3rd Monday in November; 3rd division (civil), on the 2nd Monday in May and the 4th Monday in June."

The appellee Knight was informed against on July 5, 1974, which was within the February, 1974, term of the first division and within the January, 1974, term of the second division and within the June, 1974, term of the third division. He was brought to trial on February 24, 1975, which was during the February, 1975, term of the first division (the third Monday falling on February 17). He was brought to trial during the January, 1975, term of the second division and during the June, 1974, term of the third division. The 1974

February term of the first division in which the information was filed ended on the third Monday in September, 1974, which date constituted the end of the term of the first division in which the information was filed, and constituted the beginning of the September, 1974, term which was the first term of the first division *after* the information was filed. This September, 1974, term expired on the third Monday in February, 1975, when the second term *after the information was filed* commenced. Consequently, the appellee was put to trial well within the second term of the first division court after the information was filed against him. The 1974 January term of the second division, and the one in which the information was filed, terminated on the third Monday in November, 1974, when the first term of that division *after the information was filed* commenced. This November, 1974, term continued until the fourth Monday in January, 1975, when the second term *after the information was filed* commenced. Consequently, the appellee was brought to trial well within the second term of that division after the information was filed. The information was filed on July 5, 1974, which was within the June, 1974, term of the third division. This term extended to the second Monday in May, 1975, when the first term after the information was filed commenced. Consequently, the appellee was brought to trial during the same term of the third division in which the information was filed against him. It is obvious, therefore, that two full terms of any one of the three divisions had not expired between the time the information was filed and the appellee was brought to trial.

Apparently the trial court was confused by our holdings in *Breedlove* v. *State*, 225 Ark. 170, 280 S.W. 2d 224, as related to *Stewart* v. *State*, 13 Ark. 720, cited in *Breedlove* as the leading case on the subject. It further appears that our decision in *Gardner* v. *State*, 252 Ark. 828, 481 S.W. 2d 342, having to do with the application of the statutes to multi-division circuit courts, may have added to the confusion. We shall now attempt to clarify our views and reconcile any apparent conflict in those decisions. The statutes on the subject have remained, for all practical purposes, the same since *Stewart* v. *State*, *supra*, was decided in 1853. The opinion in *Stewart* contains a thorough discussion of many facets of that case not here involved, but Stewart remained in jail until brought to

trial and he sought discharge under § 179 of the statute (now Ark. Stat. Ann. § 43-1708 [Repl. 1964]), and in connection with the right of the accused under that statute this court said:

> "[I]n our opinion, from the phraseology of section 179 [now Ark. Stat. Ann. § 43-1708], the unavoidable construction of it is, that, in order to entitle the accused to be discharged for such cause; there must be, on the part of the State, a failure of three terms to bring him to trial, that is to say, at the end of the second term which shall be held after the finding of the indictment."

Now, in *Breedlove* v. *State, supra,* Breedlove, the accused, was free on bond during the pendency of his case and he appealed from an order overruling his motion to dismiss the charges against him because he had not been brought to trial within *three terms after the filing of the information.* After reciting the provisions of § 43-1709, *supra,* as applicable to the case, this court in *Breedlove* v. *State* stated as follows:

> "The leading case on the subject is *Stewart* v. *State,* 13 Ark. 720. There it was held that the term at which the defendant is indicted is to be counted as one of the three terms mentioned in the statute. In other words, the statute is applicable where the defendant is not brought to trial at the end of the second term held after the term during which the indictment was filed."

After the above reference to our holding in *Stewart* v. *State, supra,* this court in *Breedlove* then recited that the continuances in *Breedlove* resulting in the delay complained of, were brought about by Breedlove's own motions or acquiescence. The apparently inconsistant, and perhaps confusing, language employed in *Breedlove* apparently arises from the fact that in the *Stewart* case, Stewart was in jail while awaiting trial and Breedlove was free on bond. Stewart's rights to discharge arose under § 43-1708 and the statute would have become operative as to him at the end of two full terms following the term in which he was indicted. It *was necessary* under *Stewart* and under § 43-1708 for three terms to expire before he would have been entitled to discharge under the

statute but, "that is to say, at the end of the second term which shall be held after the finding of the indictment." In other words, the first of the three terms, the one in which the accused is indicted, must expire and then two more terms, the first and second ones after the one in which the indictment is returned, must expire before the accused is entitled to discharge under § 43-1708. Breedlove was free on bond while awaiting trial and the provisions of § 43-1708 did not apply to him at all. His case fell under the provisions of § 43-1709 and that statute would have been applicable to him had he not been brought to trial by the end of *three* full terms following the one in which the information was filed. In *Stewart* we further said:

> ". . . for a prisoner to be entitled to his discharge for want of prosecution, he must have placed himself on the record in the attitude of demanding a trial, or at least of resisting postponements."

Since our decision in *Breedlove* turned on the fact that the delay was brought about by the action of the accused, we apparently overlooked, or failed to distinguish in the opinion, the difference in § 43-1708 applicable in *Stewart* and § 43-1709 applicable in *Breedlove*. Now in *Gardner* v. *State, supra,* we recognized the complications brought about by the multiple divisions of the circuit courts which have occurred since *Stewart* and in which one accused of a felony could be tried in any one of the separate divisions, either criminal or civil, such divisions having different and overlapping terms. In *Gardner* we said:

> "[W]e are of the opinion, and therefore hold, that the expiration of the terms within the meaning of the above statutes applies to terms in any one of the divisions in which the accused could be tried in a multi-division court and does not apply to the combined overlapping terms of the combined divisions."

We are at a loss to state our opinion with additional clarity but in the case at bar if Mr. Knight had not been brought to trial by the end of two court terms following the one in which he was informed upon, either in the first division

of the circuit court, or the second civil division of the circuit court, or the third division of the circuit court, he would have been entitled to seek relief under the provisions of § 43-1708, *supra*, and the court would not have erred in granting the appellee's request under the facts and evidence of record *in this case.*

To summarize, we are of the opinion and so hold, that if an accused remains in jail and is not brought to trial, without fault on his part, by the end of the second term of any one division, either criminal or civil, of the circuit court following the term in which the indictment is returned or information is filed, then he is entitled to seek discharge under the provisions of § 43-1708 subject, of course, to other statutory provisions relating to excusable delay. The same rule applies under § 43-1709 to one accused of crime and free on bond if not brought to trial by the end of the third term of court following the one in which he is charged by indictment or information.

The judgment of the trial court must be reversed and this cause remanded for further proceedings not inconsistent with this opinion.

The judgment is reversed and cause remanded.

BYRD and HOLT, JJ., dissent.

CONLEY BYRD, Justice, dissenting. I dissent for the following reasons:

1. Appeals by the State in criminal cases are not favored and are subject to the restrictions placed on them by Ark. Stat. Ann. § 43-2720 (Repl. 1964), which provides:

> "Where an appeal on behalf of the State is desired, the prosecuting attorney shall pray the appeal during the term at which the decision is rendered, whereupon the clerk shall immediately make a transcript of the record and transmit the same to the attorney general, or deliver the transcript to the prosecuting attorney, to be transmitted by him. If the attorney general, on inspec-

> ting the record, is satisfied that error has been committed to the prejudice of the State, and upon which it is important to the correct and uniform administration of the criminal law that the Supreme Court should decide, he may, by lodging the transcript in the clerk's office of the Supreme Court, within sixty [60] days after the decision, take the appeal."

The prosecuting attorney did not follow the foregoing statute in the following respects:

A. There is no prayer for appeal in the record. The prosecuting attorney only gave a notice of appeal in accordance with Act 333 of 1971. Since § 13 of Act 333 of 1971 provides that "the manner in which the state or other prosecuting party may appeal in the criminal case is not altered by this act," we then must look to the prior law to determine what is meant by "a prayer for appeal." The answer is provided in the Criminal Code § 327 [Ark. Stat. Ann. § 43-2710 (Repl. 1964)] as follows:

> "First. The appeal must be prayed during the term at which the judgment is rendered, and the prayer noted on the record in the circuit court."

B. Ark. Stat. Ann. § 43-2720, *supra,* contemplates that the prosecuting attorney will furnish a complete record. Although the prosecuting attorney, while erroneously acting pursuant to Act 333 of 1971, designated the complete record, the complete record is not before the court. The record contains only the reporter's transcript of the proceedings on the motion to dismiss.

After the prosecuting attorney has properly prayed an appeal and delivered the complete record to the attorney general, an obligation is imposed on the attorney general to inspect the record to satisfy himself that error has been committed to the prejudice of the State and that the correction of the error is important to the "uniform administration of the criminal law." C. R. Stevenson in his treatise, *Supreme Court Procedure* 167 (1956), states: "If the Attorney General desires to take an appeal, he must endorse on the transcript a direc-

tion to the clerk of the Supreme Court to file."

I submit that without the complete record from which to make his inspection, the Attorney General has no basis for making a decision that the appeal by the State is necessary for the "uniform administration of the criminal law." It would be most embarrassing to all officials involved in this appeal if the prosecution of appellee should subsequently be dismissed for insufficient evidence to sustain the conviction.

Also, I note that the United States Supreme Court has held that the Sixth Amendment guarantee of a speedy trial in the United States Constitution is applicable to the several states, *Klopfer* v. *North Carolina,* 386 U.S. 213, 87 S. Ct. 988, 18 L. Ed. 2d 1 (1967), *Smith* v. *Hooey,* 393 U.S. 374, 89 S. Ct. 575, 21 L. Ed. 2d 607 (1969) and *Dickey* v. *Florida,* 398 U.S. 30, 90 S. Ct. 1564, 26 L. Ed. 2d 26 (1970), and although they have laid down no definite standard of what constitutes a speedy trial in terms of days, months or years, they have left no doubt that delay which results in prejudice to the accused will constitute the denial of a speedy trial. See *Dickey* v. *Florida, supra.* Consequently, without the complete record, which may show the deaths of witnesses during the delays involved herein, I don't see how the Attorney General could be in a position to determine that the alleged erroneous ruling of the trial court is necessary to the "uniform administration of the criminal law." Furthermore, we are in no position to determine that the trial court committed reversible error.

2. Next, I submit that the indictment against appellee should be dismissed for lack of a speedy trial under the Constitution of Arkansas, art. 2, § 10 which provides that "In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial. . . ."

The record shows the following dates relative to this case:

May 13, 1974	3rd Div. Circuit Court commenced its May term.
May 20, 1974	Appellee was arrested and placed in jail.

June 24, 1974	3rd Div. Circuit Court commenced its June term.
July 5, 1974	Charges were filed against appellee.
Sept. 16, 1974	1st Div. Circuit Court commenced its September term of court.
Nov. 18, 1974	2nd Div. Circuit Court commenced its November term.
Dec. 9, 1974	Special Div. of Circuit Court was held by appointment of Judge Richard Adkisson.
Dec. 18, 1974	Special Div. of Circuit Court was held by appointment of Judge Richard Adkisson.
Jan. 27, 1975	2nd Div. Circuit Court commenced its January term.
Feb. 17, 1975	1st Div. Circuit Court commenced its February term.
Feb. 24, 1975	Appellee was put to trial.

Thus, from the foregoing dates, we can see that appellee was held in jail for all but one week of the May term of the Third Division Circuit Court. He was held in jail for all of the September term of First Division of the Circuit Court. He was held in jail for all of the November Term of the Second Division Circuit Court. He was also held in jail during all of the term of the Special Division of the Circuit Court held by the assignment of Judge Richard Adkisson. During all of this time that appellee remained in jail and in addition to the completed terms of courts, above mentioned, the Third Division of the Circuit Court commenced its June 1974 term and the Second Division commenced its January 1975 term of court — in other words, Circuit Court was held at least six times while appellee was languishing in jail and before the commencement of the February 14, 1975 term of court at

which he was tried. Even then his trial did not commence until one week later.

In *Gardner* v. *State*, 252 Ark. 828, 481 S.W. 2d 342 (1972), we had before us a delay in a prosecution for more than seven months. We there said:

> "The accused in this case remained in jail for more than seven months simply awaiting trial for a determination of whether he was innocent or guilty. It is difficult indeed to consider a trial after such a delay as a *speedy* trial in a three division circuit court in Arkansas where the accused may be tried in any one of the three divisions by the simple process of transferring the case from one docket to another under § 22-322.12, *supra*. On the assumption, however, that the trial court failed to recognize its jurisdiction and authority under § 22-322.12, *supra,* or misinterpreted the purpose and intent of our per curiam, *supra,* we hold that the trial court did not abuse its discretion in denying the motion to dismiss in this case, so the judgment in *this case* is affirmed."

In view of our language in the *Gardner* case, it would appear that the trial court, in view of the authority and jurisdiction of the several Divisions of the Crittenden Circuit Court under Ark. Stat. Ann. § 22-322.12, was certainly warranted in finding that appellee had been denied a speedy trial — after all, appellee was held in jail after the term at which he was arrested for three full terms of the several divisions of the Crittenden Circuit Court without being put to trial.

For the foregoing reasons, I respectfully dissent.

HOLT, J., joins in this dissent.

Eddie L. QUEARY *v.* STATE of Arkansas

CR 75-155 531 S.W. 2d 485

Opinion delivered January 19, 1976

Jim H. Boyd, for appellant.

Jim Guy Tucker, Atty. Gen., by: *Jack T. Lassiter*, Asst. Atty. Gen., for appellee.

CONLEY BYRD, Justice. Appellant Eddie L. Queary was convicted, upon a jury verdict, of burglary and grand larceny. For reversal he makes a number of contentions.

The record shows that the residence of Mr. Phillip Cain of Kingston, Arkansas, was broken into and that items totaling approximately $300 in value were removed. Upon investigation the officers found two sets of tracks leading from and to the residence of appellant to the Cain residence. The boots that appellant was wearing matched one set of the tracks found by the officers. Lowery Garten, who was living with appellant, pleaded guilty to entering Cain's residence and taking the property. Garten also showed the sheriff where he had stored the property. We find that there was

substantial evidence to support the jury's verdict.

During cross-examination of Sheriff Ralph Baker the following occurred:

> "Q. Okay. Now, other than those two dollars, to your knowledge, Queary — Eddie Queary hadn't had possession of all of this stuff; is that right? To your actual knowledge? Have you actually seen him with it?
>
> A. Seen him with this stuff here?
>
> Q. Yes, sir.
>
> A. No, sir.
>
> Q. Did you ever go into the attic and get it?
>
> A. No, sir. It was his partner there, Garten.
>
> MR. BOYD: Your Honor, I know probably nothing was intended, but we'd like to instruct the jury or that the Court do so, that the term 'partner' should be stricken from their minds.
>
> THE COURT: Overruled."

The law is that when a witness, in answer to a proper question, gives a nonresponsive answer stating matter that is incompetent and inadmissible as evidence, the trial court, on motion, should strike out the answer or so much of it as is improper, and direct the jury to disregard it as evidence in the case. See *Page* v. *State*, 88 Ark. 237, 114 S.W. 248 (1908), 58 Am. Jur. *Witnesses* § 575 (1948) and 98 C.J.S. *Witnesses* § 356 (1957). The State, in recognition of the law on the subject, acknowledges that the sheriff's reference to appellant as Mr. Garten's "partner" was improper but contends that it was harmless error. We cannot agree that this reference to appellant was harmless error. Under our law, an error in the admission of incompetent testimony is presumed to be prejudicial in the absence of an affirmative showing to the contrary, *Connelly* v. *State*, 232 Ark. 297, 335 S.W. 2d 723 (1960).

Since the only practical, factual issue before the jury was whether appellant was Mr. Garten's partner in the crime, we cannot say that the record affirmatively shows the sheriff's characterization of appellant as Garten's partner was not prejudicial.

Appellant raises a number of other issues, but since they are not apt to arise on a new trial in the same context, we need not consider them.

For the error indicated, the judgment is reversed and remanded.

GEORGE ROSE SMITH, FOGLEMAN and JONES, JJ., dissent.

JOHN A. FOGLEMAN, Justice, dissenting. I consider the error on which this case is reversed to be harmless. As I understand the majority opinion, that error is the failure of the trial court to strike an unresponsive answer by the sheriff as a witness. The word "partner" was used by the sheriff in telling who went into the attic of a house and brought down some stolen property. It was applied to a codefendant of appellant to describe the codefendant as appellant's partner. The word, in its common acception and use can mean more than a "partner-in-crime." It may mean a colleague or associate. Webster's Third New International Dictionary; Webster's New International Dictionary, Second Edition; The Random House Dictionary of the English Language; The American Heritage Dictionary of the English Language. It is synonymous with friend, companion, fellow, comrade, familiar. Rodale, The Synonym Finder, Special DeLuxe Ed. (1961). It is used to designate various relationships such as companions, fellow workers, or close friends. *Zuback* v. *Bakmaz*, 346 Pa. 279, 29 A. 2d 473 (1943).

Admittedly the two men lived together. Two sets of tracks were followed by the officers for a quarter-mile from the burglarized residence to the place where the two codefendants lived together. Boots taken off Queary matched one set of tracks. There was another muddy set of boots at the house when the officers went there. The sheriff saw the tracks and fitted the boots worn by Queary to one set of tracks. He went

to the house where Queary and his codefendant lived. The codefendant was sitting in the house barefooted. The sheriff then went with the codefendant to the residence of Queary's brother-in-law. The codefendant went into the attic of that house with the sheriff and handed the stolen property down through the ceiling.

The codefendant admitted the burglary and tried to shoulder the entire blame, but could not explain how there could have been two sets of tracks. He claimed that he had been wearing Queary's boots when he burglarized the house, because they were better than his own. He said that it was possible that two dollars he gave Queary to buy gasoline after he returned was a part of the money he stole from the house. The codefendant had not previously told the sheriff about taking Queary's boots before going to the burglarized premises.

The circumstances pointing to Queary's guilt as disclosed by the evidence preceding this unresponsive remark were indeed strong and it is difficult to see how the jury could have given much consideration to this chance remark. Whatever connotation the witness or the jury put on the word, it added nothing to what the jury already knew. The sheriff would not have arrested Queary if he did not think he was a participant in the crime and everyone in the courtroom knew that from the evidence. When the entire record is viewed on appeal, I would say that the chances that this statement was prejudicial were so remote as to put the matter beyond reasonable doubt. It seems to me that we could say with great assurance that any error was harmless.

I am authorized to state that Mr. Justice George Rose Smith and Mr. Justice Jones join in this opinion.

Walter SKELTON, Director for Revenues, Arkansas Department of Finance and Administration *v.* FEDERAL EXPRESS CORPORATION

75-130 531 S.W. 2d 941

Opinion delivered January 19, 1976
[Rehearing denied Feb. 23, 1976.]

James R. Cooper, Robert G. Brockman, James R. Eads, Jr., and *Harlin R. Hodnett,* for appellant.

Frank L. Watson and *Paul F. Henson*, for appellee.

ELSIJANE T. ROY, Justice. This is an action for declaratory judgment, and the parties have stipulated to most of the facts. Appellee, Federal Express Corporation, is an interstate air carrier of small packages and freight, organized under the laws of the State of Delaware with its principal place of business in Tennessee, and licensed in Arkansas as a foreign corporation.

One relevant section of the stipulation reads as follows:

> On February 14, 1975, the Department of Finance and Administration audited Plaintiff's personal property which consisted of eighteen Falcon jet aircraft and that these jet aircraft were located on the premises of Little Rock Airmotive, Inc.; that the aircraft were delivered to the Plaintiff in states and countries other than Arkansas; that the said aircraft were transported in interstate commerce to Little Rock, Arkansas, where each aircraft received necessary and substantial modifications to its body and structure before it could be used in Plaintiff's interstate air carrier operations; that Plaintiff's property was not in Arkansas for profit; the property in question had not been placed in service in Arkansas.

Other relevant facts stipulated are that:

Appellee has never performed any intrastate business in Arkansas; there is no dispute as to the amount of the assessment or rate of taxation; and the aircraft, while in Arkansas, received extensive modifications, and as each aircraft was completed, it was delivered to appellee's principal place of business in Memphis, Tennessee. Production time for the modification process was approximately fifty days for each aircraft.

The parties agreed that the issues involved in this controversy should be determined by declaratory judgment.

Roger Frock, general manager and senior vice president of Federal Express Corporation, testified that when the air-

craft were purchased and initially brought into Arkansas they were not involved in carrying freight. In most cases they were brought in by the seller under a ferry package, with very rudimentary equipment in them, just enough to allow them to safely fly into Arkansas, but they were not equipped, could not have handled freight. During the retention of the aircraft in Arkansas, Federal Express Corporation did exercise ownership rights or power incident to the ownership of the aircraft and contracted with Little Rock Airmotive for extensive modification of each aircraft. He testified Federal Express Corporation's route goes from Memphis to Little Rock to Houston to San Antonio, so it is very likely that some of those eighteen aircraft did make stops in Little Rock over the course of being in revenue service. Mr. Frock stated the airplanes were not used in interstate operations prior to modification.

The trial court held that the tax assessment was illegal and should be set aside. From the court's decree comes this appeal.

The Arkansas Compensating Tax Act provides in Ark. Stat. Ann. § 84-3105(a) (Repl. 1960) the following:

> (a) There is hereby levied and there shall be collected from every person in this State a tax of excise for the privilege of storing, using or consuming, within [the State, any article of tangible personal property, after] the passage and approval of this Act [§§ 84-3101 — 84-3128], purchased for storage, use or consumption in this State at the rate of three per centum (3%) of the sales price of such property. This tax will not apply with respect to the storage, use or consumption of any article of tangible personal property purchased, produced or manufactured outside this State until the transportation of such article has finally come to rest within this State or until such article has become commingled with the general mass of property of this State. This tax shall apply to the use, storage or consumption of every article of tangible personal property, except as hereinafter provided, irrespective of whether the article or similar articles are manufactured within the State of Arkansas

> or are available for purchase within the State of Arkansas, and irrespective of any other condition.

For the aircraft to be subject to the tax they must have been purchased for use or storage in the State and to have finally come to rest within the State.

The stipulation and the testimony clearly reflect that at the time of the purchase appellee intended to bring the aircraft into the State for extensive modification.

Appellee strongly contends that the aircraft were not purchased for use in the State but for use in its interstate operations. This contention is found to be without merit in light of the definition of the term "use":

> The term "use" means and includes the exercise of any right or power over tangible personal property incident to the ownership or control of that property, except that it shall not include the sale of that property in the regular course of business. Ark. Stat. Ann. § 84-3104(c) (Repl. 1960).

Retention of the aircraft within the State of Arkansas alone constitutes sufficient use to support the appellant's assessment. *Flying Tiger Line* v. *State Board of Equalization,* 157 Cal. App. 2d 85, 320 P. 2d 552 (1958); *Pacific Telephone and Telegraph Company* v. *Gallagher,* 306 U.S. 182, 59 S. Ct. 396, 83 L. Ed. 595 (1939). In addition to the aircraft being retained in Arkansas for a period of approximately 50 days appellee contracted with an Arkansas firm for modifications to be carried out on the planes. This is an exercise of a right over the aircraft incident to the ownership or control of same. Exercise of these ownership rights constitutes a taxable "use" of the aircraft within the State.

The aircraft were also stored in the State of Arkansas. In Ark. Stat. Ann. § 84-3104(b) (Repl. 1960), the term "storage" is defined as " . . . any keeping or retention in this State of tangible personal property purchased from a vendor for any purpose, except sale or subsequent use solely outside this State." The aircraft were retained in the State for ap-

proximately 50 days, and their subsequent use is not solely outside this State since appellee makes deliveries and maintains a freight stop in Little Rock.

Regardless of the ultimate use of the aircraft the use and storage in the case at bar are taxable intrastate events, separate and apart from interstate commerce.

In *Flying Tiger Line* v. *State Board of Equalization,* supra, the aircraft which were the subject of this controversy were to become instrumentalities of interstate commerce after they had been flown into California. The court upheld the use tax upon the aircraft because of their use and/or storage prior to becoming instrumentalities of interstate commerce and stated:

> We think there was a taxable moment when the former [speaking of the seven aircraft] had reached the end of their interstate transportation and had not begun to be consumed in interstate operation. At that moment, the tax on storage and use — retention and exercise of the right of ownership, respectively — was effective.

The language used here is almost identical with that used in *Pacific Telephone and Telegraph Company* v. *Gallagher,* supra, wherein the United States Supreme Court determined that retention of certain tangible personal property in California constituted an exercise of a right of ownership which subjected it to taxation even though the ultimate use of the property was in the company's interstate system.

As to the question of whether the aircraft "finally came to rest" within this jurisdiction after having been shipped via interstate commerce to Arkansas, numerous cases uphold state taxation of articles of tangible personal property during interruption in interstate shipment if the interruption is not to "facilitate interstate shipment or to save the property from the dangers of its journey." If the interruption does not meet the above test the courts have concluded that interstate shipment has ceased and the goods are within the taxable jurisdiction of the state where they are found.

The United States Supreme Court cases on this issue are reviewed in *Calvert* v. *Zanes-Ewalt Warehouse, Inc.*, 502 S.W. 2d 689 (Texas) (1973). In *Calvert* the court said:

> * * * Any interruption of the movement of commodities at an intermediate point between origin and final destination which is not incidental to the transportation or the use of the means of transportation (or being so incidental, is used or extended for the purposes of the owner not incidental to the transportation or the means used therefor) breaks the continuity in transit and subjects the shipment to local taxation at the point of interruption.

The extensive modification of the jets in Arkansas was in no way "incidental" to the transportation of the aircraft (the aircraft were capable of being flown directly to Memphis), but it was for the purposes of the owner. So here the aircraft left the stream of commerce and "finally came to rest" in Arkansas and consequently were subject to taxation at this point. *General Oil Co.* v. *Crane*, 209 U.S. 211, 28 S. Ct. 475, 52 L. Ed. 754 (1908), and *Bacon* v. *Ill.*, 227 U.S. 504, 33 S. Ct. 299, 57 L. Ed. 615 (1913).

Concerning appellant's contention of double taxation, Arkansas has enacted the Multistate Tax Compact, Ark. Stat. Ann. §§ 84-4101 — 84-4106 (Supp. 1973), which provides in part:

> Each purchaser liable for a use tax on tangible personal property shall be entitled to full credit for the combined amount or amounts of legally imposed sales or use taxes paid by him with respect to the same property to another state and any subdivision thereof.

In light of this tax compact, the State of Tennessee at the appropriate time will make a proper determination of the tax credit due appellee herein. Therefore, we find appellee is not subjected to double taxation because of the Arkansas assessment.

Furthermore, since the aircraft were not instrumen-

talities of interstate commerce nor were they in the stream of commerce at the time of taxation, the commerce clause of the Federal Constitution has not in any manner or respect been violated by the appellant's assessment of the tax on the aircraft.

Reversed.

JONES and BYRD, JJ., dissent.

CONLEY BYRD, Justice, dissenting. I disagree with the majority's interpretation of Ark. Stat. Ann. § 84-3105(a) (Repl. 1960). As interpreted it adds $18,500 to the cost of any modifications that Little Rock Airmotive, Inc., makes to any such Falcon Jets even though the costs of the modification may be $1,000 or less. I doubt that Little Rock Airmotive can long stay in business with that kind of tollgate at its front door.

The stipulated facts show that Federal Express Corporation is homebased in Memphis, Tennessee where it is engaged in interstate commerce. The stipulated facts also show that the aircraft here were stopped off enroute to Memphis to modify or fabricate the planes to meet their intended use when they arrive in Memphis. Thus, if the planes are taxable under the facts here it would not make any difference to this state's ability to tax, that the planes were first flown to Memphis and then returned.

Under the majority's interpretation of the statute, *supra*, any plane flown into Arkansas for fabrication from anyone of the five states that does not have a gross receipts or use tax will be subject to use tax by Arkansas. Thus, as I view the matter the tax here levied is purely and simply a tax levied upon commerce. Little Rock Airmotive could not exist without such commerce — that is the very nature of its business and there are obviously not enough locally owned aircraft to keep it in business.

For the reasons stated, I respectfully dissent.

JONES, J., joins in this dissent.

Robert Maurice GORDON *v.* STATE of Arkansas

CR 75-138 529 S.W. 2d 330

Opinion delivered January 19, 1976

McArthur, Loftin & Wilson, for appellant.

Jim Guy Tucker, Atty. Gen., by: *Terry Kirkpatrick*, Asst. Atty. Gen., for appellee.

ELSIJANE T. ROY, Justice. On October 19, 1974, Officer John Sparks, a criminal investigator, and another investigator, both with the narcotics section of the Arkansas State Police, and a federal drug enforcement agent were traveling on Interstate Highway 30 west of Hope. They were conducting a general traffic check in this area. At approximately 11:30 p.m. they noticed a white Chevrolet van being driven erratically and the officers stopped it. Appellant then got out and showed Sparks his driver's license. No traffic violation was disclosed but while examining appellant's license Sparks detected a strong odor of marijuana about appellant. During the questioning of appellant another vehicle containing two representatives of the United States Border Patrol and a State policeman joined the group. The law enforcement officials looked inside the van with a flashlight and discovered what appeared to be marijuana seeds. Appellant was then arrested for possession of marijuana and advised of his rights. Sparks entered the van to obtain the seeds, then the van was removed to a service station and a search warrant obtained for further examination of the vehicle. The ensuing search resulted in the discovery of over 800 pounds of marijuana.

Appellant's first assignment of error is that the court improperly refused to grant his motion to suppress illegally seized evidence and the court's failure to prevent the introduction of said evidence at his trial.

Appellant contends that the search which produced the evidence used to convict him was not based on "probable

cause" and thus is violative of Fourth Amendment proscriptions against unreasonable search and seizure. It has been recognized that where officers have reasonable cause to believe that contraband is being unlawfully transported in a vehicle then such vehicle may be the object of a warrantless search. *Carroll* v. *U.S.*, 267 U.S. 132, 45 S. Ct. 280, 69 L. Ed. 543 (1925); *Moore* v. *State*, 244 Ark. 1197, 429 S.W. 2d 122 (1968), cert. denied 393 U.S. 1063, 89 S. Ct. 714, 21 L. Ed. 2d 705 (1969). A determination of the soundness of concluding that probable cause existed to conduct a search is to be made " . . . in the light of the particular situation and with account taken of all the circumstances." *Brinegar* v. *U.S.*, 338 U.S. 160, 69 S. Ct. 1302, 93 L. Ed. 1879 (1949). The facts, or "circumstances", of the instant case support the conclusion that there existed probable cause to conduct the very limited warrantless search of the vehicle that was conducted immediately subsequent to stopping appellant. Arresting Officer Sparks testified that appellant had an odor of marijuana about his person, a fact which apparently alerted him to the possibility that appellant's vehicle may have contained a quantity of the substance. That this odor is sufficient to arouse suspicion and thus provide the underpinning for a showing of probable cause to conduct a search was recognized in *People* v. *Newman*, 14 Cal. App. 3d 246, 92 Cal. Rptr. 205 (1971), vacated for other reasons 95 Cal. Rptr. 12, 484 P. 2d 1356 (1971). See also *Moore*, supra, and *Anderson* v. *State*, 256 Ark. 912, 511 S.W. 2d 151 (1974). While it was recognized in *Newman* that a stop for a traffic violation, without more, did not justify a search of the vehicle, the court stated:

> The odor of burning marijuana recognized by the officers afforded probable cause to believe that the car contained contraband, and that its occupants were the probable offenders. (Citations omitted)

The examination of the interior of the vehicle, conducted at 11:30 p.m., revealed marijuana seeds on the floorboard. The search involved concerned only a visual scrutiny of the van interior, and the marijuana seeds were openly visible. The seeds that were detected came within the "plain view" of the arresting officer and, as was recognized in *Harris* v. *U.S.*, 390 U.S. 234, 88 S. Ct. 992, 19 L. Ed. 2d 1067 (1968), cannot

be considered the product of an illegal search. Moreover, the fact that the seeds were only discernible by use of a flashlight does not invalidate the propriety of the search. In *U.S.* v. *Johnson*, 506 F. 2d 674 (8th Cir. 1974), cert. denied 421 U.S. 917, 95 S. Ct. 1579, 43 L. Ed. 2d 784 (1975), a case also involving the use of a flashlight, the court observed that:

> The fact that the contents of the vehicle may not have been visible without the use of artificial illumination does not preclude such observation from application of the "plain view" doctrine. (Citations omitted)

It follows that the limited search in this instance suffers no constitutional defect nor was the seizure of the seeds an unpermitted outgrowth thereof. Needless to say, the constitutionality of the later search and seizure which netted the 800 odd pounds of marijuana is not open to question since probable cause existed for the initial intrusion and a valid search warrant was procured before further search was made of the van.

Appellant next contends that the testimony of Officer Sparks as to the odor and seeds should have been excluded at trial below since no foundation was laid qualifying Sparks as an expert witness. Officer Sparks disclaimed any expertise except the experience that he had gained as a result of two years with the narcotics section of the Arkansas State Police. Sparks' testimony would be more accurately described as being a non-expert offering opinion evidence. We have approved opinion evidence offered by ordinary witnesses, derived from observation, in those situations where from the nature of the subject matter the facts cannot otherwise be presented to the jury. *Miller* v. *State*, 94 Ark. 538, 128 S.W. 353 (1910). In the instant case only by explaining the circumstances of the search and seizure could the jury be adequately apprised of the basis for probable cause of the search. Descriptions involving odor and appearance are uniquely personal to the observer and explanations based thereupon must rely on the observer's opinion.

Furthermore, questions going to the competence of a witness are largely discretionary with the trial judge and are

not ordinarily reviewable on appeal unless so clearly in error as to constitute an abuse of discretion. *Farmers Equipment Co.* v. *Miller*, 252 Ark. 1092, 482 S.W. 2d 805 (1972); *Lee* v. *Crittenden County*, 216 Ark. 480, 226 S.W. 2d 79 (1950). No such error is here evident and the testimony was properly received.

Appellant's final contention is that the court erred in allowing Officer Sparks' testimony concerning other drug related crimes in order to establish a value for the contraband seized in the instant case. The appellant argues that Sparks' testimony impugns appellant's character and is likely to have an inflammatory effect on the jury. We do not find this contention meritorious. The testimony was not offered to reflect on appellant's character but was introduced to qualify Officer Sparks to give an opinion on the large quantity of marijuana seized. In *Williams* v. *State*, 129 Ga. App. 103, 198 S.E. 2d 683 (1973), an officer with several years experience in narcotics work testified as to the value of drugs seized, and the Georgia court observed:

> * * * While the value of the drugs is not a necessary ingredient which the State must prove, it can be helpful to the jury in the light of other circumstances in the evidence to know whether the quantity of drugs was inconsequential or substantial.

Appellant was not implicated in any of these crimes, hence the jury could not be inflamed.

Finding no reversible error, the case is affirmed.

STATE of Arkansas *v.* Marvin ALEXANDER

CR 75-190 531 S.W. 2d 707

January 19, 1976
[Rehearing denied Feb. 17, 1976.]

PER CURIAM

On September 4, 1974, information was filed against Marvin Alexander in the Crittenden County Circuit Court charging him with first degree murder committed on August 10, 1974. Alexander was released on bond while awaiting trial and on February 26, 1975, he filed a motion for discharge because he had not been given a speedy trial. By judgment entered September 1, 1975, and filed on September 5, 1975, the trial court recited that Alexander had filed a motion for dismissal under Ark. Stat. Ann. § 43-1709 (Repl. 1964). The trial court found that Alexander was arrested on August 10, 1974; that information was filed against him on September 4, 1974, and that the defendant was admitted to bond in the sum of $15,000. The trial court judgment then recited as follows:

> "The Court further finds that the defendant was held to bail and was not brought to trial before the end of the third term of Court, which was held after the finding of the indictment, or the filing of the information against said defendant as provided in Arkansas Statute 43-1708, supra, and the Court finds that the Motion of the defendant to dismiss with prejudice for lack of a speedy trial is hereby granted.

IT IS THEREFORE, BY THE COURT,

> CONSIDERED, ORDERED AND ADJUDGED that the charges pending against the defendant, Marvin Alexander, in the Circuit Court of Crittenden County, Arkansas, Criminal Division, cause number CR-74-295, be and same are hereby dismissed with prejudice and costs of this action are hereby taxed to the State.
>
> ENTERED this 1st day of Sept., 1975."

On September 15, 1975, the prosecuting attorney filed notice of appeal to this court. The transcript was filed with the clerk of this court on November 10, 1975, and on December 4, 1975, Alexander filed his motion to dismiss the appeal for failure of the attorney general to file the appeal within the time provided by statute.

Ark. Stat. Ann. § 43-2720 (Repl. 1964) provides as follows:

> "Where an appeal on behalf of the State is desired, the prosecuting attorney shall pray the appeal during the term at which the decision is rendered, whereupon the clerk shall immediately make a transcript of the record and transmit the same to the attorney general, or deliver the transcript to the prosecuting attorney, to be transmitted by him. If the attorney general, on inspecting the record, is satisfied that error has been committed to the prejudice of the State, and upon which it is important to the correct and uniform administration of the criminal law that the Supreme Court should decide, he may, by lodging the transcript in the clerk's office of the Supreme Court, *within sixty [60] days after the decision,* take the appeal." (Emphasis supplied).

It is obvious, therefore, from the face of the record before us, that the decision appealed from was entered on September 1, 1975, and the appeal was not perfected in this court until November 10, 1975, and was, therefore, not lodged in the clerk's office of this court within 60 days after the decision.

The motion is granted and appeal dismissed.

Richard R. HEATH, Director of Department of Finance and Administration of the State of Arkansas *v.* WESTARK POULTRY PROCESSING CORP.

75-200 531 S.W. 2d 953

Opinion delivered January 26, 1976
[Rehearing denied Feb. 23, 1976.]

James R. Cooper, Harlin R. Hodnett, James R. Eads Jr., and *Robert G. Brockman,* for appellant.

Harper, Young & Smith, by: *G. Alan Wooten,* for appellee.

JOHN A. FOGLEMAN, Justice. Westark Poultry Processing Corporation, an Arkansas corporation with its principal

place of business in Fort Smith, paid an assessment of compensating tax made by the Arkansas Director of Finance and Administration. Having made the payment under protest after having exhausted all administrative remedies, it brought this suit for recovery of the payment under Ark. Stat. Ann. § 84-3120 (Repl. 1960). The Director appeals from a decree allowing recovery, asserting that the chancery court erred in holding that Westark was engaged in "manufacturing and/or processing" as the term is used in Ark. Stat. Ann. § 84-3106 (D) (2) (e) (Supp. 1973) and in holding that Westark was using the poultry processing equipment involved. We find that Westark was not entitled to an exemption from the tax because we do not agree that it was engaged in "manufacturing and/or processing" as defined in the statute and reverse.

The facts were stipulated. Insofar as material, they are:

> . . . . . [T]he property the subject of the assessment and payment under protest is processing machinery and equipment purchased and used for expanding an existing processing plant or to replace existing machinery used directly in processing or packaging slaughtered poultry for sale for human consumption and which is owned by Westark and leased for a fixed rental to O.K. Processors, Incorporated engaged in the business of processing slaughtered poultry for sale for human consumption; . . . . .
>
> . . . . . none of the property the subject of the assessment used in growing poultry but solely in processing and/or packaging slaughtered poultry for sale in the form of dressed fresh poultry ice packed for transportation and marketing and cooked and/or partially cooked poultry for frozen transportation and marketing; *** after marketing no further processing is required except for cooking fresh poultry, thawing and heating cooked poultry or thawing and further cooking partially cooked poultry; . . . . .

At the outset, we should point out that Westark is claiming an exemption. Contrary to Westark's contention that all

doubts should be resolved in its favor, an exemption provision must be strictly construed against the exemption and to doubt is to deny the exemption. *Hervey* v. *Tyson's Foods, Inc.*, 252 Ark. 703, 480 S.W. 2d 592. The burden is on the claimant to establish its right to the exemption beyond a reasonable doubt. *Arkansas Beverage Company* v. *Heath*, 257 Ark. 991, 521 S.W. 2d 835; *Heath* v. *Midco*, 256 Ark. 14, 505 S.W. 2d 739.

In order to qualify for the exemption, it was necessary that the property upon which the tax was assessed must have replaced machinery used directly in producing, manufacturing, fabricating, assembling, processing, finishing, or packaging of articles of commerce at manufacturing or processing plants or facilities in this state if that machinery would have been exempt at the time of purchase to either create or expand manufacturing or processing plants or facilities within this state.

We have previously held that manufacturing and processing are not two distinct operations and that a taxpayer, in order to be entitled to the exemption must first qualify as a manufacturer. *Hervey* v. *Tyson's Foods, Inc.*, supra. Under the holding in *Tyson* appellee in processing and packaging slaughtered poultry for sale as fresh dressed poultry and cooked poultry for frozen transportation and marketing is not a manufacturer.

We do not agree with appellee that changes in the statute after the period for which the assessment was made in *Tyson's Foods* dictate a different result. Appellee argues and the chancery court apparently held that "manufacturing" and "processing" under the statute applicable during the period for which the assessment was made are separate operations, and that Westark was involved in "processing" when that word is given its ordinary meaning. It relies on Ark. Stat. Ann. § 84-3106 (D) (2) (e), which reads:

> For the purposes of this subsection, the terms "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.

It should be noted that the critical words in the statute involved in *Tyson's Foods* were "manufacturing or processing". Appellee contends that the language of subsection (D) (2) (e) quoted above requires an entirely different treatment. We do not agree. The primary reason for our disagreement is that "manufacturing" and/or "processing" mean "manufacturing and processing" *or* "manufacturing or processing". Webster's Third New International Dictionary; Webster's New International Dictionary, Second Edition. The phrase "and/or" has brought more confusion than clarity to the task of construction of statutes, contracts and pleadings. See *Guerin* v. *State*, 209 Ark. 1082, 193 S.W. 2d 997. But we cannot say that its use rendered the statute meaningless. Construing the statute most strictly against the exemption, the use of "and/or" has not really changed the critical language considered in *Tyson's Foods* because we must read the words as "manufacturing or processing". The use of the words "commonly understood within their ordinary meaning" does not change the approach taken in *Tyson's Foods* and the authorities upon which it is based, where the statute in question contained these same words. See *Pellerin Laundry Machinery Sales Co.* v. *Cheney*, 237 Ark. 59, 371 S.W. 2d 524. It should be noted that among the statutory changes made by the subsection was the specific addition of mining, quarrying, refining, and extracting oil and gas to those operations specifically qualifying for an exemption.

The language of the emergency clause of Act 5 of 1968 of which subsection (D) (2) (e) was a part tends to support our view. In case of ambiguity in a statute, we may look to this clause in construing the act of which it is a part. *Roscoe* v. *Water & Sewer Improvement District No. 1*, 216 Ark. 109, 224 S.W. 2d 356; *McMahan* v. *Bd. of Trustees of the University of Arkansas*, 255 Ark. 108, 499 S.W. 2d 56. The General Assembly found and declared that the emergency consisted of a loss in revenues to the state by reason of confusion arising from the "manufacturing and processing" exemption. Increasing the scope of this general exemption to cover Westark's operation certainly would add to, not reduce, the

loss of revenue. If the legislature had intended to add an exemption for appellee's "processing," in spite of this language, it would have been a simple matter to have described it as specifically as it did mining, etc.

To say the least, appellee's entitlement to the exemption is not beyond reasonable doubt. Since our construction of the exemption is dispositive of the case, we do not reach appellant's second contention.

The decree is reversed and the cause dismissed.

Duane H. FAULL *v.* Richard HEATH, Director, Department of Finance and Administration

75-201 532 S.W. 2d 164

Opinion delivered January 26, 1976
[Rehearing denied March 1, 1976.]

Givens & Buzbee, for appellant.

James R. Cooper, Harlin R. Hodnett, and *Robert G. Brockman,* for appellee.

J. FRED JONES, Justice. This is an appeal by Duane H. Faull from a chancery court decree in favor of Richard Heath, Director, Department of Finance and Administration, holding the Gross Receipts Act of 1941, Ark. Stat. Ann. § 84-1902 et seq. (Repl. 1960), as amended (Ark. Stat. Ann. § 48-1401 et seq. [Supp. 1973]), constitutional as it applies to the ten per cent supplemental tax levied by §§ 8 and 10 (b) of Act 132 of 1969, Ark. Stat. Ann. §§ 48-1408 — 48-1410 (b) (Supp. 1973); and, holding that the appellant is liable for the supplemental tax on the entire gross proceeds or receipts from the dispensing of alcoholic beverages for the years 1970-1972.

The facts and issues are clearly set out in the appellant's brief and they appear as follows: The appellant is the indemnitor on a surety bond executed (pursuant to § 8 of Act 132 of 1969) by the Pastime Club of Hot Springs, Arkansas, a private club incorporated pursuant to the Act and which disburses mixed drinks to its members and their guests. As indemnitor, the appellent is ultimately liable for all tax liability of the Pastime Club, including the ten per centum supplemental tax levied by § 8 and § 10 of Act 132 of 1969, Ark. Stat. Ann. § 48-1410 (b) (Supp. 1973).

This controversy arose due to a dispute between the appellant and the Arkansas Department of Finance and Administration as to what portion of the charges made by the club to its members for alcoholic beverages should be subject to the ten per centum supplemental tax levied by the Act.

The parties stipulated that, after deducting the cost of the liquor, 60% of the charge for each drink at the club went to defray the cost of preparation and serving or the cooling and serving of the alcoholic beverages and that the other 40% of the charge was for non-alcoholic mixes and for entertainment for the members. The club paid the ten per centum supplemental tax on 60% of the proceeds but not on the other 40%. This litigation arose over whether the appellant was liable for a ten per cent supplemental tax levied on the remaining 40% of the charges for each drink to its members. The appellee made demand on appellant for $4,773.31 as the tax due on the remaining 40% of the revenues for the years 1970 through 1972.

The chancellor held the ten per cent supplemental tax valid and collectible on the entire 100% of the charge for alcoholic beverages (after deducting the cost of the liquor) and entered the decree as already stated.

On appeal to this court the appellant has designated the points on which he relies for reversal as follows:

> "The ten percentum supplemental tax established by Section 8 and Section 10 of Act 132 of 1969 is unconstitutional.
>
> If the court determines that the ten percentum supplemental tax is constitutional, then it should be levied only on that portion of the total charge for alcoholic beverages which represents the charge for preparing and serving or cooling and serving said beverages and not on the entire charge."

We agree with the chancellor that the Act is constitutional and that the ten per cent supplemental tax was due on the entire amount of the charges made by the club for

alcoholic beverages (less the cost of the liquor). Ark. Stat. Ann. § 48-1408 (Supp. 1973) reads as follows:

> "The sale of alcoholic beverages pursuant to this Act [§§ 48-1401 — 48-1418] shall be subject to the Arkansas Gross Receipts Act of 1941 [§§ 84-1901 — 84-1936], as amended, and, in addition, there is hereby levied a supplemental tax of ten per centum (10%) upon the gross proceeds or gross receipts thereof. Said supplemental tax shall be reported, and paid, to the Commissioner of Revenues in the same manner and at the same time as the Gross Receipts Tax and shall be subject to such reasonable rules and regulations as the Commissioner of Revenues may prescribe, including the maintenance of permanent records showing all purchases and sales of alcoholic beverages and the requirement of a bond to secure payment. The taxes herein prescribed may be passed on to the consumer and shall be in lieu of all other special taxes at the retail level."

The ten per cent levy portion of subsection (b) of Ark. Stat. Ann. § 48-1410 (Supp. 1973) is the primary portion of that section under attack in this case, but in an effort to clarify the decision we have reached in this case, we quote the entire section through subsection (b) as follows:

> "The General Assembly recognizes that many individuals in this State serve mixed drinks containing alcoholic beverages to their friends and guests in the privacy of their homes and, in addition, many individuals associated together in private nonprofit associations and/or corporations established for fraternal, patriotic, recreational, political, social, or other mutual purposes as authorized by law, established not for pecuniary gain, have, for their mutual convenience, provided for the preparation and serving to themselves and their guests of mixed drinks prepared from alcoholic beverages owned by such members individually or in common under a so-called 'locker,' 'pool,' or 'revolving fund' system. In order to clarify the alcoholic beverage control laws of this State, and to regulate and prohibit

the sale of alcoholic beverages in violation of the provisions of this Act [§§ 48-1401 — 48-1418] and other applicable alcoholic beverage control laws of this State, the General Assembly hereby determines that the preparation, mixing and serving of such mixed drinks, beer and wine for consumption only on the premises of a private club as defined in Section 2 (j) [subsection j of § 48-1402] hereof by the members thereof and their guests, and the making of a charge for such services, shall not be deemed to be a sale or be in violation of any law of this State prohibiting the manufacture, sale, barter, loan or giving away of intoxicating liquor whenever:

(1) The alcoholic beverages, beer and wine so consumed have been furnished or drawn from private stocks thereof belonging to such members, individually or in common under a so-called 'locker,' 'pool,' or 'revolving fund' system and are replenished only at the expense of such members;

(2) Such private club has acquired a permit from the Board, in such form as the Board may appropriately determine. No private club permitted hereunder shall sell alcoholic beverages either by the package or drink. Alcoholic beverages, beer and wine owned by members may be stored on the premises of the club. If any permittee shall sell, barter, loan or give away any intoxicating liquor in violation of this Act or other alcoholic beverage control laws of this State, the permit of such club shall be revoked.

(b) Application for a permit under the provisions of this Section may be made to the Director in accordance with the rules and regulations of the Board. The application shall be accompanied by an annual permit fee of $500.00. Upon the Director determining that the applicant is qualified hereunder, a permit may be issued as authorized in this Section. Said permit shall be renewed on or before July of each year, provided, that any permit issued between January 1 and July 1 of any year shall be at one-half (½) of the amount of the fee provided herein.

> In addition, there is hereby levied a supplemental tax of ten per centum (10%) upon the gross proceeds or gross receipts derived by such private club from the charges to members for the preparation and serving of such mixed drinks or for the cooling and serving of such beer and wine, drawn from the private stock of such members as hereinabove provided, for consumption only on the premises where served. Said supplemental tax shall be reported and paid to the Commissioner of Revenues in the same manner and at the same time as the gross receipts tax under the Gross Receipts Tax Act of 1941 [§§ 84-1901 — 84-1936], as amended, and shall be in addition to such tax. The Commissioner of Revenues shall promulgate reasonable rules and regulations for the enforcement and collection of the tax levied herein, including a requirement that each permittee maintain records showing all such charges made. The taxes herein prescribed may be passed on to the member. In addition to the fee and/or supplemental tax as levied herein, any city or incorporated town, or any county in which the permitted premises are located, if located outside the limits of a city or incorporated town, may levy an additional permit fee and/or supplemental tax not to exceed one-half [½] of the amount of the fee or rate provided in this Section. All fees and taxes levied hereunder by any city or county shall be used for city or county general purposes."

It is admitted that the Pastime Club in Hot Springs was incorporated as a nonprofit corporation and was granted a mixed drink permit to dispense alcoholic beverages to its members and guests as a private club pursuant to Act 132 of 1969, and that the alcoholic beverages were owned by the members and stored at the club.

In support of his first point the appellant argues that the statutory provisions levying the ten per cent supplemental tax "are unconstitutionally void, ambiguous and impossible of exaction." The appellant then states several rules of law with which we do not disagree, but which we do not consider applicable to the case at bar. The appellant argues that where a general statutory provision contains an express ex-

ception, the courts are required to give effect thereto, even though it may render the principal clause meaningless; that as a general rule, a tax cannot be imposed except by express words indicating that purpose; that the intention of the Legislature is to be gathered from a consideration of the entire Act and where there is ambiguity or doubt, it must be resolved in favor of the taxpayer, and against the taxing power; that the validity of an Act must be determined by its practical operation, and not by its title or declared purpose; that if it should be determined the legislative purpose as expressed by the words employed is ambiguous, all doubt should be resolved in favor of the taxpayer and, while a law should be construed to give meaning to all its parts, the construction must not be inconsistent with the language used therein.

The appellant cites numerous decisions supporting the above rules of law. As already stated, we have no quarrel with the stated rules of law or the decisions cited in support of them, but there are other rules of law which we consider more applicable to the facts in the case at bar. In construing a statute in the absence of any indication of a different legislative intent, we give words their ordinary and usual accepted meaning in common language. *Phillips Petroleum* v. *Heath*, 254 Ark. 847, 497 S.W. 2d 30 (1973). This means that a court does not resort to a subtle or forced construction for the purpose of limiting or extending the meaning of the statute's language. *Black* v. *Cockrill, Judge*, 239 Ark. 367, 389 S.W. 2d 881 (1965). Particularly when dealing with taxing legislation where any doubt or ambiguity must be resolved in favor of the taxpayer. *Hervey* v. *Construction Helicopters, Inc.*, 252 Ark. 728, 480 S.W. 2d 577 (1972).

We find nothing ambiguous or unclear in the provisions of the Act. Ark. Stat. Ann. § 48-1408 (Supp. 1973) clearly provides that the *sale* of alcoholic beverages is subject to the Gross Receipts Act of 1941 (§§ 84-1901 — 84-1936), as amended, and in addition thereto, levies a supplemental tax of ten per cent upon the "gross proceeds or gross receipts thereof," meaning the gross proceeds or gross receipts from the *sale* of alcoholic beverages.

Ark. Stat. Ann. § 48-1410 (Supp. 1973) in subsection (a) recognizes that a considerable amount of alcoholic beverages is consumed in private clubs when lawfully dispensed by the drink to club members and their guests under a "so-called 'locker,' 'pool' or 'revolving fund' system" under which the beverages are drawn from private stock belonging to the club members, and under which a *sale* by the drink or package is prohibited by law. Subsection (b) of § 48-1410 then provides for the issuance of permits to such private clubs for the lawful dispensation of such beverages under such system upon approval and the payment of a fee of $500, and subsection (b) then provides that in addition to the $500 fee "there is hereby levied a supplemental tax of ten per centum (10%) upon the *gross proceeds or gross receipts* derived by such private club from the *charges* to members for the preparation and serving of such mixed drinks or for the cooling and serving of such beer and wine, drawn from the private stocks of such members as hereinabove provided, for consumption only on the premises where served." (Emphasis added).

Thus it is clear to us, that the intent and purpose of the Act, as it relates to private clubs, is to levy a supplemental tax on the gross proceeds or gross receipts from alcoholic beverages not sold but dispensed by the clubs to its members and guests in the same percentage amount of ten per cent as is levied on the gross proceeds or gross receipts from the *sale* of alcoholic beverages through hotels, cafes and other lawful channels where such sales are lawfully conducted.

In support of his second point the appellant argues that by definition under the Arkansas Gross Receipts Act the term "gross receipts" or "gross proceeds" means total consideration for *sale* of tangible personal property and such services specifically provided for therein. He argues that the subject matter of this litigation is not "provided for therein"; that the Act defines the word "sale" and provides that the "term 'sale' shall not include furnishing of services." The appellant then argues that according to the specific language of Section 10 of the 1969 Act, there is no sale or gross receipts upon which to levy a supplemental ten per cent tax in the case at bar. He argues that the charges made by the club in dispensing drinks to its members is a charge for *services* and not a

sale; consequently, the ten per cent supplemental tax is not applicable in this case because the charge was for services and not a sale since there had been no sale.

We feel that what we have already said disposes of the appellant's argument on his second point. The subject of the ten per cent supplemental tax is alcoholic beverages. Although not germane to the issues before us, we see no logical reason why a supplemental tax should be levied on proceeds from alcoholic beverages sold by the drink in public hotels, cafes, taverns and bars and not be levied in the same percentage amount and manner on similar drinks with the same alcoholic content when the ingredients are purchased by a private club for its members and their guests, and paid for or reimbursement made by the individual member or guest as the beverage is mixed and dispensed by the drink in the privacy of the member's club.

The decree is affirmed.

Harlan A. WEBER *v.* David PRYOR,
Governor, et al

75-337 531 S.W. 2d 708

Opinion delivered January 26, 1976

McArthur, Lofton & Wilson, for appellant.

Jim Guy Tucker, Atty. Gen., by: *Scott Stafford,* Asst. Atty. Gen., for appellees.

Warren & Bullion, for intervenors, Forrest Rozzell, Lloyd George and James L. Shaver Jr.

GEORGE E. CAMPBELL, Special Chief Justice. This action was commenced by the appellant challenging solely the constitutionality of Section 5 of Act 325 of the 1975 General Assembly. Act 325 abolishes, effective January 1, 1979, the existing circuit and chancery court districts and establishes the State Board of Judicial Apportionment. The legislation is comprehensive in nature. The Board is charged, under certain limitations, with the responsibility of designating new circuit and chancery court districts and apportioning judges among the several districts.

While this action deals only with chancery courts we note that Act 325 also deals with circuit districts consistent with the duties imposed on the General Assembly by Article

7, Section 13, of the Constitution of 1874, to provide for convenient circuits for the courts.

Section 5 of Act 325 provides, in part, for the extension of the terms of office of chancery judges which would have expired December 31, 1976 to an expiration date of December 31, 1978. It is undisputed that Section 5 affects only the terms of three chancery judges. The Section, in effect, establishes a system of uniform expiration dates for the terms of chancery judges in the reapportioned districts for the State as a whole. We find Section 5 to be constitutional.

Certain other citizens and taxpayers were permitted by the Chancellor to intervene and sought additional relief from the trial court by way of a declaratory judgment that Act 325 was valid in its entirety. The Chancellor was correct in deciding that the intervenors could not enlarge the issues presented by the appellant's complaint. *Grayson* v. *Arrington,* 225 Ark. 922, 286 S.W. 2d 501; and *Schulte* v. *Walthour,* 239 Ark. 627, 393 S.W. 2d 242.

The appellant urges that chancery courts are "constitutional courts" and legislation may not alter the terms of office of the judges. Further, appellant argues that there is an inherent right of the people to elect their judicial officials at stated intervals which, apparently once fixed, can never be changed.

Chancery courts since the Constitution of 1836 have been subject to legislative control, rather than limited by constitutional provision, as to the terms of office of chancery judges. See Article 6, Section 1, Constitution of 1836. The earliest separation of the chancery jurisdiction was by Act of January 15, 1855, establishing a separate court of chancery at Little Rock. The judge of this court was appointed by the Governor for a four-year term, subject to confirmation by the Senate.

The language of the Constitution of 1836 was substantially carried forward into the Constitution of 1874, which provides in Article 7, Section 1:

> ". . . The General Assembly . . . when deemed expedient, may establish separate courts of chancery."

Further in Article 7, Section 15, it is stated:

> "Until the General Assembly shall deem it expedient to establish courts of chancery the circuit court shall have the jurisdiction in matters of equity, subject to appeal to the Supreme Court, in such manner as may be prescribed by law."

These 1874 Constitutional provisions clearly create within the General Assembly the power to establish courts of chancery. The power to "establish" necessarily carries with it the power to deal with the complete organization of the courts and, when necessary, to alter or amend for valid purposes. *Buzbee* v. *Hutton*, 186 Ark. 134, 52 S.W. 2d 647 (which dealt with the power of the General Assembly to alter the term of the chancery clerk of Pulaski County). Section 44 of Article 7 of the Constitution of 1874 in recognizing the existence of the Pulaski County Chancery Court, and permitting the General Assembly to deal with its continued existence, cannot reasonably be read to create a new class of "constitutional courts" so as to deprive the General Assembly of the express powers created by Sections 1 and 15 of Article 7.

A uniform, state-wide system of chancery courts was established by Act 166 of 1903 for which the initial judges were appointed, and subsequent elective terms were established at six years. Read in context, Section 5 of Act 325 seeks to reestablish a uniform time for the election of chancery judges in the newly apportioned districts and is consistent with the general purposes of Act 325. The power to extend legislatively established terms of office, so long as it is reasonable, is within the discretion of the General Assembly. *Lovell* v. *Democratic Central Committee*, 230 Ark. 811, 327 S.W. 2d 387. Nothing in the record indicates any effort on the part of the General Assembly to punish or reward any judicial officer, or unreasonably extend a term of office.

The decree is affirmed.

HARRIS, C.J., not participating.

Virgil WILLIAMS *v.* STATE of Arkansas

75-208

January 26, 1976

[redacted]

PER CURIAM

Appellant asks this Court to waive the page limitation on printing requirements as set forth in our Supreme Court Rule No. 11(f), and also that, pursuant to 11(g), the Attorney General be required to print the briefs since appellant is an indigent represented by the public defender. The motion states that in the present case the abstract and brief together exceed the 40 page limitation for printing as set out in the Supreme Court Rule No. 11(F).

Appellant misinterprets the rule with respect to page limitation. The 40 page restriction applies to the *brief only* and not to the abstract *and* brief. The pertinent portion of the rule reads as follows:

> The appellant's *brief* in chief, before its printing, shall not exceed 40 doublespaced typewritten pages, with a similar 10-page limit upon the reply brief, except that if either limitation is shown to be too stringent in a particular case it may be waived by the Court on motion. (Emphasis added)

Accordingly, appellant's motion with respect to the brief limitation is denied without prejudice to his right to renew the motion if deemed necessary.

Motion granted as to Rule No. 11(g).

Danny Mack BYARS *v.* STATE of Arkansas

CR 75-145 533 S.W. 2d 175

Opinion delivered February 2, 1976
[Rehearing denied March 22, 1976.]

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

Jim Guy Tucker, Atty. Gen., by: *Jackson Jones,* Asst. Atty. Gen., for appellee.

CARLETON HARRIS, Chief Justice. Danny Byars, appellant herein, was charged with possessing marijuana with intent to sell and deliver, and a jury returned a verdict of guilty, fixing punishment at six years confinement in the Department of Correction, and a $5,000 fine. From the judgment so entered, Byars brings this appeal.

Two issues are presented, the first being whether the affidavit, upon which a warrant was issued to search Byars' car, meets constitutional standards previously set out by United States Supreme Court decisions, and decisions of this court, and if such standards were not met, whether the search can be upheld on the ground that appellant consented thereto.

Because of information obtained, hereinafter discussed, Trooper W. D. Davidson of the Arkansas State Police, assign-

ed to Monroe County, accompanied by then Prosecuting Attorney Sam Weems and an area newspaperman, stopped Byars in his car at Main and Walnut Streets in Brinkley and took appellant into custody and drove him to the Brinkley jail where Byars was placed in a cell. Weems and the newspaperman remained at the scene of the arrest with the automobile. In the meantime, Captain James Neighbors of the State Police had arrived at the scene. While Byars was in the Brinkley jail, Davidson went to the Municipal Judge and requested a search warrant for appellant's car. The warrant was issued upon Davidson's affidavit, which reflects as follows:

> "That he has reason to believe that on the premises known as 'A green 1970 Ford LTD, Arkansas APA-299, driven by Danny M. Byars, W. M. from Cotton Plant, Arkansas' in the county of Monroe, State of Arkansas, there is now being concealed certain property, namely 'Marijuana, drugs and or narcotics or other paraphernalia' which are 'I have received certain information from a confidential source, of known reliability and who has furnished reliable information in the past, and that the suspect has a general reputation of transporting and selling marijuana, and drugs.'
>
> "And that the facts tending to establish the foregoing grounds for issuance of a Search Warrant are as follows: 'That the above marijuana, and drugs mentioned are being concealed in the above 1970 Ford LTD, bearing Arkansas license no. APA-299, driven by the above suspect, Danny M. Byars. Cotton Plant, Arkansas.' "

Davidson subsequently testified at a pretrial hearing that he gave the Municipal Judge no other information than that contained in the affidavit. After obtaining the warrant, Davidson returned to the police station, removed Byars from the jail and took him back to the scene, where appellant's car was still parked. The Brinkley Chief of Police, George Bethell, and a Brinkley policeman, Robert Gaddis, accompanied Davidson and Byars back to the scene. At this point, there is a slight conflict in the evidence. Bethell and Gaddis

testified positively that the warrant was read to appellant, Gaddis stating that Weems read the warrant to Byars. Davidson said that Byars stated, "You don't need the warrant, it is in the car." At any rate, the three officers all testified that Byars at this point stated, in effect, that he did not want to "cause a show and embarrass his family," and that what the officers were looking for was in the trunk of the car. Weems testified that his recollection was that appellant told Davidson, "What you are looking for is in the trunk," immediately after the arrest, and before the warrant was obtained. Thereafter, everyone returned to the police station, where the officers opened the trunk of the car and seized 38 sealed packages of green vegetable matter and 2 partially filled plastic bags containing green vegetable matter and assorted pills. Subsequently, at trial, a chemist from the State Department of Health testified that the vegetable matter tested positively as Cannabis Sativa L.

Apparently because of the unavailability of witnesses, and because appellant challenged both the validity of the search warrant and the voluntariness of an in-custody statement, the trial court held five separate pretrial hearings. During these hearings, the officers testified as heretofore mentioned, and at the conclusion of the hearings, the trial court held that the search warrant was valid, and, in addition, that appellant had given his permission for the car to be searched. The court did exclude from evidence the in-custody statement.

We think unquestionably, that under the decisions of the United States Supreme Court, and decisions of this court, the affidavit was insufficient to sustain the issuance of the search warrant. In *Aguilar* v. *Texas,* 378 U.S. 108, the court held that an affidavit based upon hearsay was insufficient to justify a search warrant, and this decision was expounded upon in the case of *Spinelli* v. *U.S.*, 393 U.S. 410. The court stated that:

> "[W]e first consider the weight to be given the informer's tip when it is considered apart from the rest of the affidavit. It is clear that a Commissioner could not credit it without abdicating his constitutional function.

> Though the affiant swore that his confidant was 'reliable,' he offered the magistrate no reason in support of this conclusion. *** The tip does not contain a sufficient statement of the underlying circumstances from which the informer concluded that Spinelli was running a bookmaking operation. We are not told how the FBI's source received his information — it is not alleged that the informant personally observed Spinelli at work or that he had ever placed a bet with him. Moreover, if the informant came by the information indirectly, he did not explain why his sources were reliable. [Citing cases]."

The court concluded that the informant's tip was not sufficient to provide the basis for a finding of probable cause, and added:

> "In the absence of a statement detailing the manner in which the information was gathered, it is especially important that the tip describe the accused's criminal activity in sufficient detail that the magistrate may know that he is relying on something more substantial than a casual rumor circulating in the underworld or an accusation *based merely on an individual's general reputation.*" [Our emphasis]

Our own decisions are to the same effect. In Walton and Fuller v. *State*, 245 Ark. 84, 431 S.W. 2d 462 (where the affidavit contained more information than the one before us), the law applicable to affidavits based on hearsay was summarized as follows:

> "While an affidavit for a search warrant may be based upon personal observations of the affiant, it may also be based, in whole or in part, on hearsay information. When it is based upon hearsay, the magistrate must be informed of some of the underlying circumstances from which an informant concluded that the object of a proposed search was where he said it was. He must also be advised of some of the circumstances from which the officer concludes that the informer (whose identity need not be then disclosed) is credible or his in-

formation reliable. An affidavit, which does not contain any affirmative allegation that affiant speaks with personal knowledge of the matters contained therein and also fails to show that information given by an unidentified source was not merely his suspicion, belief or conclusion, *has been held not to show probable cause..*" [Our emphasis]

Likewise, in *Cockrell* v. *State,* 256 Ark. 19, 505 S.W. 2d 204, the requirements were further explained as follows:

"In *Bailey* v. *State,* 246 Ark. 362, 438 S.W. 2d 321 (1969), we said: 'The purported affidavit, which is the sole evidence of probable cause afforded the magistrate, is defective in that it states a mere conclusion.' There we also said that when an officer obtains information from an informer (hearsay) 'the warrant should not issue unless good cause is shown in the affidavit for crediting that hearsay.' Then in *Walton* v. *State,* 245 Ark. 84, 431 S.W. 2d 462 (1968), we said: 'In determining probable cause for the issuance of a search warrant, the magistrate must judge for himself the persuasiveness of the facts relied upon by a complaining officer and may not accept a complainant's conclusions without question.' And in *Durham* v. *State,* 251 Ark. 164, 471 S.W. 2d 527 (1971), we said: 'It is elementary that a valid search warrant cannot be issued except upon probable cause determined from facts and circumstances revealed to the issuing magistrate . . . . ' "

A recent opinion by the United States Court of Appeals (Fifth Circuit), handed down August 1, 1973, sets out succinctly the requirements for a valid search warrant and the reasons therefor. The court in *U.S.* v. *Chavez,* 482 F. 2d 1268, first referred to what had been said in *Aguilar* v. *Texas, supra,* to-wit:

"[T]he magistrate must be informed of some of the underlying circumstances from which the informant concluded that the narcotics were where he claimed they were, *and* some of the underlying circumstances from which the officer concluded that the informant, whose

identity need not be disclosed, (citations omitted), was 'credible' or his information 'reliable.' 378 U.S. at 114, 84 S. Ct. at 1514.

The court then stated:

> "This test is typically referred to as 'Aguilar's two-pronged test." [Citing cases] The first 'prong' requires that the affidavit disclose particular facts or circumstances which justify concluding that the informant is a reliable or trustworthy person. The second requires specific facts or circumstances tending to demonstrate that the informant, in the instance in question, had gathered his information in a reliable manner. The theory underlying these twin requirements is that they are dictated by the long-standing principle that determinations of probable cause are to be made by 'neutral and detached magistrate[s],' rather than by 'officer[s] engaged in the often competitive enterprise of ferreting out crime.' *Johnson* v. *United States,* 1948, 333 U.S. 10, 14, 68 S. Ct. 367, 369, 2 L. Ed. 436, 440. If a magistrate accepted an affidavit which did not meet the first prong of the test, the theory went, he would abandon to the officer his constitutional function of making an independent determination; for his determination would then be entirely dependent upon the officer's judgment of the informant's credibility. Similarly, if he accepted an affidavit not meeting the second prong, he would abandon his function to the informant; then his determination would depend entirely upon the informant's judgment about the facts of the case."

Let it be borne in mind that Trooper Davidson testified that, in acquiring the search warrant, he did not relate any facts to the Municipal Judge in addition to what was said in the affidavit. Indeed, to only orally mention additional facts would likewise have been insufficient, though prior to 1971, we had held that an affidavit could be supplemented by oral evidence before the judicial authority from whom the search warrant was being sought. However, in 1971, the General Assembly passed an act which is codified as Ark. Stat. Ann. § 43-205 (Supp. 1973), and which provides:

> "A search warrant may be issued by any judicial officer of this State, *only upon affidavit sworn to before a judicial officer* which establishes the grounds for its issuance. [Our emphasis].

We commented upon this act in *Cockrell* v. *State, supra,* stating

> "The cited act thus eliminates from consideration any oral testimony unless it is reduced to writing and accompanied by affidavit. We have said that for an instrument to be an affidavit it must be 'reduced to writing and sworn to or affirmed before some person legally authorized to administer an oath or affirmation.' *Thompson* v. *Self,* 197 Ark. 70, 122 S.W. 2d 182 (1938). It is therefore important that magistrates and law enforcement officers take heed of § 43-205 and govern their actions accordingly."

It is thus apparent that the affidavit made by Trooper Davidson (a form filled in by the officer) was insufficient to support the issuance of a valid warrant.

Why additional information was not included in the affidavit before being presented to the Municipal Judge is not shown, for according to subsequent testimony, there was ample evidence which could have been included in the affidavit, and which would have supported the issuance of a valid warrant. We refer to the testimony of Kenneth McKee, a supervisor in narcotics for the Criminal Investigation Division of the State Police. In the first pretrial hearing, McKee testified that he had concluded an investigation, based on information received and had located a supply of marijuana hidden in a shed in Brinkley. The officer stated that he had conducted a "field test" on the substance in the shed and had determined that it was marijuana, before the marijuana was ever picked up by appellant. He also testified that he staked out the shed, and on December 27, saw Byars place the contraband in the trunk of his car, and drive away. He described the car and gave the license number to Davidson who had already been alerted about the possibility of a narcotics arrest, and Davidson, as previously stated, stopped the

automobile. Now, these events *all occurred before the search warrant was obtained.* Needless to say, if these facts, or even a substantial part of them, had been included in the affidavit, such affidavit would have been more than adequate,[1] *i.e.,* the recitation of the facts, with the additional statement that such information was obtained from a police officer (instead of stating a "confidential source") would have answered the test. See *United States* v. *Ventresca,* 380 U.S. 102; *United States* v. *Spach,* 518 F. 2d 866, 869 & n.1 (7th Cir. 1975); *United States* v. *DeCesaro,* 502 F. 2d 604 (7th Cir. 1974); *United States* v. *Welebir,* 498 F. 2d 346 (4th Cir. 1974); and *United States* v. *Various Gambling Devices,* 478 F. 2d 1194 (5th Cir. 1973). Of course, the fact that later testimony before the Circuit Court established that there was ample evidence to obtain a search warrant does not change the insubstantiality of the affidavit, nor does the fact that the marijuana was found in the car validate the search warrant. See *Walton and Fuller* v. *State, supra; Cockrell* v. *State, supra; Manning* v. *City of Heber Springs,* 239 Ark. 969, 395 S.W. 2d 557.

This brings us to the question of whether Byars gave a valid consent that his car be searched. In this connection, appellant relies upon *Bumper* v. *North Carolina,* 391 U.S. 543, where the United States Supreme Court said:

> "The issue thus presented is whether a search can be justified as lawful on the basis of consent when that 'consent' has been given only after the official conducting the search has asserted that he possesses a warrant. We hold that there can be no consent under such circumstances.
>
> "When a prosecutor seeks to rely upon consent to justify the lawfulness of a search, he has the burden of proving that the consent was, in fact, freely and voluntarily given. This burden cannot be discharged by showing no more than acquiescence to a claim of lawful authority. A search conducted in reliance upon a warrant cannot later be justified on the basis of consent if it turns out that the warrant was invalid. The result can be no different when it turns out that the State does

[1]It may be that Davidson was not advised of these facts.

not even attempt to rely upon the validity of the warrant, or fails to show that there was, in fact, any warrant at all."

We think the key statement is, "This burden cannot be discharged by showing no more than acquiescence to a claim of lawful authority," *i.e.*, we do not take *Bumper* to mean that an accused can never be deemed to have consented to a search, if a search warrant had been obtained and the accused was aware of that fact. Rather, we consider that this question is determined by the particular facts present when the consent is purportedly given. In *Hoover* v. *Beto,* 467 F. 2d 516 (1972), the United States Court of Appeals (Fifth Circuit) held that whether consent to search has been given is a question of fact. There, the officer went to the home of Hoover, knocked, and Hoover answered the door. The officer advised that he had a warrant to search the house; thereupon, Hoover replied, "that the search warrant was unnecessary, for (him) to come on in his house and look wherever (he) pleased." The officer had the warrant in his hand when he knocked on the door, and Hoover asked to see it after the officer went inside. The state trial court upheld the search on the ground that Hoover had advised that it was not necessary to have a search warrant and invited the officer to search the residence, and the Texas Court of Criminal Appeals subsequently affirmed, finding that there was an invitation to search. Thereafter, Hoover applied to the Federal District Court for a writ of *habeas corpus*, which application was denied, and Hoover appealed to the Circuit Court of Appeals. A three-judge panel of that court reversed the district court, but on rehearing *en banc*, the court held that the consent was not involuntary because of the use of the warrant.

In doing so, the court stated:

"The Texas State rule of law prior to *Bumper* was not substantially different from the principles upon which *Bumper* is based. In *Stanford* v. *State*, 1942, 145 Tex. Cr. R. 306, 167 S.W. 2d 517, on which the Texas court relied to find consent, the Texas Court of Criminal Appeals stated:

> 'This court has frequently held that when a party was advised that officers had a warrant to search the premises the mere statement of the party that it was all right to go ahead was not regarded as a waiver of the right to question the regularity of the warrant nor of consent to the search * * * On the other hand, where the party tells the officer that a warrant to search is unnecessary, and no issue is made on the question, consent is shown. * * * The question turns on the point as to whether the party really gives consent for the search, or merely acquiesces in the officer pursuing his legal rights under a valid warrant.' Id. 167 S.W. 2d at 519. (Citations omitted.)

"In *Stanford,* after the officer told defendant that he had a warrant, defendant stated that it was not necessary to have a warrant and 'to go any place in the hotel (he) wanted to go.' Id. at 519. The Court held that the defendant had consented to the search and that the consent operated as a waiver of the right to object to the validity of the warrant. That was the situation here, and it is apparent the circumstances differ from those in *Bumper.*"

It was then pointed out that in *Bumper,* the party in question was a sixty-six year-old widow of limited education, who was not a suspect at the time, nor an eventual defendant in the criminal proceedings, and while Hoover was a lawyer experienced in criminal law, this fact was not necessarily a controlling distinction, but only a circumstance.

The United States Supreme Court denied certiorari. 409 U.S. 1086 (December 18, 1972).

The same approach was taken by the Supreme Court of Tennessee in *Earls* v. *State,* 496 S.W. 2d 464. There, also, a search warrant which had been obtained was held to be invalid, but the court held that Earls validly consented to the search. The facts, pertinent to this discussion, are set out in the opinion as follows:

> "Armed with the search warrant, Sheriff Russell and five other officers went to the home of the defendant.

The defendant was not under arrest. The Sheriff handed him a copy of the warrant and began reading the original to him. As the Sheriff was reading, the defendant threw his copy to the ground and said: 'You needn't to have brought a search warrant. You gentlemen are welcome to search anywhere on my premises you want to search and take anything you find.' Following this the officers searched the defendant's home and took from it a torn love letter to 'Marsha'; and in his truck they found a number of tools, the most important of which was a pair of wire cutters subsequently determined by the laboratories of the Federal Bureau of Investigation to be those that had been used to sever a barbed wire fence surrounding the pond where the body of the deceased was found."

The court then stated:

"Can a search be justified as lawful on the basis of consent when that 'consent' has been given only after the official conducting the search has asserted that he possesses a warrant? The *Bumper* opinion holds, ' . . . that there can be no consent under such circumstances * * * (because) the situation is instinct with coercion — albeit colorably lawful coercion. Where there is coercion there cannot be consent.' The defendant relies on this language to support the proposition that consent can never be given under the situation involved in this case. The State argues that the *Bumper* opinion does not establish any such absolute prohibition. Rather, it contends that such a holding, if allowed to stand, 'would invalidate the well-established rule . . . that the voluntariness of a consent to search is a question of fact to be decided in light of the attendant circumstances by the trier of fact,' and relies on the following excerpt from the *Bumper* opinion in support of its contention:

> 'When a prosecutor seeks to rely upon consent to justify the lawfulness of a search, he has the burden of proving that the consent was, in fact, freely and voluntarily given. This burden cannot be discharged by showing no more than acquiescence to a claim of lawful authority.'

"We are asked, therefore, to examine and interpret the *Bumper* opinion in order to determine its requirements. We do not believe that the *Bumper* opinion is a blanket prohibition that no consent can ever be given where an invalid warrant is involved. Such a holding ignores the realities of life and denies the long standing principle that the existence and voluntariness of a consent to search and seizure is a question of fact to be decided in the light of attendant circumstances. *White* v. *United States,* 444 F. 2d 724 (10th Cir. 1971). The creation of such a legal fiction is inherent with danger. ***

"We believe that the *Bumper* case stands for the proposition that it is possible to give valid consent to search even after the existence of the warrant is made known, but the State must show by clear and convincing evidence that the consent is not based upon the warrant and was not coerced by other factors. It is conceivable that a person could give a voluntary and uncoerced consent to search even though he had been informed that the officers had a search warrant, but the State would bear the burden of showing that the consent was sufficiently independent of the warrant to remove the taint of its coercive nature.

"Having decided that the *Bumper* case concerns itself with the quantum of proof brought forth by the prosecution, we must now determine the standard for meeting the burden of proof and the factors that must be considered in its evaluation. The sole indication given in the *Bumper* case is that the burden cannot be discharged by showing no more than acquiescence to a claim of lawful authority.

"In the *Bumper* case the court emphasized that the party to whom the warrant was presented was 'a 66-year old Negro widow, in a house located in a rural area at the end of an isolated mile-long dirt road.' Further, there were 'four white law enforcement officers — the county sheriff, two of his deputies, and a state investigator —'. The court seems to imply that age, intelligence, socio-economic class, and environment are

factors to be considered in determining whether consent was given."

The holding in *Hoover* v. *Beto, supra,* was then discussed, and the court continued:

> "Hence, we are left with no explicit statement as to what is necessary to meet the burden. Instead we must simply make our decision on the basis of the circumstances presented in the case law. Having thoroughly reviewed the facts, we are of the opinion that Earls voluntarily consented to the search, and the fruits of the search were admissible into evidence against him. While Earls was not a lawyer with extensive criminal experience, he did nevertheless have some college education. The record further reveals that he engaged in investment trading of stocks and bonds. And, as was noted above when the Sheriff handed him a copy of the warrant, the defendant threw it to the ground and stated, 'You needn't to have brought a search warrant. You gentlemen are welcome to search anywhere on my premises you want to search and take anything you find.' In all cases the question turns on whether the party really consents to the search or merely acquiesces to the warrant. In our opinion, the facts 'constitute clear and convincing evidence of voluntary consent to the search, irrespective of the validity of the warrant.' Earls voluntarily consented to and invited the search. That consent was neither coerced nor compelled by the search warrant. As the court stated in the *Hoover* case, supra: The argument that express declarations of invitation and consent, such as were present here, constitute nothing 'more than acquiescence to a claim of lawful authority' neither comports with reason and logic nor with human experience and common sense."

Petition by Earls for Federal *habeas corpus* relief was denied by the district court on May 22, 1974, that court holding that it is the intent of the person giving the consent to search, and not the intention of those conducting the search, which controls in determining whether the consent was voluntarily given.

What are the facts in the case before us?

First, three officers all testified that Byars stated, in effect, that he did not want to "cause a show and embarrass his family"; that what the officers were looking for was in the trunk of the car. The prosecutor was of the opinion that this statement was made even before the warrant was obtained, but at any rate, the statement made by the appellant appears to have been spontaneous and voluntarily given. The record reflects that Byars, son of an Exxon distributor in Cotton Plant, graduated from high school and attended Henderson State University for two and one-half years, playing on the football team. It is thus apparent that appellant was not ignorant, or unlearned, and was apparently possessed of sufficient intelligence to make his own determination that the officers could search the automobile. His statement that he didn't desire to "embarrass" his family appears to be in accord with his background. Let another important fact be remembered, *viz.*, that there was never, in chambers or otherwise, any denial of the statements made, nor any contrary evidence presented.[2] We have concluded that Byars' consent to the search of the car was voluntarily given.[3]

It is also urged that there was insufficient evidence before the jury to sustain a conviction of possessing marijuana with the intent to sell and deliver. Ark. Stat. Ann. § 82-2617 (d) (Supp. 1973) provides:

> "Possession by any person of a quantity of any controlled substance listed in this subsection in excess of the quantity limit set out herein, shall create a rebuttable presumption that such person possesses such controlled substance with intent to deliver in violation of Section 1 (a) and (b) (this section) of this article. . . . "

The subsequent amount referred to in the subsection is one ounce of marijuana, and the evidence here reflects that

[2]In *Hock* v. *State,* 259 Ark. 67, 531 S.W. 2d 701 (1976), Hock vigorously denied that he had given his consent for a search.

[3]Of course, the fact that Byars was in custody does not invalidate consent. It is only a circumstance to be considered. *United States* v. *Watson,* — U.S. —, 96 S. Ct. 820 (1976); *United States* v. *Jones,* 475 F 2d 723 (5th Cir. 1973) *cert. denied,* 414 U.S. 841 (1974).

the officers recovered thirty-six pounds of marijuana from the car. Don Wise, a chemist with the Arkansas Department of Health and Drug Abuse Laboratory, testified that he ran a test on 10% of the confiscated vegetable matter (standard procedure), as earlier pointed out, and it tested positively as Cannabis Sativa L.

Appellant, in his brief, contends, however, that the evidence was insufficient for conviction, stating:

> "Definitely, there is no testimony that anyone at any time saw the defendant raise the lid of the trunk, and no evidence that the defendant had knowledge that the substance was in the trunk of the car driven by him.
>
> "The court will take judicial knowledge of the fact that the contents of the trunk of an automobile is not visible to anyone unless the lid to the trunk is raised.
>
> "It is fundamental that unless the defendant had knowledge that the substance was in the car it could not be held that he had it in his possession."

Of course, the testimony of McKee in chambers, heretofore summarized, would have quickly answered this argument, but neither this officer, nor the city officers, testified before the jury. Nor did Davidson mention the statement of Byars relative to not desiring to embarrass his family, and that what the officers were looking for was in the trunk. Be that as it may, Davidson testified relative to stopping the car, and the finding of the marijuana, and Officer Neighbors testified relative to the chain of custody after the confiscation from the officers to the Department of Health and Drug Abuse Laboratory. While we have no drug cases on the particular argument made by appellant, other jurisdictions provide much authority on the question. In *Eason* v. *United States,* 281 F. 2d 818 (9th Cir.), where two defendants denied knowledge of the presence of marijuana found hidden in the car, the court held that a jury could properly infer from the presence of narcotics in the car that the defendants had knowledge of such presence. The argument that some stranger could have secreted the marijuana in the car, was rejected, the court noting that while this *could* have happened, its possibility was not "so patently reasonable as to warrant our ruling as a matter of law that an inference of knowledge

was not available from the facts of the case." This approach has been affirmed subsequently many times. In *U.S.* v. *Dixon,* 460 F. 2d 309 (9th Cir.), *cert. denied,* 409 U.S. 864 (1972), that court decided a case quite similar to the instant litigation. Dixon attempted to drive his car across the Mexican border, but a search revealed thirty pounds of marijuana hidden in the trunk and under the rear seat. Dixon argued that the evidence was not sufficient to prove that he knew that marijuana was in the car. However, the court affirmed the conviction, stating:

> "[T]he simple act of driving a loaded car provides a substantial basis for a conclusion of knowledge. [Citation omitted.] The jury was not obliged to believe Dixon's story that, unknown to him, someone else loaded the car."

See also *People* v. *Chavez,* 511 P. 2d 883 (Col.) and *State* v. *Potts,* 464 P. 2d 742 (Wash.).

Here, it is undisputed that the appellant had control of the automobile in which the marijuana was hidden — he was its driver and sole occupant. The amount of the drugs recovered — plus its form, *i.e.,* individual "bricks" that would facilitate sale or delivery, in addition to what has already been pointed out, certainly was substantial evidence to support the verdict of the jury.

Finally, it is contended that the verdict of the jury was ambiguous and not corrected before adjournment. When the jury retired, the court gave the following form for verdict:

> "We, the jury, find the defendant, Danny Mac Byars guilty as charged in the information and fix his punishment at _____ (not to exceed 10) years in the State Department of Correction or a fine of _____ (not to exceed $15,000.00) or both imprisonment and fine."

In returning the verdict, the jury had written in the first blank the figure "6" and the second blank "$5,000.00." Appellant points out that the verdict form uses the word "or" instead of "and." When this verdict, signed by the foreman, was read, the court immediately inquired if the jury meant both the 6 years confinement and the 15,000.00 fine, and the

foreman answered in the affirmative. The court further inquired of all members of the jury if this was the verdict, and all agreed. We find no error.

Affirmed.

FOGLEMAN, J., concurs.

GEORGE ROSE SMITH, BYRD and HOLT, JJ., dissent.

JOHN A. FOGLEMAN, Justice, concurring. I agree with the majority and with Mr. Justice Byrd that the search warrant was invalid. I agree with Mr. Justice Byrd that the state did not meet its burden of proving consent. I would add that the search was not permissible as incident to the arrest. See *Chambers* v. *Maroney*, 399 U.S. 42, 90 S. Ct. 1975, 26 L. Ed. 2d 419 (1970). I still would hold that the search was not unreasonable.

In spite of the fact that the affidavit for the search warrant failed to properly establish probable cause for a search, there was certainly probable cause for Byars' arrest. By the same token, there was probable cause to search the automobile driven by him for contraband, marijuana. Ever since *Carroll* v. *United States*, 267 U.S. 132, 45 S. Ct. 280, 69 L. Ed. 543 (1925), it has been recognized that automobiles may be searched without a warrant in circumstances which would not justify the search of a house or office, provided that there is probable cause to believe that the car contains articles that the officers are entitled to seize. The United States Supreme Court said this in *Carroll:*

> "The measure of legality of such a seizure is, therefore, that the seizing officer shall have reasonable or probable cause for believing that the automobile which he stops and seizes has contraband liquor therein which is being illegally transported."

In *Chambers* the precepts of *Carroll* were applied. In speaking of *Carroll*, the *Chambers* court said:

> The Court also noted that the search of an auto on

probable cause proceeds on a theory wholly different from that justifying the search incident to an arrest:

"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."

Finding that there was probable cause for the search and seizure at issue before it, the Court affirmed the convictions.

In *Chambers* it was held that given probable cause for a search, an intense warrantless search of the automobile after it had been removed to the police station was not unreasonable. A reading of *Chambers* in the light of *Texas* v. *White,* 423 U.S. 67, 96 S. Ct. 304, 46 L. Ed. 2d 209 (1975), makes the search of an automobile reasonable if there is probable cause, and the fact that an automobile, rather than a house or an office is searched, furnishes exigent circumstances. In *White* consent was refused, and the automobile had been taken to the police station by a police officer. The search was not conducted until about 45 minutes after it had been brought to the station house, duri g which time the officers were questioning the arrested driv r of the automobile.

In this case the officers took Byars into custody, put him in jail, obtained an invalid warrant, then took Byars back to the automobile, and after he made the statements set out in full in the dissenting opinion, seized the automobile and returned both Byars and the automobile to the police station where the search was conducted. It seems to me that the seizure was justified under *Chambers* and that the search for contraband at the police station without a warrant can be justified.

Even where contraband is not involved, we have sustained warrantless searches of automobiles based on probable cause. See *Anderson* v. *State,* 256 Ark. 912, 511 S.W. 2d 151; *Roach* v. *State,* 255 Ark. 773, 503 S.W. 2d 467; *Cox* v. *State,* 254 Ark. 1, 491 S.W. 2d 802; *Moore* v. *State,* 244 Ark. 1197, 429

S.W. 2d 122.

I should note that *Steel* v. *State,* 248 Ark. 159, 450 S.W. 2d 545, was decided on the basis of validity of a search incident to an arrest, applying *Chimel* v. *California,* 395 U.S. 752, 89 S. Ct. 2034, 23 L. Ed. 2d 685, reh. den. 396 U.S. 869, 90 S. Ct. 36, 23 L. Ed. 2d 124 (1969). This was before the decision in *Chambers.* In a footnote to that opinion it was pointed out that nothing in *Chimel* purported to modify or affect the rationale of *Carroll. Steel* probably would have been decided differently after *Chambers,* or if the searches in *Steel* has been considered in the light of anything except a search incident to an arrest and a search with a warrant.

I would affirm the judgment.

CONLEY BYRD, Justice, dissenting. I agree with the majority the search warrant is invalid. I disagree with the majority opinion that the evidence here is sufficient to show that appellant Byars consented to the search of his automobile.

The facts in the case before us show that appellant Byars was first arrested on the streets in the city of Brinkley and then placed in jail. After the officers obtained a search warrant, they removed appellant from the jail and took him to his automobile where the search warrant was served. On cross-examination of Sergeant Davidson at pages 169-170 of the record, the following occurred:

> "Q. Alright what statements did the defendant make there?
>
> A. Only the request that uh I don't remember just what he did say but he indicated that he didn't want a show, that he wanted to handle it quietly. He said 'what you are looking for is in the car.' At this time and uh he want to embarrass his family and at this time we all loaded up, his car was driven to the police station by some officer. I don't know who drove the car.
>
> Q. Let me ask you sir whether or not he was emphatic about not wanting to embarrass his family?

A. To me yes sir he was emphatic.

Q. That seemed to be a thing that was bearing on his mind?

A. It was a concern of his, yes.

Q. Would you say at that point that the matter of concern of his family of embarrassing his family, whatever the right term is, worrying them, embarrassing them, concerning them or whatever it may be was foremost in his mind?

A. I couldn't answer that. I don't know what was foremost in his mind.

Q. It was obviously toward the front of his mind?

A. Yes sir, it was in his mind.

Q. Because he was, you say, emphatic on that point?

A. Yes.

Q. Now do you remember his saying anything else?

A. No sir. He was not asked anything pertaining to the case. I don't recall him volunteering anything else."

Sergeant Davidson made a written return on the search warrant, stating as follows:

"RETURN

I received the attached search warrant 12-27-72 and have executed it as follows: On 12-27-72 at 10:00 a.m. I searched the premises described in the warrant and I left a copy of the Warrant with Danny M. Byars together with a receipt for the items seized.

The following is an inventory of property taken pursuant to the warrant; 38 sealed packages of green

vegetable matter, 2 partially filled plastic bags containing a green vegetable matter, 1 small scales, 1 pipe (smoking), 1 fuse box containing 8 orange colored pills and 2 pills wrapped in aluminum foil, and 1 small vial.

This inventory was made in the presence of J. L. Neighbors and George Bethell.

I swear that this inventory is a true and detailed account of all the property taken by me on the warrant.

Signed by W. D. Davidson on 12-27-72."

To distinguish this case from our opinion in *Hock* v. *State*, 259 Ark. 67, 531 S.W. 2d 701 (1976), the majority relies upon *Hoover* v. *Beto*, 467 F. 2d 516 (5th Cir. 1972) and *Earls* v. *State*, 496 S.W. 2d 464 (Tenn. 1973). There is a substantial difference between those cases and this case. In both of those cases, the accused was at home and not under arrest when the search was made. Furthermore, both of those cases involved an invitation to search instead of an acquiescence to lawful authority.

Hoover v. *Beto*, *supra*, involved the conviction of an experienced Texas criminal lawyer and former mayor of the City of Pasadena, Texas, as an accomplice to the crime of robbery. When the officer knocked at Hoover's home and told him that he had a search warrant, Hoover told the officer, "that the search warrant was unnecessary, for [him] to come on in his house and look wherever [he] pleased." Hoover acknowledged on appeal that the words he spoke constituted an invitation to the police to enter and search but argued:

> "The invitation which appellant extended to the searching officers to come into his house upon his being presented with that misrepresentation [the allegedly invalid search warrant] was induced by, and solely a product of, that misrepresentation.
>
> "Therefore any consent evidenced by that invitation could not have wholly been a product of the appellant's free will."

The Fifth Circuit after recognizing the sufficiently clear and positive evidence test then held as follows:

> ". . . Our own view of the testimony is that when attorney Sam Hoover told Police Officer Hodges that his warrant was not necessary and to come on into his home and search wherever he wanted, this constituted clear and convincing evidence of voluntary consent to the search, irrespective of the validity of the warrant. Hoover voluntarily consented to and invited the search. That consent was neither coerced nor compelled by the search warrant. The argument that express declarations of invitations and consent, such as were present here, constitute nothing 'more than acquiescence to a claim of lawful authority' neither comports with reason and logic nor with human experience and common sense.
>
> . . .
>
> "The dissent filed herein is merely a lengthy restatement of the views of the panel in the original decision in this case. We are impelled, however, to make further elaboration of the majority opinion because of what we consider to be erroneous statements of law and fact in the dissent.
>
> . . .
>
> "As to the alternative question of Hoover having voluntarily consented to the search and, in fact, having invited it, the dissent insists that *Bumper* v. *State of North Carolina,* 391 U.S. 543, 88 S. Ct. 1788, 20 L. Ed. 2d 797 (1968), to which we have already referred, is expressed in absolute terms and consent to search is legally impossible where an invalid search warrant is presented. Curiously, in making this assertion the dissent appears to abandon that part of the original panel decision which asserted that 'while it is possible to give valid consent to search even after the existence of the warrant is made known, the State must show by clear and convincing evidence that the consent is not based upon the warrant and was not coerced by any other factors' and

further stated, 'It is conceivable that a person could give a voluntary and uncoerced consent to search even though he had been informed that the officers had a search warrant. But the State would bear the burden of showing that the consent was given sufficiently independent of the warrant to remove the taint of its coercive nature.' 439 F. 2d at 920. In our opinion the panel's holding in this regard, rather than the present dissent, correctly states the law. Resolution of the question of consent and invitation to search under such circumstances is dependent upon the facts of each case. *Bumper* was decided on its facts which are substantially dissimilar to those facts of this case, as we have already pointed out. Yet the dissent argues that 'Nowhere does *Bumper* draw a distinction, as the majority in this case seemingly does, between an invitation and acquiescence.' The answer to this argument is plain — *Bumper* did not involve an invitation, such as occurred here."

Consequently, as can be seen in *Hoover* v. *Beto, supra,* relied upon by the majority, there was an "invitation" to search by a seasoned and experienced criminal lawyer.

The next opinion upon which the majority relies is *Earls* v. *State,* 496 S.W. 2d 464 (Tenn. 1973). There the defendant was not under arrest, and when the sheriff handed him a copy of the warrant and began reading the original, Earls threw his copy to the ground and stated: "You needn't to have brought a search warrant. You gentlemen are welcome to search anywhere on my premises you want to search and take anything you find." The Tennessee Supreme Court, after stating a preference for Justice Black's dissent in *Bumper* v. *North Carolina,* 391 U.S. 543 (1968), stated its understanding of the *Bumper* decision to be as follows, to wit:

"We believe that the *Bumper* case stands for the proposition that it is possible to give valid consent to search even after the existence of the warrant is made known, but the State must show by clear and convincing evidence that the consent is not based upon the warrant and was not coerced by other factors. It is conceivable

> that a person could give a voluntary and uncoerced consent to search even though he had been informed that the officers had a search warrant, but the State would bear the burden of showing that the consent was sufficiently independent of the warrant to remove the taint of its coercive nature."

The Tennessee Court, after reviewing the conduct of Earls and his statement when the sheriff started reading the original warrant, then concluded:

> ". . . Earls voluntarily consented to and invited the search. That consent was neither coerced nor compelled by the search warrant. . . . "

In *Hock* v. *State,* 259 Ark. 67, 531 S.W. 2d 701 (1976), the issue was whether the State had sustained its burden of showing consent. We there pointed out:

> "The latest expression with reference to the burden cast upon the State to show consent to search is contained in *Bumper* v. *North Carolina,* 391 U.S. 543, 88 S. Ct. 1788, 20 L. Ed. 2d 797 (1968), where it is stated:
>
> > 'When a prosecutor seeks to rely upon consent to justify the lawfulness of a search, he has the burden of proving that the consent was, in fact, freely and voluntarily given. This burden cannot be discharged by showing no more than acquiescence to a claim of lawful authority. A search conducted in reliance upon a warrant cannot later be justified on the basis of consent if it turns out that the warrant was invalid. The result can be no different when it turns out that the State does not even attempt to rely upon the validity of the warrant, or fails to show that there was, in fact, any warrant at all.'
>
> The Supreme Court, in *Bumper, supra,* cited *Judd* v. *United States,* 190 F. 2d 649 (D.C. Cir. 1951), favorably as indicating the extent of the burden placed upon the State to show consent. With reference to searches and seizures made without a proper warrant, the Court in

Judd v. *United States, supra* said:

> 'Searches and seizures made without a proper warrant are generally to be regarded as unreasonable and violative of the Fourth Amendment. True, the obtaining of the warrant may on occasion be waived by the individual; he may give his consent to the search and seizure. But such a waiver or consent must be proved by clear and positive testimony, and it must be established that there was no duress or coercion, actual or implied. . . . The Government must show a consent that is 'unequivocal and specific' . . . 'freely and intelligently given.' . . . Thus 'invitations' to enter one's house, extended to armed officers of the law who demand entrance, are usually to be considered as invitations secured by force. . . . Intimidation and duress are almost necessarily implicit in such situations; if Government alleges their absence, it has the burden of convincing the court that they are in fact absent."

In *Schneckloth* v. *Bustamonte*, 412 U.S. 218, 93 S. Ct. 2041, 36 L. Ed. 2d 854 (1973), the issue before the Court was what the prosecution must prove to demonstrate that a consent, given by one not under arrest, was voluntary. In holding that voluntary consent did not require a *Miranda* warning, the Court, with respect to "coercion" or "consent", stated:

> "But the Fourth and Fourteenth Amendments require that a consent not be coerced, by explicit or implicit means, by implied threat or covert force. For, no matter how subtly the coercion was applied, the resulting 'consent' would be no more than a pretext for the unjustified police intrusion against which the Fourth Amendment is directed. In the words of the classic admonition in *Boyd* v. *United States,* 116 U.S. 616, 635:
>
> > 'It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. This can

only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon.'

The problem of reconciling the recognized legitimacy of consent searches with the requirement that they be free from any aspect of official coercion cannot be resolved by any infallible touchstone. To approve such searches without the most careful scrutiny would sanction the possibility of official coercion; to place artificial restrictions upon such searches would jeopardize their basic validity. Just as was true with confessions, the requirement of a 'voluntary' consent reflects a fair accommodation of the constitutional requirements involved. In examining all the surrounding circumstances to determine if in fact the consent to search was coerced, account must be taken of subtly coercive police questions, as well as the possibly vulnerable subjective state of the person who consents. Those searches that are the product of police coercion can thus be filtered out without undermining the continuing validity of consent searches. In sum, there is no reason for us to depart in the area of consent searches, from the traditional definition of 'voluntariness.' "

In *McCreary* v. *Sigler,* 406 F. 2d 1264 (8th Cir. 1969), one Officer Parker arrived at an apartment with an invalid search warrant. When one Mr. Bradbury, the occupant, was advised that the officers had a search warrant, he got up to get a drink and then said: "You don't need it. Go ahead and search. I pay the rent here." In holding the warrant invalid, the Eighth Circuit (Matthes, Gibson and Lay) stated:

"Upon reconsideration of *Bumper* v. *North Carolina,* 391 U.S. 543, 88 S. Ct. 1788, 20 L. Ed. 2d 797 (1968), decided subsequent to the district court's findings of

'consent' below, we hold that any consent given by Bradbury must be viewed as 'impliedly coerced.' The Supreme Court has expressly held that ' "consent" * * * given only after the official conducting the search has asserted he possesses a warrant' is not a valid consent when the only showing is 'no more than acquiescence to a claim of lawful authority.' Id. at 548-549, 88 S. Ct. at 1792.

The facts supporting 'voluntary consent' are much stronger in *Bumper* than here. See 391 U.S. at 547 n. 8, 88 S. Ct. 1788 n. 8. The Supreme Court, however, has made clear:

> 'When a law enforcement officer claims authority to search a home under a warrant, he announces in effect that the occupant has no right to resist the search. The situation is instinct with coercion — albeit colorably lawful coercion. Where there is coercion there cannot be consent.' Id. at 550, 88 S. Ct. at 1792.

See also *Overton* v. *New York,* 393 U.S. 85, 89 S. Ct. 252, 21 L. Ed. 2d 218 (1968) (per curiam).

An officer must have a legal basis for obtaining access to private living quarters under the badge of his office and the authority of the law. The clear logic of this rule is that a search conducted by reason of consent given upon representation of a warrant validly issued will not be lawful unless the warrant itself was validly issued."

I submit that whether you follow the line of authorities cited by the majority or the ruling of the Eighth Circuit in *McCreary* v. *Sigler,* 406 F. 2d 1264 (1969), there is not sufficient proof in this record to sustain the State's burden of proving a consent to search — *i.e.* by clear and positive evidence.

For the reasons stated, I respectfully dissent.

HOLT, J., joins in this dissent.

A. V. SHANNON *v.* FIDELITY NATIONAL BANK of West Memphis

75-226 531 S.W. 2d 958

Opinion delivered February 2, 1976

Troutt, Moore & Johnson and *Spears & Sloan,* for appellant.

Skillman, Durrett & Davis, for appellee.

GEORGE ROSE SMITH, Justice. This appeal presents a single question under our "long-arm" statute. In 1972 R. S. Pitts executed a $15,000 promissory note to the plaintiff-appellee, Fidelity National Bank of West Memphis, Arkansas. The appellant Shannon, a resident of Tennessee, came to the bank and endorsed a guaranty of payment on the back of the note. Pitts defaulted and went bankrupt. Shannon, upon being sued in Arkansas, appeared specially and contended that he was not subject to personal jurisdiction here. This appeal is from a judgment rejecting that plea and holding Shannon liable upon his guaranty.

The judgment is correct. The long-arm statute confers personal jurisdiction over a nonresident as to a cause of action arising from his "transacting any business in this State." Ark. Stat. Ann. § 27-2502 (Supp. 1975). In construing the statute in *Wichman* v. *Hughes,* 248 Ark. 121, 450 S.W. 2d 294 (1970), we cited a number of cases holding that personal jurisdiction may be sustained on the basis of "a single contractual transaction." To that list may be added *Pacer Inter-*

national Corp. v. *Otter Distributing Co.*, 273 N.Y.S. 2d 829, 51 Misc. 2d 737 (1966), where, as here, the nonresident executed a guaranty within the state. Hence the statute, as we have construed it, confers personal jurisdiction over Shannon, because the bank's cause of action arises from Shannon's having transacted business in Arkansas.

Affirmed.

Lee Otis HARRIS *v.* STATE of Arkansas

CR 75-50 532 S.W. 2d 423

Opinion delivered February 2, 1976
[Rehearing denied March 8, 1976.]

Christopher C. Mercer, Jr., for appellant.

Jim Guy Tucker, Atty Gen., by: *Jackson Jones*, Asst. Atty. Gen., for appellee.

GEORGE ROSE SMITH, Justice. Theotis Maxwell and the appellant Lee Otis Harris were jointly charged with the first-degree murder of Ellis Robb. In separate trials both defendants were found guilty and were sentenced to life imprisonment without parole. Maxwell's conviction was upheld last month. *Maxwell* v. *State*, 259 Ark. 86, 531 S.W. 2d 468 (1976). Harris now argues three points for the reversal of his conviction.

First, defense counsel, in asserting that prosecution by information rather than by indictment is unconstitutional, concedes with candor that we have consistently rejected that contention. *Ellingburg* v. *State*, 254 Ark. 199, 492 S.W. 2d 904 (1973). In the case at bar, however, the further argument is made that the defendant's confinement pending trial, on the basis of the information alone, unconstitutionally deprived him of his right to a judicial determination of the existence of probable cause for his pretrial detention.

That contention is answered by the Supreme Court's opinion in *Gerstein* v. *Pugh*, 420 U.S. 103 (1975). There the court said that a judicial hearing is not prerequisite to prosecution by information and that illegal detention does not void a subsequent conviction. The court recognized that "although a suspect who is presently detained may challenge the probable cause for that confinement, a conviction will not be vacated on the ground that the defendant was detained pending trial without a determination of probable cause." Thus the challenge here comes too late.

Second, the appellant argues that when the trial court sustained a motion to quash the entire jury wheel, the jury commissioners should have then been directed to select only a panel of jurors for the trial of this case rather than a number

sufficient to satisfy the requirements for a new jury wheel. Ark. Stat. Ann. § 39-214 (Supp. 1975). The argument is without merit, as we held in the companion *Maxwell* case, *supra*. A defendant cannot be prejudiced by being afforded an even greater cross-section of eligible jurors than the minimum that the statute might be construed to require.

Third, counsel insists that Act 438 of 1973, reinstating capital punishment in Arkansas, is invalid, as conferring upon the jury more discretion in the fixing of punishment than is permitted by the majority opinions in *Furman* v. *Georgia*, 408 U.S. 238 (1972). In cases involving capital punishment we have upheld the new statute. *Collins* v. *State*, 259 Ark. 8, 531 S.W. 2d 13 (1975); *Neal* v. *State*, 259 Ark. 27, 531 S.W. 2d 17 (1975). Further, this appellant received only a sentence to life imprisonment without parole. We find nothing in any of the opinions in *Furman* to indicate that the court's restrictions upon a jury's discretion in the matter of punishment apply to anything except the imposition of the death penalty. If the court's holding is extended to life imprisonment as well, we can discern no stopping point. Accordingly we hold that the appellant's case does not fall within the purview of the *Furman* decision.

Other objections, not argued here, were made at trial, but we find no prejudicial error.

Affirmed.

ARKANSAS STATE HIGHWAY COMMISSION
v. W. R. RICE, et ux

75-138 532 S.W. 2d 727

Opinion delivered February 2, 1976
[Rehearing denied March 8, 1976.]

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

Dwain Hodge, William Wright, Hardin, Jesson & Dawson, H. Clay Robinson, Pearce, Robinson, McCord & Rotenberry, for appellees.

JOHN A. FOGLEMAN, Justice. In this case two actions are consolidated. In the first proceeding (1971), the appellant filed a petition in chancery court seeking to compel the appellees to consummate a contract for the sale of their land to the appellant. The appellee landowners answered denying appellant's right to specific performance. They also filed a motion to transfer the case to the circuit court specifically asserting they were entitled to have a jury determine their damages for the acquisition of their lands by the appellant for highway purposes. The appellant resisted their motion to transfer. The chancellor denied the appellant's petition for specific performance. Although it appears that neither party requested it, the chancellor ordered the property involved in the litigation condemned, granted the appellant immediate possession, and retained jurisdiction to assess damages for condemnation. The appellant, thereafter, proceeded with the construction of the highway.

About three years later, or in 1974, the appellant, through its contractor, had completed the highway across appellees' lands except for the erection of a fence between appellees' property and the highway. This fence would have affected appellees' access. When the contractor attempted to

complete the construction, appellees sought an injunction asserting that the 1971 decree was a nullity and that the condemnation provision in that decree was beyond the chancery court's jurisdiction. The 1971 and 1974 cases were consolidated. The present chancellor issued a permanent injunction against the appellant and held that the 1971 decree was a nullity because the chancery court had no jurisdiction to condemn appellees' lands and access rights. Appellant first contends that the chancellor erred in declaring its 1971 decree a nullity and dismissing the case.

Ark. Stat. Ann. § 76-532 (Repl. 1957) empowers the Arkansas State Highway Commission to condemn property. § 76-533 states with specificity the manner in which that authority is to be exercised. The commission exercises its power "by filing an appropriate petition and condemnation in the Circuit Court of the County in which the property sought to be taken is located," then "it shall be the duty of the Circuit Court to impanel a jury of twelve (12) men, as in other civil cases, to ascertain the amount of compensation which the State Highway Department shall pay, and the matter shall proceed and be determined as in any other civil cases." The legislature has authorized only the circuit courts to condemn property for the Arkansas State Highway Commission.

Appellant argues, however, that once the chancery court had jurisdiction, which it did in appellant's action for specific performance in 1971, it has jurisdiction for all purposes and, therefore, had a right under the "clean up doctrine" to retain jurisdiction for eminent domain purposes and award damages for the taking of appellees' land. There are cases where we have recognized that equity can retain jurisdiction for condemnation purposes under the "clean up doctrine." For example are *Selle* v. *City of Fayetteville,* 207 Ark. 966, 184 S.W. 2d 58; *Burton* v. *Ward, Chancellor,* 218 Ark. 253, 236 S.W. 2d 65; and *Gregory* v. *Oklahoma Mississippi River,* 223 Ark. 668, 267 S.W. 2d 953. In *Gregory,* suits were brought in the circuit court by the condemnor to condemn easements. However, *the property owners* requested the cause be transferred to chancery court. The owners later made an effort to have it transferred back to the circuit court. The request to remand was denied and on this issue, we said:

> It is our view that equity was definitely *selected* [by the appellant landowners] as an appropriate forum and the appellants are not now entitled to lift the cause from the court they asserted to be the only one with sufficient jurisdiction to afford complete relief. **** [W]here equity jurisdiction exists in respect of an essential element of the litigation and such *jurisdiction* is *invoked*, the process draws full power to determine all of the rights that are involved. (Emphasis ours.)

In the case at bar, the issue however is not whether the chancery court can award damages once it acquires jurisdiction but whether the chancery court had jurisdiction. The first action originated in chancery court when the appellant condemnor brought an action for specific performance. The appellee landowners then asked that the action be transferred to circuit court to give them their statutory right of a trial by jury for the award of their just compensation. The court, as indicated, after denying appellant's motion for specific performance, held that the highway department needed the land, condemned it, and retained jurisdiction to determine damages. It does not appear that the appellee property owners or the appellant ever requested the chancery court at any time to hear those aspects of the case. To the contrary, let it be remembered, they resisted it from the very beginning. The landowners neither selected not wanted equity jurisdiction. We are not favored with any citation where this court has held that the chancery court can use the "clean up doctrine" to assume jurisdiction in a condemnation case where the issue was not before the court, and the landowners, from the beginning, as here, resisted equity jurisdiction. We feel that it is the better rule of law to limit and not extend equity jurisdiction in condemnation cases. Cf. *Spitzer* v. *Barnhill*, 237 Ark. 525, 374 S.W. 2d 811. If the action of the court below in the first proceeding was sanctioned by this court, then a condemning authority could come into equity seeking some equitable relief and then by the "clean up doctrine" keep the unwilling landowner in equity, thereby depriving him of his right to a jury trial on the issue of just compensation. We do not feel this is the import of those cases, which have accorded jurisdiction, under the "clean up doctrine," to equity on condemnation cases. As indicated, the legislature has given the

landowner the right to have his damages ascertained by a jury of his peers only in a circuit court proceeding.

Therefore, we hold the chancery court lacked jurisdiction in this case to condemn the property and award damages. Since the court lacked jurisdiction in the first instance, the failure to appeal is of no consequence inasmuch as a lack of jurisdiction is open, as here, to collateral attack. *Catlett* v. *Republican Party of Arkansas,* 242 Ark. 283, 413 S.W. 2d 651.

Appellant next contends for reversal that the trial court erred in making the injunction issued in 1974 permanent. We conclude that this proceeding was prohibited as a suit against the state by Art. 5 § 20 of the Constitution of Arkansas and an attempt to accomplish indirectly what clearly could not have been done directly, just as much as was the prayer of the landowner for mandamus to require the highway department to institute condemnation proceedings in *Bryant* v. *Arkansas State Highway Commission,* 233 Ark. 41, 342 S.W. 2d 415.

The very fact that the decree held void was a nullity and that it was so treated by the landowners from the date of its entry is a critical background fact in evaluating the standing of the landowner to enjoin the highway department's contractor from completing the construction. There can be no doubt that the landowners knew not only that the highway department had entered upon their land and done substantial construction, but that the highway department was engaged in the construction of a controlled access highway. The mere fact that the chancery court had no power to condemn the land in a specific performance suit does not eliminate the notice to the landowner of the purposes of the highway department disclosed in connection with that proceeding.

The complaint in the specific performance suit contained an allegation that the highway department was constructing a highway known as the Waldron Bypass, as job 4612, and that the lands to which the highway department sought a deed were needed for that purpose. The chancery court denied specific performance after a trial but made a fin-

ding that the part of the Rice tract described in the deed *and rights of easement of access and ingress and egress to and from the lands remaining were needed for highway purposes.* A plat supporting the highway department's position and the proposed warranty deed were exhibited to the highway department's complaint in the specific performance action. The decree in that action referred to the exceptions to the limitation of rights of ingress and egress shown on that plat.

The landowners sat idly by for 2½ years and watched construction without taking any steps whatever to protect their rights until the contractor undertook the very last part of the construction necessary to complete the job, i.e., building a fence to prevent ingress and egress to and from the Rice property at every point along the right-of-way boundary. The idea that the Rices did not know what the highway department was doing is unthinkable. To say the very least, they had knowledge of such facts sufficient to put them on inquiry and to charge them with knowledge of what that inquiry would unquestionably have disclosed. See *Woods* v. *Wright*, 254 Ark. 297, 493 S.W. 2d 129. There is not the slightest suggestion that there had been any deviation in the plans contemplated when the highway department filed the specific performance suit. As a matter of fact, at the very outset of the hearing which resulted in the decree now on appeal, while the parties were entering into certain stipulations, it was stated, in answer to an inquiry by the chancellor, that the plans for construction under job 4612 introduced by stipulation were the identical plans which were attached to the pleadings in the specific performance case, without any contradiction by the landowners.

Since the decision of *Arkansas State Highway Commission* v. *Partain*, 192 Ark. 127, 90 S.W. 2d 968, it has been clearly recognized that a landowner who acts before there has been a taking of his property or property rights may enjoin the taking until such time as just compensation has been paid or secured to him. In that case, however, it was stated:

> The property owner has no cause of action which may be maintained to recover his damages against the State. *Arkansas State Highway Commission* v. *Nelson Bros.*,

> [191 Ark. 629, 87 S.W. 2d 394]. If he permits an agency of the State, such as the Highway Commission to appropriate his property he is limited to such relief as the State may provide.

We were not long in applying this rule to other landowners affected by the same taking as that involved in *Partain.* In *Arkansas State Highway Commission* v. *Kincannon, Judge,* 193 Ark. 450, 100 S.W. 2d 969, we held that other landowners who suffered the same damage as Partain from the same highway construction could not intervene in the condemnation suit filed as a result of the decision in the Partain case, because the highway commission had taken no action in regard to condemnation of the property of the intervening landowners and their intervention was, in effect, a suit against the state. See also, *Arkansas State Highway Commission* v. *Bush,* 195 Ark. 920, 114 S.W. 2d 1061.

In *Bryant* v. *Arkansas State Highway Commission,* supra, we held that once there had been a taking, any action to coerce the state was a suit against the state. In sustaining a demurrer to a complaint for mandamus to require the highway department to file an eminent domain proceeding against the plaintiff landowners, we said:

> ***But where the landowner stood by and permitted the Commission to take, occupy, and damage his lands, he could not maintain an action against the Commission to recover his damages, for such a coercive proceeding would constitute a suit against the State. *Federal Land Bank of St. Louis* v. *Arkansas State Highway Commission,* 194 Ark. 616, 108 S.W. 2d 1077; *Arkansas State Highway Commission* v. *Bush,* 195 Ark. 920, 114 S.W. 2d 1061.

In *Federal Land Bank of St. Louis* v. *Arkansas State Highway Commission,* supra, the landowner sought to enjoin further trespass upon its lands and use and occupancy of a road, bridge, and viaduct across them, on the basis that, after an original taking for the construction of the bridge and its approaches, the highway commission, without compensating the landowner, again entered upon the land, dug out the remaining tillable land and constructed another and higher

dump, completely destroying the value of the land. A demurrer to the complaint was sustained on the basis that the action was one against the state and that, in effect, the allegations of the complaint showed that the landowner stood by and permitted the state to appropriate, occupy and damage its land, in the second instance, without making compensation. We said:

> The instant suit is one to coerce the State by taking from the possession of the State a portion of one of its highways. Under the allegations of the complaint the State has wrongfully appropriated appellant's land, and the obligation to pay abides and in morals and good conscience should be discharged, but the State cannot be compelled to discharge this obligation through the coercion of being deprived of a portion of its highway. **** Appellant had, therefore, the right to prohibit the Highway Commission, or any other agency of government, from taking its property until compensation had been paid. It was so expressly held in the case of *Arkansas State Highway Commission* v. *Partain,* 192 Ark. 127, 90 S.W. 2d 968. But, if the property owner fails to assert this right and permits the State to take and occupy his property before compensating him, he may not thereafter coerce compensation by retaking the property from the possession of the State. He must thereafter trust the State to deal fairly with its citizens. He then has no other remedy.

Arkansas State Highway Commission v. *Flake,* 254 Ark. 624, 495 S.W. 2d 855, is analogous to the case before us. It applies and reinforces the previous decisions treated above. In *Flake,* the emphasis was upon the landowner's standing by while substantial work was done. It was there pointed out that *Miller County* v. *Beasley,* 203 Ark. 370, 156 S.W. 2d 791, was an analogous case. In *Miller* where county court orders were involved and no notice of taking required, we held that an entry was necessary to complete the taking. In speaking of entry, we said:

> ***Such entry, being physical and visible, affords the proprietor an opportunity to exact payment or to re-

> quire a guaranteeing deposit. If there is neither payment nor deposit, resort may be had to injunction; but should the proprietor stand by and permit the land to be occupied and *the improvement to proceed until substantial road work has been done,* he is then relegated to the county's credit. [Emphasis ours.]

The only difference in that case and the others cited is that in one the landowner is relegated to the county's credit and in the other to the state's fairness in dealing with its citizens.

Our holding with reference to entry is in accord with the general rule. "Where an entry is made upon property by the condemnor and an act committed which indicates an intent to appropriate the property the taking is complete." 2 Nichols on Eminent Domain (3rd Ed.) 6-17, § 6.1 [2]. (*Miller County* v. *Beasley,* supra, is one of many authorities cited in support.) The author makes this further statement on Page 6-44 in § 6.21:

> Where an entity, vested with the power of eminent domain, enters into actual possession of land necessary for its purposes, with or without the consent of the owner, and the latter remains inactive while valuable improvements are being constructed thereon, the use of which require a continued use of the land, the appropriation is treated as equivalent to title by appropriation. It is open to some doubt whether one can be constitutionally deprived of his property without the recording of some definite statement of the extent of the taking; certainly he can stand in no worse position because the taking is *in pais.* Such taking is frequently referred to a "common law" taking or a "*de facto*" taking.

Here the owner clearly stood by until the taking was complete, even though the construction was not, so as to bar injunctive relief. This case cannot be equated with such cases as *Arkansas State Highway Commission* v. *Coffelt,* 257 Ark. 770, 520 S.W. 2d 294 and *Arkansas State Highway Commission* v. *Union Planters National Bank,* 231 Ark. 907, 333 S.W. 2d 904, where the taking of access rights and rights of ingress and egress could not have been contemplated by the landowner at the

time of the original taking. Here the landowner was clearly notified of the contemplated extent of the taking at the time of entry by the highway department and its contractors. It was the very thing that gave rise to the specific performance suit.

The decree is affirmed insofar as the holding that the 1971 decree was a nullity but reversed as to the permanent injunction and the injunction suit is dismissed.

The Chief Justice dissents as to the affirmance and concurs in the reversal. Justices Byrd, Holt and Roy concur in the affirmance and dissent as to the reversal.

CARLETON HARRIS, Chief Justice, dissenting in part, concurring in part. Referring to Scott Chancery Case No. 4612, in my view, the chancery court, under the "clean-up" doctrine, had jurisdiction. In the case of *Gregory* v. *Oklahoma Mississippi River Products Lines, Inc.*, 223 Ark. 668, 267 S.W. 2d 953, appellee filed two suits in Woodruff Circuit Court, seeking to condemn easements, the causes then being consolidated. The appellant landowner moved to transfer to chancery court, contending that too much land was being taken. This was done. The trial court held that the corporation had the right to condemn easements, did condemn, and the landowner appealed. This court held that equity was an appropriate forum and the court approached this problem as follows:

> "The appeal presents two problems: (a) Was the Chancery Court's order permitting entry appealable? (b) Did equity have jurisdiction to decree complete relief?
>
> "We have consistently held that where private property is to be taken, any public agency seeking to exercise the high prerogative of eminent domain must bring itself clearly within the law's contemplation. A corollary is that no more land may be taken than the public need requires.
>
> "Another rule equally definite is that where equity jurisdiction exists in respect of an essential element of

> litigation and such jurisdiction is invoked, *the process draws full power to determine all of the rights that are involved.* [My emphasis]. *Selle* v. *Fayetteville,* 207 Ark. 966, 184 S.W. 2d 58. ***
>
> "The evidence convincingly shows that the company's purpose is to operate as a public service agency. It has no production of its own, but must transport commodities without discrimination. This being true, the Chancellor's finding that the easements were necessary will not be disturbed.
>
> "But inasmuch as there has been no judgment fixing the damages (a judgment Chancery has a right to render) the appeals are premature. The consolidated causes will therefore be remanded with directions to proceed in a manner not inconsistent with this opinion, the sole question being the amount of damages."

See also *Burton* v. *Ward, Chancellor,* 218 Ark. 253, 236 S.W. 2d 65, consolidated with *Beedeville Special Dist. # 28* v. *Bone, Judge.*

Let it be noted that *Gregory* was not simply a matter of fixing damages, but rather the chancery court actually entered a condemnation order; in fact, as set out, the case was remanded back to chancery for the sole purpose of fixing damages.

This court says that in Case No. 4612, the Scott County Chancery Court had no jurisdiction to condemn, although I take it from the opinion that if the landowner had invoked the aid of the chancery court on equitable grounds, this court would hold differently. This presents, to me, an enigma, for if there was no jurisdiction of the subject matter, jurisdiction could not be conferred by consent or otherwise — "period." In other words, if a chancery court has no jurisdiction, as here, under the "clean-up" doctrine, to enter an order of condemnation, I cannot understand how it suddenly acquires jurisdiction of the subject matter (to condemn) simply because the landowner invokes the aid of that court.

Be that as it may, it is apparent that I consider that the chancery court, having originally properly acquired jurisdiction on the issue of specific performance, had jurisdiction to condemn and to determine the amount of damages, and under my view, the present decree should be reversed and the cause remanded to chancery court.

Referring now to Scott Chancery Case No. E7417, the injunction case, I concur in the result. Of course, since I feel that the chancery court, under the "clean-up" doctrine, had jurisdiction, it is my view that, if dissatisfied with the fact that the chancery court would determine damages, the Rices should have filed an appeal.

Admittedly, the decree under discussion (wherein the chancery court condemned the property) was entered in 1971. No appeal was ever taken by the landowner. To the contrary, appellees have sat by and permitted the highway department and its contractors to construct a new modern highway facility without any complaint; in fact, the highway has been completed across appellees' lands except for the erection of a fence between their property and the highway. Then, at the late date of 1974, a collateral attack was made upon the 1971 decree.

It is apparent, that in my opinion, the 1971 decree not having been appealed from, and the court having jurisdiction, the present effort for injunctive relief[1] comes too late, and I accordingly am of the view that the injunction was improperly granted.

FRANK HOLT, Justice, dissenting in part. I concur in that part of the majority opinion which holds that the chancery court lacked jurisdiction to condemn appellees' property and award damages. Consequently, its 1971 decree was a nullity in that respect. However, I cannot agree it was error for the chancellor to issue a permanent injunction in 1974 in a related proceeding. The majority opinion recognizes that if a landowner acts before the taking of his property rights, he has

[1]Of course, had my view prevailed in Case No. 4612, the case would be remanded to the Scott County Chancery Court for determination of damages.

the right to enjoin the taking until such time as just compensation is paid or secured to him. *Arkansas State Highway Comm.* v. *Partain*, 192 Ark. 127, 103 S.W. 2d 53 (1936). There we also said that if the landowner permits the highway department to appropriate his property, then he is limited to whatever relief the state provides. The rationale is that the landowner cannot sit idly by without any overt action and then institigate the litigation. This would be a coercive action and constitute a suit against the state. Here, however, the condemning authority instigated the litigation in 1971. The landowners, in response, sought and were denied adjudication of their property rights in the proper forum. The landowners were denied that right by a decree which today we hold a nullity. Manifestly, they were entitled, as they then asserted, to the right they sought. In the circumstances, I cannot say the appellee landowners sat idly by within the meaning of the cases cited in the majority opinion. Those cases are factually inapposite.

The appellees in their brief assert, and properly so, that "the core of this controversy is" about the taking of their access rights. As indicated, the 1971 litigation was instituted by the highway department when the appellee landowners refused to sign a deed giving the highway department controlled access rights to their property. The landowners had previously signed a contract to sell 2.24 acres to it. That agreement did not include controlled access rights. In the 1971 litigation the chancellor agreed that the landowners were not required under their agreement to sign a deed which conveyed their access rights to the highway department. It is undisputed that following this decree and during construction of the highway the appellees were exercising their rights of access. It is further undisputed that the landowners acted promptly whenever these rights were threatened by appellant through its contractor. From the very beginning and here, the appellee landowners have sought to have just compensation for their property rights determined by a jury in the circuit court. The appellant highway commission maintains the proper forum is a court of equity where the department initiated the litigation. Today's opinion precludes either forum to the parties. No doubt, it will come as quite a surprise to the landowners and the condemning authority since neither has sought the claims commission as being the proper forum.

Again, I emphasize that the parent litigation was initiated by the state's authority. It is, therefore, most difficult for me to perceive how the injunctive litigation which followed the state's action can be construed as a coercive action against the state. I would affirm the decree.

BYRD and ROY, JJ., join in the dissent.

Nicholas W. RIEGLER Jr. *v.*
Mary Miller RIEGLER

75-180 532 S.W. 2d 734

Opinion delivered February 2, 1976
[Rehearing denied March 8, 1976.]

Howell, Price, Howell & Barron, for appellant.

Stubblefield & Matthews, for appellee.

J. FRED JONES, Justice. This is an appeal by Nicholas W. Riegler, Jr. from a chancery court order in which he contends that the chancellor erred in awarding child support payments and college education payments to an adult child where there was no contract. The appellee, Mary Miller Riegler, has cross-appealed contending that the chancellor erred in refusing to increase the amount of alimony and in ordering its termination after June 8, 1975, and in failing to increase the monthly child support. She also contends that the appellant should be required to pay her attorney's fees in both the trial court and on appeal.

The parties to this proceeding were divorced in 1966 and this is the fourth appeal to this court growing out of the divorce litigation. See *Riegler* v. *Riegler,* 243 Ark. 113, 419 S.W. 2d 311 (1967); *Riegler* v. *Riegler,* 244 Ark. 483, 426 S.W. 2d 789 (1968); and *Riegler* v. *Riegler,* 246 Ark. 434, 438 S.W. 2d 468 (1969). The case reported in 244 Ark., *supra,* was an appeal from a circuit court judgment, but the other two appeals and the present one were from decrees of the chancery court presided over by the same chancellor who has had the parties before him from time to time over the past decade.

The parties had five daughters when the divorce was granted in 1966. Four of the daughters at that time were minors under 18 years of age. Their custody was awarded to the appellee Mrs. Riegler and the appellant was ordered to pay to the appellee alimony and support money for the four minor children. During the intervening years since the divorce three of the four minor children went to live with the appellant and have attained their majority. The youngest daughter remained with the appellee and also reached her majority on October 31, 1974.

The appellee was being paid $350 per month alimony and $250 per month child support when, on October 11, 1974, the appellant filed a petition to terminate the child sup-

port upon the youngest child becoming 18 years of age and to terminate the alimony payments because of change in conditions. The appellee filed a counter-petition praying for an increase in both alimony and child support. The chancellor ordered the child support continued at $250 per month until the daughter finished high school and entered college, at which time the child support payments would be increased to $350 per month until graduation from college or further orders of the court. Alimony payments were terminated as of June 8, 1975.

A part of what we said when this matter was first before us in 1967 (*Riegler* v. *Riegler*, 243 Ark. 113, 419 S.W. 2d 311) is pertinent to the decision we reach in the matter now. In the 1967 opinion we said:

> "The matter of the children's college education was deferred for a later decision. What we have to say in Part V of this opinion may be pertinent if that question comes up in the future.
>
> * * *
>
> V. The decree for separate maintenance awarded Mrs. Riegler $600 a month 'for maintenance of herself and the four children now in her custody.' In the interval between that decree and the one now being reviewed Mrs. Riegler spent a total of $3,187.68 for college educational expenses of her oldest daughter, who was of age when the separate maintenance decree was entered, and for similar expenses of her next daughter, who reached 18 before the rendition of the later decree. The chancellor directed Dr. Riegler to repay $2,749.00 of those outlays.
>
> That direction was an error. Ordinarily a mother who spends more for child support than the court has allowed her cannot recover the excess, because an award of child support ought not be increased retroactively. She should apply in advance for a larger allowance. *Gant* v. *Gant*, 209 Ark. 576, 191 S.W. 2d 596 (1946). On the other hand, a father may by contract bind himself to go

beyond the decree in supporting a daughter who has reached her majority. *Worthington* v. *Worthington,* 207 Ark. 185, 179 S.W. 2d 648 (1944). Mrs. Riegler insists that the proof establishes such a contract on Dr. Riegler's part.

We do not so find. Dr. Riegler testified as most fathers would, that he wanted all his children to have a college education. We do not read his testimony, however, as embodying an agreement to pay the expenses now at issue. To the contrary, he said that if he paid for his daughters' higher education he expected them to treat him with the respect due a father and to counsel with him about their college training. He complained, among other things, that his oldest daughter had told him to go to hell and had declared that the only thing he had to do with her education was to give her the money to spend as she chose. On the proof as a whole Mrs. Riegler did not sustain the burden of proving an agreement for support over and above the allowance made by the separate maintenance decree."

Miss Katherine Elizabeth Riegler, the young lady involved in the case at bar, testified that she lives with her mother in Memphis, Tennessee, in a condominium her mother is purchasing. She said she was in the twelfth grade in high school; that she has a 1973 model Chevelle Malibu automobile which she uses for transportation to and from school and to and from her part-time employment two days per week at about $2.25 an hour. She said her earnings at part-time work amounted to about $20 per week. She testified that she was 18 years of age on October 31, 1974, and would graduate from high school in May, 1975. She said she planned to attend the University of Tennessee at Knoxville where she plans to major in accounting with a minor in computer science. She said she had a savings account of $140, but has no other money with which to defray her college expenses except what her father has given her. She testified that she had made an estimate of what her first year expenses in college would amount to and that it amounted to $526.67 per month. She said this estimate consisted of $158.33 per month for room, board and fees, and $166.67 per month for clothes. She

said she would need $30 per month for gasoline, $60 per month for spending money and $66.67 per month for sorority expenses. She said the maintenance of her automobile would amount to $25 per month. She said she respected and admired her father greatly and that she would like for him to pay her expenses in college. She said she would be willing to counsel with her father about the things she would use the money for if he would pay her expenses. She said that if her father does not finance her college education, she will have to get a student loan or maybe go to school part-time and try to get on a student work program, or else she will have to stay in Memphis and go to a technical school for two years and see if she can get a job that way.

On cross-examination Miss Riegler testified that she purchased her Malibu automobile June 13, 1973, and did not discuss the purchase with her father, for the reason that he was not paying for it. She said she had decided to attend the University of Tennessee because a number of her friends were attending that university, and that she had not discussed those plans with her father. She said she simply had not had time to discuss her plans with her father; that he had his medical practice to attend to and she was not in town enough to discuss her plans with him.

> "Q. You went ahead and made your plans without even finding out if he wanted to send you to the University of Tennessee?
>
> A. It seems to me it would be up to my choice where I would like to go to college."

Miss Riegler said she had a savings account at the time her mother and father were divorced, but that she drew it all out. She said that part of it went toward the payment of her automobile but that she couldn't tell exactly how much. She said she was drawing out quite a bit from her savings account and supposed she applied $600 or $700 of it on her automobile. She said she did not know how she got her savings account; that she just "had it put in there." She testified on cross-examination that one dress for college can run anywhere from $25 to $50 each; that she is not attemp-

ting to force her father to pay $166.67 per month for her clothes, but that she guesses she is asking the court to make him do so. She then testified as follows:

"Q. Can you tell me again where you got this figure of $166.67? Do you spend that much money for clothing now?

A. Roughly, yes.

Q. What do you pay for your dresses?

A. $25.00 to $50.00 on some dresses.

* * *

Q. Have you discussed with your father whether or not he wanted to send you to school in $50.00 dresses?

A. No.

Q. Don't you think it would be a proper thing to take up with him?

A. I don't know. It seems like I could buy whatever I wanted to, you know, in clothing, which is whether it was $50.00 to $1,000.00 dress, if I wanted to wear it.

Q. You think that would be up to you rather than your father?

A. It would be up to both of us, but it would be more of my choice of what I like to wear.

Q. Now, have you discussed with your father whether or not he thinks you should have an automobile at the University of Tennessee?

A. No.

Q. Don't you think that is a proper item for him to make some decisions about?

A. Not really."

On redirect examination Katherine Elizabeth said her father was busy and out of town quite a bit and it was rather difficult for her to get in touch with him; that if he furnished her expenses while in college she would be willing to discuss matters with him and let him know exactly how she spent the money. She said she and her father had never corresponded by mail; that she had started to write letters to him several times but she didn't know what to say to him. She said she just simply did not know her father.

It is obvious from the overall record that the appellant and his youngest daughter have become more or less estranged over the past nine years. While the daughter said she would be willing to discuss college with her father and would be willing to counsel with him about what she used the money for if he would support her while attending college, she testified that she had already arranged to attend the University of Tennessee at Knoxville and had already been accepted and had arranged for a place to stay while attending the university, and that if her father did not continue to support her it would be necessary to obtain a student loan or part-time work. She said it seemed to her that she could buy whatever she wanted to in the way of clothing whether a dress cost $50 or $1,000, if she wanted to wear it; that she did not really think an automobile, while attending the university, would be a proper item for her father to make some decision on.

Pertaining to his daughter's continued college education, the appellant testified in part as follows:

"Q. Well, suppose that Kathy right now would come up to you and say, 'Father, I want and need your help in going to college.' What would be your attitude about it?

A. My attitude would be to accept her as a daughter and then we would begin to work out what would have to be done to accomplish the means.

Q. What do you mean by, accepting her as a daughter?

A. I have always accepted her as a daughter. I would take her in as I did any of my daughters. I would discuss this with her and we would decide and she if she can follow what my requirements would be and if I could follow what her requirements are.

Q. By taking her in, do you mean you would require her to come and live in your home?

A. I did not say that.

Q. What do you mean by taking her in? You said, 'I would take her in.' What did you mean by that?

A. I would sit down and discuss the thing with her and follow through with her and do anything I could to assist my daughter."

Dr. Riegler testified that he was willing to pay Kathy's expenses until she graduated from high school but was not agreeable to paying her expenses in college or contribute further to her unless she changed her attitude toward discussing matters with him.

The appellant in the case at bar gave his three older daughters a college education after they attained their majority, but they discussed with him the college of their choice and they complied with reasonable restrictions he prescribed for them while attending college. The question in the case at bar as to the youngest daughter is not whether appellant is morally obligated to assist her financially while attending college, but the question is whether he is *legally* obligated to do so under the evidence in this case. We approved the chancellor's "slight extension of the appellant's minimum duty to support the older child" in *Matthews* v. *Matthews*, 245 Ark. 1, 430 S.W. 2d 864, but that duty has not been extended to an entire college education in Arkansas under such facts as appear of record in this case. The chancellor found, as recited in paragraph three of his order, as follows:

"(3) That the youngest daughter of the parties reached her 18th birthday on October 31, 1974; that she is

> without physical or mental infirmities, and is not an abnormal child; that there has been no contract entered into on the part of defendant to pay for the college education expenses of his said daughter who is now a senior in high school, making good grades, due to graduate at the end of the current school year in May or June, 1975, desires and has definite plans to enter college upon graduating from high school and to continue and complete her college education without interruption."

The chancellor further set out his reasoning in language as follows:

> "I was referring to *Jerry* v. *Jerry*, 235 Ark. Well, of course, as you all know, years ago, fifty or more years ago, it was not considered of much importance to have a college education or a degree, but in recent years it is much more important. A child can hardly get started or even apply for a job without some college education. So, this is not clear here. It says in other cases, in 254 Ark. says, if the father is financially able the child is entitled to such support as will sustain the manner and type of living to which it is accustomed. It doesn't say whether before or after it reaches a certain age, its majority. In addition to the actual needs of the child, the father has the legal duty to give the child those advantages which are reasonable contributions, etc., which seems to indicate that the child should have at least some college education."

The case to which the chancellor was referring in 254 Ark. appears to have been *Sain* v. *Smith*, 254 Ark. 720, 495 S.W. 2d 865 (1973), or *Thompson* v. *Thompson*, 254 Ark. 881, 496 S.W. 2d 425 (1973). In *Sain* the child was 16 years of age and in *Thompson* the appellant-father stopped payment without court order and we approved the award of arrears which accumulated after one child married and another reached majority.

In *Jerry* v. *Jerry*, 235 Ark. 589, 361 S.W. 2d 92 (1962), the divorced parents of three minor children agreed upon $200

per month for the maintenance and education of the children. When the oldest child, a daughter, became 18, she had finished high school and desired to enter college. The father stopped one-third of the payment when she became 18. The chancellor held he was no longer obligated but continued payment for the other two at $200 per month. The chancellor ordered the payment of arrears for the support of the child who had reached her majority. In affirming the decree this court said:

> ". . . Ark. Stats. § 57-103 makes it plain that 'females of the age of eighteen (18) years shall be considered of full age for all purposes. . . . ' In *Missouri Pacific Railroad Company et al* v. *Foreman*, 196 Ark. 636, 119 S.W. 2d 747 (at page 651 of the Arkansas Reports) we said: 'Ordinarily, there is no legal obligation on the part of a parent to contribute to the maintenance and support of his children after they become of age.' A significant word in the above quotation is the word 'ordinarily,' showing that the Court realized there might be circumstances which could impose on a parent the duty to support a child after such child became of age. This fact was expressly recognized in *Upchurch* v. *Upchurch*, 196 Ark. 324, 117 S.W. 2d 339 (page 327 of the Arkansas Reports) where it was stated: 'It is, of course, the duty of the father to contribute to the support of his children even after they are of age if the circumstances are such as to make it necessary.' This court has uniformly held, based on Ark. Stats. § 34-1213, that the amount allowed for child support is subject to modification when required by changed conditions. See: *Watnick* v. *Bockman*, 209 Ark. 696, 192 S.W. 2d 131."

In *Petty* v. *Petty*, 252 Ark. 1032, 482 S.W. 2d 119 (1972), this court reversed a chancellor's decree terminating child support for an 18 year old child. But in that case we pointed out that the girl was "disabled and unable to earn a livelihood." In *Matthews* v. *Matthews*, *supra*, we affirmed a chancellor's order continuing child support for an 18 year old girl until she finished high school. The "circumstances of necessity" to justify the order were pointed out as follows:

"Had the chancellor terminated the appellant's support payments for Dinah Gale as soon as she became of age, it may be assumed, as far as this record shows, that she would have been forced to drop out of high school to support herself, there being no obligation on the part of either of her parents for her continued maintenance. We know, by common knowledge, that a high school diploma is of almost inestimable value to a young person who seeks to make his or her own living. The appellant, as a result of having taken no appeal from the supplementary October decree and as a result of having offered no new testimony at the hearing with respect to the modification of that decree, is not in a position to contend that he has suffered an undue hardship by having to support his daughter during the six months between her coming of age and her graduation from high school. Upon the facts of this case — and our decision of course is limited to those facts — we sustain the chancellor's slight extension of the appellant's minimum duty to support the older child."

The appellant's daughter involved in the case at bar has reached her majority and is not physically or mentally handicapped. We conclude, on trial *de novo,* that the appellant should have been relieved of the legal obligation to support his youngest daughter after she attained her majority and graduated from high school.

Mrs. Riegler, the appellee and cross-appellant, testified that she now lives in Memphis, Tennessee, and that her daughter Katherine lives with her. She said that they live in a condominium she has purchased in Memphis. She said that the alimony of $350 per month was fixed by court order on July 5, 1968, and the child support for Katherine in the amount of $250 was fixed in May, 1969. She said there had been some pretty drastic changes since July, 1968, and May, 1969. She said one of the changes was the increased cost of clothing, feeding and maintaining a young adult as compared to a teenage child. She said that she purchased a condominium in Memphis in August, 1973, and that when she first went to Memphis, Katherine required special clothing at Laus Anne, a private school where she was enrolled. She said

she herself went to school and put herself through the University of Arkansas at Little Rock. She said she applied for admission to the graduate school of social work but was rejected; that she applied to the University of Tennessee at the Memphis branch and was accepted, and that was the reason she moved to Memphis. She said that since the aforesaid dates she has had to drop her country club membership in Little Rock; that she does not still pay dues but that the membership has not been sold and she has received no money from it. She said that during her marriage she had a fulltime maid and a part-time maid and that she can no longer afford a maid. She said she used to be able to go to a beauty shop on a weekly basis but that she can no longer afford to do so. She said she had sold some of her stock, and that the stock she inherited from her aunt, which was valued at $113,220.68 in 1969, is now only worth $27,047.50. She said since selling some of the stock she does not receive the dividends that she did receive. She said she only has about $15 in savings and that the $6,900 she had in savings in 1968 or 1969 had gone for living expenses. She said on May 23, 1972, she sold 25 shares of General Telephone & Electronics and received $731; that on that same date she sold 100 shares of General Telephone & Electronics and received $2,938; and also sold 200 shares of Portland General Electric and received $4,275. She said that on November 17, 1972, she sold 50 shares of General Telephone & Electronics and received $1,506. She said on the same date she sold 200 shares of Portland General Electric from $4,374, and in April, 1972, she sold 106 shares of Bullock Fund for $1,738.40; that on August 8, 1973, she sold 100 shares of J. P. Morgan for $6,355; that on December 27, 1973, she sold an additional 100 shares of J. P. Morgan for $6,584.80, and on December 6, 1974, she sold an additional 50 shares for $2,640.

In answer to interrogatories Mrs. Riegler said her income from her employment in 1972 totaled $9,547; that in 1973 it amounted to $8,936 and for 1974 it amounted to $9,-435.16.

Mrs. Riegler testified on direct examination that in 1974 it took $22,581.76 for her and Katherine's living expenses for that year. She said their living expenses for 1973 amounted to

$21,021.69. She said she is now employed as a social worker at the Les Passees Rehabilitation Center in Memphis at $528 and some cents per month. She said that her work required her to be well dressed which would entail additional expenses in connection with her job. She said her standard of living is lower than it had been. She said she was no longer free to go into a store and buy any dress she saw at any price, and that money is simply no longer available to take vacations.

Mrs. Riegler testified as to her income and expenses partially from her income tax returns and on cross-examination she testified that under her Schedule D of income tax returns for 1973, she showed a net gain on the sale of J. P. Morgan stock of $8,846; that she showed on the same returns a long-term capital gain on these stocks of $8,800. Mrs. Riegler testified that she deposited the money from her sales of stock in the Pulaski Heights Bank, but on cross-examination she was at a loss to explain why her bank records did not show the deposits.

It is apparent from the overall record that Mrs. Riegler still has income in her own right from investments she had made; that she still has a substantial interest in trust property of considerable value and which is now in litigation; that the appellant has been paying alimony to the appellee as directed by the court over the past nine years, during which time the appellee has attended college and obtained a master's degree in social work; that she is now employed in social work where she is capable of earning, and actually is earning, $9,574 per year. Consequently, we are unable to say that the chancellor erred in ordering alimony terminated after June 8, 1975, or that the chancellor's order was against the preponderance of the evidence.

The appellee's attorneys have been paid substantial fees over the history of this litigation and we are unable to say that the chancellor abused his discretion in refusing to award attorney's fees against the appellant in this case.

The decree is reversed as to the $350 per month child support until graduation from college and in all other respects the decree is affirmed.

Reversed in part on appeal and affirmed on cross-appeal.

BYRD, J., not participating.

WESTERN ARKANSAS TELEPHONE COMPANY *v.* Raymond COTTON et al

75-228 532 S.W. 2d 424

Opinion delivered February 2, 1976

[Rehearing denied March 8, 1976.]

Wright, Lindsey & Jennings, for appellant.

Hixson & Cleveland, for appellee.

CONLEY BYRD, Justice. Appellee Raymond Cotton, an employee of Darrell Hutcherson, d/b/a Hutcherson's Tree Service, was injured in Waldron, Arkansas, on July 28, 1970, while taking down some outdated telephone cables. To recover for Cotton's damages, Cotton and Hutcherson's Workmen's Compensation carrier, Employers Insurance of Wausau, brought an action against appellant Western Arkansas Telephone Company on the theory that appellant was negligent in selecting Hutcherson as a contractor to remove the telephone cables. The jury found the issues in favor of Cotton, *et al*, and appellant appeals contending that it was entitled to a directed verdict.

Some of the proof is disputed, but when considered in the light most favorable to appellees, as we must on appeal, it shows that prior to July 28, 1970, Hutcherson had told his foreman, Kenneth Lewis, that he had had no experience in removing telephone cables.

The undisputed proof is that Hutcherson had farmed some 20 to 25 years before 1965. From 1965 to 1968 he worked in the construction industry driving a dirt mover. In 1968 he contacted an official of appellant whom he had known from 1946 and who had married one of Hutcherson's relatives. As a result of that contact Hutcherson got a contract to trim the trees from appellant's telephone right-of-ways. In early 1970 Hutcherson entered into an oral contract with appellant to take down some outdated telephone cables at Mountainburg at a rate of $20 per hour for a four-man crew. The Mountainburg job lasted four months and was completed satisfactorily to appellant. The second contract with appellant to take down and remove an outdated telephone system was at Waldron, Arkansas. That job was also based on an oral contract of $20 per hour per four-man crew and had been in progress for approximately two months before Cotton was injured. In selecting Hutcherson to remove telephone cables, appellant made no inquiries of Hutcherson nor any outside source to determine if Hutcherson was competent to perform the service.

A. O. Croxton, a retired Southwestern Bell employee, testified, without contradiction, that the type of work in

which Hutcherson was involved required special knowledge and skill.

Hutcherson testified that he had four crews on the Waldron job and that three or four of the people he had hired had previous telephone company experience. This testimony was corroborated by his foreman, Kenneth Lewis, who testified on behalf of appellees.

Kenneth Lewis testified that Ray Merchants, appellant's construction foreman, and Hutcherson gave him his instructions when he began the Waldron job. Mr. Merchants showed the crew what they had to do and told them how to do it. They successfully wrecked the telephone cables until July 28, 1970, when Hutcherson changed the procedure for removing the lead spliced cables. When the cables were cut on July 28, 1970, in the manner that Hutcherson had instructed, the pole that Cotton had climbed snapped causing Cotton's injuries.

Our law with respect to the liability of a principal for the alleged negligent selection of an independent contractor is stated in *Ozan Lumber Co.* v. *McNeely,* 214 Ark. 657, 217 S.W. 2d 341 (1949), in this language:

> "Although there is some authority to the contrary, it has generally been held that the duty rests on the employer to select a skilled and competent contractor, and the employer is liable to third persons for the negligent or wrongful acts of an independent contractor employed by him where he knew his character for negligence, recklessness, or incompetency at the time he employed him, or where the employer was negligent in failing to exercise reasonable care in the selection of a competent contractor. However, where the independent contractor is in fact a competent person to perform the work, it is of no consequence whether or not due care was used in the selection. The fact that a contractor is negligent in respect of the work in question raises no presumption that the employer was guilty of negligence in employing him."

As can be seen from the foregoing statement, the fact that Hutcherson was negligent with respect to the work in question does not raise a presumption that Western Arkansas Telephone was negligent in employing him.

The cases also hold that the fact that a principal knows that in independent contractor is personally ignorant or untrained in the actual performance of the work does not, of itself, make the owner liable to the contractor's employees. Many successful contractors who are thoroughly competent to estimate in advance the costs of construction are often ignorant of many of the construction operations. Such persons either sublet such work to other persons or employ a competent foreman. See *Schip* v. *Pabst Brewing Co.*, 64 Minn. 22, 66 N.W. 3 (1896).

The cases also hold that an employer who has had previous successful experience with an independent contractor in the performance of his work cannot be held liable on the theory of the negligent selection of the contractor, *Kueckel* v. *Ryder,* 54 App. Div. 252, 66 N.Y.S. 522 (1900).

Thus, since the uncontradicted evidence shows that Hutcherson employed a competent and experienced foreman and that he had successfully completed other work for the appellant in a satisfactory manner and without incident, we hold that there was no substantial evidence to warrant the submission of this case to the jury on the theory that appellant was negligent in selecting Hutcherson as its contractor.

We note that there is a conflict among the authorities whether an employee of an independent contractor can maintain an action against his employer's principal, see 41 Am. Jur. 2d *Independent Contractors* 26 (1968) and Annot., 44 ALR 932, 976 (1924), but since that issue was not raised in the trial court, we have left that issue for future determination.

Appellees also suggest that appellant was negligent in selecting Hutcherson in violation of the contractor's licensing statute, Ark. Stat. Ann. § 71-701 through § 71-724 (Supp. 1975). We find no merit in this contention because the con-

tractor's licensing statute is not applicable to the contract here which involves only an hourly rate of pay and not a gross sum.

Reversed and dismissed.

FOGLEMAN, J., dissents.

James JOHNSON *v.* STATE of Arkansas

CR 75-182 532 S.W. 2d 1

Opinion delivered February 2, 1976

John W. Achor, Public Defender, for appellant.

Jim Guy Tucker, Atty. Gen., by: *Robert A. Newcomb,* Asst. Atty. Gen., for appellee.

FRANK HOLT, Justice. Appellant was convicted by the court, sitting as a jury, of armed robbery and sentenced to 21 years pursuant to the provisions of the Habitual Criminal Act, Ark. Stat. Ann. § 43-2328 (Repl. 1964). An additional two year sentence for the use of a firearm was also imposed. Appellant's sole contention for reversal is that the prosecuting attorney improperly presented evidence that

appellant had a gun in his possession when he was arrested. Appellant relies on *Botany* v. *State,* 258 Ark. 866, 529 S.W. 2d 149 (1975). There we said "that [the] weapon had nothing to do with the offense on trial." In the case at bar, however, the victim identified the appellant and testified that appellant used a .22 pistol during the robbery. One of the arresting officers testified that when he arrested the appellant he had a .22 pistol in his possession. We cannot say, in view of this evidence, that the weapon had nothing to do with the offense of robbery. Therefore, *Botany* is not controlling.

Furthermore, appellant did not object to the testimony that he had a gun in his possession when arrested. In the absence of an objection we are precluded from considering appellant's contention for the first time on appeal. *Ford* v. *State,* 253 Ark. 5, 484 S.W. 2d 90 (1972); and *Williams* v. *State,* 257 Ark. 8, 513 S.W. 2d 793 (1974).

Affirmed.

Wayne STOWE d/b/a UNION TRUCK STOP *v.* Robert C. BOWLIN

75-225 531 S.W. 2d 955

Opinion delivered February 2, 1976

Smith, Williams, Friday, Eldredge & Clark, by: *Overton S. Anderson,* for appellant.

Howell, Price, Howell & Barron, for appellee.

ELSIJANE T. ROY, Justice. This action was brought by appellee, Robert C. Bowlin, a long-haul household goods trucker, against appellant, Wayne Stowe d/b/a Union 76 Truck Stop, for damages to appellee's truck. Appellee alleges that an employee of the truck stop in changing the oil in appellee's truck left out the drain plug. Approximately 10 miles from the truck stop, the engine froze and welded itself together because of lack of oil. Appellee sought damages, including repairs to his truck, rental expense for a replacement truck and lost profits totaling $10,543.19. The jury returned a verdict in appellee's favor for $1,491.50. On appellee's motion the trial court set aside the verdict on the grounds that "the issue of contributory negligence should not have been submitted to the jury and that the verdict was against the preponderance of the evidence."

For reversal appellant first contends the trial court erred

in ordering a new trial on the basis that the contributory negligence of appellee should not have been submitted to the jury.

Several witnesses testified that a diesel engine makes a substantial amount of noise when it loses oil; that such an engine will lose all of its oil in a very short time due to high pressure; that such an engine will run just a minute or two at high speeds without emitting knocking sounds. Appellee testified that his truck had an oil gauge and a temperature gauge which would be affected in the event of loss of oil. Appellee's own testimony was that he drove his truck about ten miles from the truck stop before he noticed his oil pressure was low and before he heard unusual sounds from his engine.

This court has held many times that the testimony of a party is not undisputed. *Woodward* v. *Blythe,* 246 Ark. 791, 439 S.W. 2d 919 (1969). Additionally, there was testimony that prior to the occurrences in this suit appellee had made a statement to the effect that his truck was about worn out and in need of replacement. Appellee admitted that he had expressed dissatisfaction with previous service from appellant.

We have consistently held that negligence and contributory negligence are questions for the jury unless the facts are undisputed. In *Wood* v. *Combs,* 237 Ark. 738, 375 S.W. 2d 800 (1964), we quoted from an earlier case as follows:

> This court has consistently held that where fair-minded men might honestly differ as to conclusions to be drawn from facts, whether controverted or incontroverted, the question at issue should go to the jury. (Citations omitted) * * *

See also *Ragon* v. *Day,* 228 Ark. 215, 306 S.W. 2d 687 (1957).

From the facts and permissible inferences in this case, the jury could reasonably have concluded that had appellee exercised the proper degree of care he could have noticed much sooner that the oil pressure was low, or that the water

temporature was high, or that noise from the engine was unusually loud, and thereby avoided extensive damage to the engine. The jury reasonably could have concluded that appellee was negligent in continuing to operate his truck and not heeding these warnings until the engine welded itself together from lack of oil. Therefore, we find that the trial court was correct in submitting to the jury the issue of contributory negligence; and consequently the verdict should not have been set aside for this reason.

Appellant next contends that the trial court erred in finding that the verdict was against the preponderance of the evidence. We recognize that the trial judge has the advantage of observing the demeanor of the witnesses, and in *Garrett* v. *Puckett*, 252 Ark. 233, 478 S.W. 2d 48 (1972), we said:

> It is . . . well settled that we only reverse the ruling of the trial judge in setting aside a verdict he finds to be against the preponderance of the evidence when we find that the trial judge has abused his discretion. *Houston* v. *Adams*, *supra* [239 Ark. 346, 389 S.W. 2d 872]; *Farmer* v. *Smith*, 227 Ark. 638, 300 S.W. 2d 937; *Worth James Construction Co.* v. *Fulk*, 241 Ark. 444, 409 S.W. 2d 320; *Bowman* v. *Gabel*, 243 Ark. 728, 421 S.W. 2d 898; *U.S.F. & G. Co.* v. *Hagan*, 246 Ark. 629, 439 S.W. 2d 915.

We have carefully reviewed the record and find no abuse of the trial court's discretion in setting the verdict aside on this basis.

Since on a new trial certain issues will again be presented to the court we review appellant's contention that cross-examination of appellee "as to his undesirable discharge from the Navy and as to acts of sodomy committed by him" should have been allowed. We find merit in this contention.

Prior to the commencement of the trial, appellee made a motion *in limine* requesting the court to direct attorneys for appellant not to cross-examine plaintiff as to the basis for his undesirable discharge from the military service. The court granted the motion. Appellant made a proffer of proof, and

appellee admitted that he had engaged in various acts of sodomy before his discharge from the Navy in 1968 as well as "a couple of times" since then, but not within the year preceding the trial date of March 26, 1975.

This proof was offered to impeach appellee's credibility as a witness. Sodomy was a felony under Ark. Stat. Ann. §§ 41-813 and 41-814 (Repl. 1964) at the time of the occurrences involved herein.[1] *Bennett* v. *State,* 252 Ark. 128, 477 S.W. 2d 497 (1972).

Huffman v. *City of Hot Springs,* 237 Ark. 756, 375 S.W. 2d 795 (1964) involved an action for personal injuries. The trial court refused to permit cross-examination of the plaintiff-police officer regarding his dismissal for misconduct from the police force. On appeal we held that:

> Counsel should have been permitted to cross-examine Appellee Digby as suggested. Wide latitude is permissible in cross-examining a party, who is to be treated as any other witness, to elicit facts contradicting his testimony given on direct examination or impeaching his credibility as a witness. (Citation omitted). * * *

In *Hale* v. *State,* 252 Ark. 1040, 483 S.W. 2d 228 (1972), we held it was error for the trial court to refuse to permit cross-examination of a prosecution witness as to acts of sodomy committed by her.

In *May* v. *State,* 254 Ark. 194, 492 S.W. 2d 888 (1973), Cert. denied 414 U.S. 1024, 94 S. Ct. 448, 38 L. Ed. 2d 315 (1973), where the trial court had precluded cross-examination regarding acts of adultery and the use of drugs, we found the exclusion to be error.

In *Bockman* v. *Rorex,* 212 Ark. 948, 208 S.W. 2d 991 (1948), we held that the same rules apply to the scope of cross-examination in civil cases as apply in criminal cases when credibility of a witness is attacked.

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[1]The subject of sexual offenses is now governed by Act 280 of 1975 (Ark. Stat. Ann. § 41-1801 et seq., effective January 1, 1976).

In the case at bar the credibility of appellee was important as to whether he may have intentionally damaged his own property due to past disagreements with employees at appellant's truck stop or due to his desire to replace a truck described by him as worn out. Credibility was also of importance with respect to whether appellee exercised due care to prevent damage before his truck engine was ruined, and also in mitigation of damages. The cross-examination on this point should have been allowed.

In its concluding point appellant requests that in the event of a new trial we instruct the trial court not to admit evidence of lost profits. It would be inappropriate for this court to take such action since we do not know what will arise in the way of proof on damages in a new trial.

This cause is affirmed as indicated.

BYRD, J., not participating.

G. E. HIRRILL *v.* CIVIL SERVICE COMMISSION of The City of Little Rock

75-372

Opinion delivered February 9, 1976

Floyd Lofton, for appellant.

Joseph Kemp, for appellee.

GEORGE ROSE SMITH, Justice. In the court below a transcript of testimony presented to the Civil Service Commission was introduced as an exhibit and is part of the record on appeal. The appellant has filed a motion asking the court to waive Rule 9 (d) and to permit counsel to abstract the exhibit instead of photographing it and attaching it to the abstract.

The motion is unnecessary; but since there have been other similar misconceptions of the purpose of the Rule, we take this opportunity to explain that the Rule is intended to refer only to exhibits that cannot readily be abstracted in words, such as maps, plats, and photographs. The pertinent sentence in the Rule is being amended today to clarify the court's intention.

PER CURIAM. The last sentence of Supreme Court Rule 9 (d) is amended to read as follows: Whenever a map, plat, photograph, or other similar exhibit, which cannot be abstracted in words, must be examined for a clear understanding of the testimony, the appellant shall reproduce such exhibit by photography or other process and attach such reproduction to the copies of the abstract filed in this court and served upon the opposing counsel, unless this requirement is shown to be impracticable and is waived by the court upon motion.

Bobby TOSH et al *v.* A.T.I., Inc.
(BATESVILLE R & P CORP., INC.) and
Dale CLINE, Director of Labor for the
State of Arkansas

75-234 534 S.W. 2d 242

Substituted Opinion on Rehearing
delivered March 22, 1976

Youngdahl & Larrison, for appellants.

Herrn Northcutt, for appellees.

JOHN A. FOGLEMAN, Justice. This is an unemployment compensation case. The Appeals Referee and the Board of Review found appellants were not entitled to unemployment benefits because their unemployment was due to a labor dispute in which they were participating as active members of their union. Ark. Stat. Ann. § 81-1105 (f) (Repl. 1960) in pertinent part provides that an employee cannot "be paid benefits . . . if he lost his employment or has left his employment by reason of a labor dispute . . . " unless " . . . it is shown that he is not participating in or directly interested in the labor dispute . . . " For reversal appellants contend that, since they were laid off for lack of work before the calling of a strike, they are entitled to draw unemployment benefits until notified by their employer to return to work and they refuse to do so, citing *Harding Glass* v. *Crutcher,* 244 Ark. 618, 426 S.W. 2d 403. The thrust of appellants' argument is that appellants were on a layoff status and already out of work when the labor dispute arose and, consequently, did not leave or lose their employment "by reason of a labor dispute" within the meaning of § 81-1105 (f). Further, since they were not notified to return to work and given an opportunity to refuse, a fact issue does not exist and, therefore, it must be said, as a matter of law, that they have not lost their employment by reason of participation in a subsequent labor dispute.

Findings of fact by the Board of Review in Employment Security cases are conclusive on appeal if supported by substantial evidence. *Terry Dairy Products Co., Inc.* v. *Cash, Commissioner of Labor,* 224 Ark. 576, 275 S.W. 2d 12; Ark. Stat. Ann. § 81-1107 (d) (7) (Repl. 1960). On our review of such findings of fact to determine whether they are supported by substantial evidence, we consider 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 fact finder. *Campbell* v. *Athletic Mining & Smelting Co.,* 215 Ark. 773, 223 S.W. 2d 499; *Green* v. *Lion Oil Co.,* 215 Ark. 305, 220 S.W. 2d 409; *Employers Casualty Co.* v. *United States Fidelity and Guaranty Co.,* 214 Ark. 40, 214 S.W. 2d 774; *Thrifty Rent-A-Car* v. *Jeffrey,* 257 Ark. 904, 520 S.W. 2d 304; *Yellow Cab Co.* v. *Sanders,* 250 Ark. 418, 465 S.W. 2d 324. In *Thrifty Rent-A-Car* we reiterated that we consider only the evidence of the appellee or that portion of the evidence most favorable to appellee to determine the existence of substantial evidence. In the case at bar, we are of the view that the issue is one of fact and not a question of law and there is substantial evidence to support the Board's finding.

On March 11, 1974, the appellants were told that a boiler had blown up and that they would be notified to return to work as soon as it was repaired, but that there would be no work until they were notified. Thereafter, the executive committee of the appellants' union voted to strike effective at noon on March 12, 1974. The appellee's personnel director testified that, at the time the strike was called, boiler repairmen were in the boiler room assembling the boiler and left after they were told by a union official that a strike was called. He said that work would have been available on March 12 at 11:30 p.m. had the strike not been called. The boiler was finally repaired by appellee's maintenance personnel and it was back in operation at 5:00 p.m. on March 14, 1974. The personnel director stated that those on the picket line could see that the boiler was in operation due to the "steam coming out of the roof." The president of the local union testified that he and all the appellants were members of the local union and were actively engaged in picketing the plant. The finding of fact critical to this appeal was that appellants' unemployment was "because of a labor dispute in which they are participating as active members of the union."

In *Harding Glass,* supra, the employees were in a layoff status and collecting benefits when the labor dispute commenced. Some employees were requested to return to work at various times during the labor dispute and refused to do so. The employees involved in the case returned to work after the dispute ended. The Board of Review held that the employees

who were in layoff status were not entitled to benefits from the date they were directed to report to work and failed to do so as they participated in the labor dispute by their refusal to report to work as directed. These employees were not notified that work was available or requested to return to work until after the labor dispute commenced. We concluded that "the appellees did not lose or leave their employment by reason of the labor dispute which arose on October 10, 1966; but that they remained on a lay-off status and did not participate in the labor dispute until they were notified to return to work and they failed to do so. For it was then, and only then, that they lost or left their employment *by reason of the labor dispute.*"

We distinguished the case from *Fort Smith Chair Co.* v. *Laney,* 238 Ark. 636, 383 S.W. 2d 666, but pointed out that we had there held that an employee who was notified to return to work and refused to do so because of a labor dispute thereby participated in and became a part of the dispute. In *Harding Glass,* the appellees were allowed to draw benefits for the period in question because they did not participate in the "labor dispute until they were notified to return to work following their layoff and they joined in the labor dispute by failing to return to work." Thus, in both the Chair Company case and the Harding Glass case, the employees' refusal to return to work, when notified work was available, constituted or was equivalent to joining in the labor dispute. These cases clearly stand for the principle that one drawing benefits in a layoff status is not entitled to continue to draw them after he joins in or participates in a labor dispute. We do not consider that the mere fact that the employees in *Harding Glass* were held to be entitled to benefits is controlling as a matter of law in this case. In *Harding Glass,* there was no evidence that the employees involved had ever done anything toward participation in the labor dispute prior to being notified to return to work. Here, the appellants were actively participating in and supporting the labor dispute by picketing the plant. This was very substantial evidence that appellants were participating in the labor dispute. In fact, the president of the union to which they belonged and in sympathy with which they were acting said that if he had been notified to return to work he would not have crossed the picket line to do so. There is no contrary evidence on the part of any of the appellants. The

Board, as a fact finder, could reasonably infer that one who actively participated, as here, in the labor dispute would not have returned to work until the dispute was resolved and that a notice to return to work would have been futile. Thus there was substantial evidence to support the finding of fact made in this case.

The purpose of the enactment of the Unemployment Act was aptly enunciated in *Harding Glass,* supra, when we said:

> The Employment Security Act was intended to withhold benefits from those who bring about their own unemployment by bringing about or participating in a labor dispute.

In 12 Ark. Law Rev. 123, it is said:

> Not all unemployment is compensable, and recovery is conditioned by certain legislative policies which generally restrict benefits to cases of involuntary unemployment . . . Policy reasons given for the labor dispute clause include: (1) that the benefits payable to strikers might exhaust the insurance fund; (2) that unemployment due to strikes is not involuntary; and (3) that the state should not assist either side in a labor dispute. (Case Note, James E. Youngdahl)

In the case at bar, as indicated, there is substantial evidence to support the Board's finding that the appellant employees were voluntarily unemployed due to a labor dispute and, therefore, are not entitled to unemployment compensation.

Affirmed.

The Chief Justice and Mr. Justice Jones dissent.

CARLETON HARRIS, Chief Justice, dissenting. This dissent is not based on any contention that, under the law, strikers are eligible for unemployment benefits. Rather, it is predicated on the belief that this court should not pervert or distort a legislative statute, which, in my view, is what is being done in this case. It is undisputed that appellants were

laid off from work *before* any strike was called; it is also undisputed that when laid off, they were told, as set out in the majority opinion, that a boiler had blown up and "that they would be notified to return to work as soon as it was repaired, but there would be no work until they were notified." Again — it is undisputed that these employees were never advised that the boiler had been repaired and that they could return to work. Now — the burden was on somebody to determine when work could be resumed. To me, this burden was on the employer, and particularly so, since appellants had been told that they would be notified and "*there would be no work until they were notified.*" [My emphasis].

In *Harding Glass Co.* v. *Crutcher,* 244 Ark. 618, 426 S.W. 2d 403, this court said:

> "The question then, boils down to whether the employees who were laid off for lack of work and who were drawing unemployment benefits, were still entitled to draw unemployment benefits until they were notified to return to work and refused to do so. In other words, does notice to the employer by the union president that employees do not intend to work without a contract, suspend the right to continued compensation payments to those employees who are on a lay-off status and already out of work when the notice is given and a labor dispute arises, or is it necessary that such employees be notified to return to work and refuse to do so before their unemployment benefits are suspended?
>
> "We are of the opinion that such employees should be notified to return to work *and refuse to do so* before the payment of their unemployment compensation benefits should be suspended." [My emphasis].

I do not think that the fact that appellants could see "steam coming out of the roof" constitutes notice that these employees could return to their jobs. If the Unemployment Compensation Act needs amending to cover all facts mentioned in the majority opinion, then that is a matter for the legislature, and not for this court.

I, therefore, respectfully dissent.

J. FRED JONES, Justice, dissenting. I am unable to see wherein the substituted opinion on rehearing adds any soundness to the reasoning employed by the majority in the original opinion. I still dissent.

The question in this case still remains whether the employees left their employment by reason of a labor dispute. I find no evidence at all that the appellants left their employment because of a labor dispute or that they were participating in, or were directly interested in, the labor dispute when they were required to leave their employment. The appellants were required to leave their employment until notified to return because a boiler blew up and there is not the slightest evidence in the record that the boiler blew up because of a labor dispute.

The reason for leaving the employment in the first place is the controlling factor as I see it and not what occurred after the employees left their employment and while they remained on a lay-off status. The appellants were on a lay-off status because of the disabled boiler and were told that they would be notified by their employer when to return to work. The mere fact that a strike was subsequently called and the appellants, or some of them, might have been on a picket line where they could have seen steam issuing from the boiler house and thereby should have known that the boiler was again in operation and work would be available if they cared to return to work, simply does not make sense to me.

Certainly there was a fact question as to whether the appellants subsequently participated in a labor dispute by appearing on a picket line, and as to whether they could have seen steam coming from the boiler house indicating that the boiler had been repaired and work was again available, but that is beside the issue in this case. Perhaps the law should be that rights to unemployment benefits should be denied an employee who has been laid off for other reasons if, and when, he subsequently participates in a labor dispute or strike while on a lay-off status, but I do not so interpret the law as it stood prior to the majority opinion in this case.

It is my opinion that this case falls squarely within the rule of *Harding Glass* v. *Crutcher,* 244 Ark. 618, 426 S.W. 2d

403. I see no difference in the employees' status when they are on a lay-off status and *collecting* benefits when the labor dispute arises as in *Harding Glass,* and when they are on a lay-off status and *should* be collecting benefits when the labor dispute commences as in the case at bar.

Certainly the employees in the case at bar should have been denied subsequent benefits if they had been notified to return to work and had failed to do so because of the labor dispute — that very thing probably would have occurred in this case, but the fact is, that it did not. Had the appellants been notified to return to work as the employer promised they would, and if they had then failed to return to work, it would have been then and only then that this court should agree they lost their employment by reason of a labor dispute.

I would still reverse.

Ed BARCLAY et ux *v.* Matt TUSSEY et ux

75-248 532 S.W. 2d 193

Opinion delivered February 9, 1976

Dodds, Kidd & Ryan, by: *Donald S. Ryan,* for appellants.

Hardin & Rickard, for appellees.

JOHN A. FOGLEMAN, Justice. Appellants seek reversal of a judgment in an ejectment suit brought by appellees. Appellants assert two points for reversal, the first of which we find to be without merit. On the second, we find merit and reverse.

The first point is based upon appellees' failure to comply with the requirement that a plaintiff in ejectment must rely upon the strength of his own title and not the weakness of that of his adversary. In their complaint, appellees merely alleged that they had title by virtue of a deed which they exhibited. Appellants raised no objection to this pleading but filed an answer in which they incorporated a separate general denial of each paragraph of the complaint and an affirmative defense in which they asserted that they were the owners of the lands involved either by deed or by adverse possession for more than 15 years. No objection was made to appellees' pleading or deraignment of title prior to trial.

Matt Tussey testified that he purchased the 11-acre tract he claimed from Irene Kelly Lewis and that it had previously been owned by Lovie Harris. He knew when he purchased the property that appellant Ed Barclay claimed a tract lying within the boundaries of the land purchased from Ms. Lewis, and that Barclay was using a substantial part of the tract.

Tussey had observed a garden and a chicken house thereon and saw some fences on the boundaries. Tussey immediately notified Barclay that some written agreement would have to be made for Barclay's continued use of this tract, because Tussey had the legal title.

At the conclusion of Tussey's testimony, appellants moved for a directed verdict because appellees had failed to deraign title from the United States or from a common owner. The circuit judge denied the motion for directed verdict, and then agreed with appellants' attorney that they had the burden of proving adverse possession. This motion for directed verdict was renewed at the conclusion of all the evidence. Appellants now argue that the circuit court erred in denying the motion for directed verdict.

We agree with appellants that appellees must rely upon the strength of their own title, but the objection came too late. A general denial of a complaint in ejectment in which the plaintiff alleges that he derived title by a specifically described warranty deed is insufficient to raise any issue as to plaintiffs' title. *Davis* v. *Beauchamp,* 99 Ark. 404, 138 S.W. 636. Going to trial without any objection to the plaintiffs' failure to deraign title constituted a waiver of that requirement that justified the circuit judge's holding on the first motion for directed verdict that appellees were entitled to prevail on the record title, unless, of course, appellants could show that appellees' grantors did not have title or establish their rights by adverse possession. *Gingles* v. *Rogers,* 206 Ark. 915, 175 S.W. 2d 192. For the same reason, there was no error in denying the motion at the conclusion of all the evidence.

Appellants' second point for reversal is the contention that the circuit judge, sitting without a jury, erred in finding that their possession was permissive and could not ripen into adverse possession because it was commenced after an attempt to contract for the property with a prior owner without any agreement having been reduced to writing. We do not agree with appellees that appellants' pleading barred them from claiming title by adverse possession. This is not a case where appellants were claiming title by virtue of a deed and then attempted to assert title adversely to that deed or

the grantor as was the case in *Vanndale Special School District* v. *Feltner,* 210 Ark. 743, 197 S.W. 2d 731, relied upon by appellees. Although appellants pleaded alternatively in asserting affirmative defenses, no deed was exhibited with the complaint and none introduced. The statement of appellants' attorney and of the trial judge when appellants' motion for directed verdict was first made showed clearly that appellees were relying upon adverse possession.

Ed Barclay testified that he had used at least part of the disputed tract since 1948. He said that he went into possession pursuant to a swap of tracts he made with Lovie Harris, but, in spite of the intention of both parties to evidence the transaction by deed, they never did. On rebuttal, Matt Tussey testified that Mr. Barclay told him of this trade when Tussey confronted Barclay about continued possession of the disputed tract. This belies Tussey's claim that Barclay did not assert an adverse claim to the property until Barclay, after consulting his attorney, had declined to sign a lease as requested by Tussey. Tussey said that Barclay then said that his attorney had told him that Tussey could not put Barclay off.

It was not necessary that the Barclays have color of title in order to establish adverse possession. *Morgan* v. *Downs,* 245 Ark. 328, 432 S.W. 2d 454. For possession to be adverse, as distinguished from permissive, it is only necessary that it be hostile in the sense that it is under a claim of right, title or ownership as distinguished from possession in conformity with, recognition of, or subservience to, the superior right of the owner, which is permissive. See *Smart* v. *Murphy,* 200 Ark. 406, 139 S.W. 2d 33; *Martin* v. *Winston,* 209 Ark. 464, 190 S.W. 2d 962; *Stricker* v. *Britt,* 203 Ark. 197, 157 S.W. 2d 18; *Arkansas Commemorative Commission* v. *City of Little Rock,* 227 Ark. 1085, 303 S.W. 2d 569; *Hull* v. *Hull,* 212 Ark. 808, 205 S.W. 2d 211. The oft-repeated statement that adverse possession is a possession commenced in wrong but maintained in right, does not mean that the possessor must commence his possession with an intentional wrong, for the doctrine of adverse possession is intended to protect one who honestly enters into possession of land in the belief that the land is his own. *McAllister* v. *Harzell,* 60 Ohio St. 69, 53 N.E. 715 (1899);

Landers v. *Thompson,* 356 Mo. 1169, 205 S.W. 2d 544 (1947). As a matter of fact, it has sometimes been said that title by adverse possession for a long period rests upon a presumed grant or conveyance or may give rise to a presumption that there was such a deed or grant. 3 Am. Jur. 2d 81, Adverse Possession, § 3; *Butler* v. *Johnson,* 180 Ark. 156, 20 S.W. 2d 639. See also, *Koonce* v. *Woods,* 211 Ark. 440, 201 S.W. 2d 748; *Carter* v. *Goodson,* 114 Ark. 62, 169 S.W. 806; *State* v. *Taylor,* 135 Ark. 232, 205 S.W. 104; *Reed* v. *Money,* 115 Ark. 1, 170 Ark. 478. The only evidence shows that appellants entered into possession claiming a right based upon an oral swap of lands with one purporting to be the true owner and referred to in the proceedings as a prior owner of the disputed tract.

It is of no consequence that the contract may not have been enforceable because of the statute of frauds. It is important that the only evidence clearly shows that appellants entered into possession of the disputed tract under a claim of right by reason of the swap. Claim of ownership, even under a mistaken belief, is nevertheless adverse. *McNeely* v. *Ballard,* 220 Ark. 736, 249 S.W. 2d 567. Entry by one claiming title under a parol grant or exchange is adverse and not permissive, and evidence as to the grant is immaterial except as it bears on the character of the entry and occupation of the possessor. *Elam* v. *Alexander,* 174 Ky. 39, 191 S.W. 666 (1917); *Nevells* v. *Carter,* 122 Me. 81, 119 A. 62 (1922); *Mitchell* v. *Chicago, B & Q Ry. Co.,* 265 Ill. 300, 106 N.E. 833 (1914); *Parrish* v. *Minturn,* 234 Or. 475, 382 P. 2d 861 (1963); *Serritt* v. *Johnson,* 223 Ga. 620, 157 S.E. 2d 484 (1967); *Southern Reynolds County School Dist.* v. *Callahan,* 313 S.W. 2d 35 (Mo., 1958). It has been aptly said that although an entry under such a grant is permissive and friendly in the popular sense, it is nonetheless hostile and adverse to the paper title in the legal sense, because there is an assertion of ownership in the occupant. *Harrelson* v. *Reaves,* 219 S.C. 394, 65 S.E. 2d 478, 43 ALR 2d 1 (1951).

Since there was no evidence to support the finding that appellants' possession was permissive in its inception, we must set aside the trial court's finding in this respect.

The judgment is reversed and the cause remanded.

Billy Don TANNER *v.* STATE of Arkansas

CR 75-107 532 S.W. 2d 169

Opinion delivered February 9, 1976

Kenneth C. Coffelt, for appellant.

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

JOHN A. FOGLEMAN, Justice. Billy Don Tanner was charged with the capital felony murder of his sister-in-law, Sue Keith and her two children Carolyn Sue, aged three, and James Randall, aged six, by beating them "and cutting their throats with a knife". He was found guilty by a jury and sentenced to life imprisonment without parole. He contends on appeal that the statute providing for imprisonment without parole is unconstitutional and that the trial court erred in admitting into evidence a confession and certain photographs.

Appellant argues that the statute [Ark. Stat. Ann. § 41-4707 (Supp. 1973)] is unconstitutional because life imprisonment without parole is in violation of Art. 6 § 18 of the Constitution of Arkansas, which vests the power to grant pardons, reprieves and commutations of sentences in the Governor. This power is specifically recognized in the questioned statute, which specifically provides that one sentenced to life imprisonment without parole may not be released except pursuant to a commutation, pardon or reprieve by the Governor under procedures provided in Ark. Stat. Ann. § 41-4714 (Supp. 1973). Appellant does not question the section relating to the procedures required for the grant of clemency, but says only that the statute is invalid because of the inclusion of the words "without parole".

Although parole may have some characteristics similar to a pardon or reprieve, we do not take it to be a matter of gubernatorial clemency under our constitution as distinguished from administrative conditional release from imprisonment which may be controlled or prohibited by legislation that is not discriminatory. Parole has been defined as a supervised release from incarceration prior to the termination of a sentence. *Roach* v. *Board of Pardons & Paroles,* 503 F. 2d 1367 (8th Cir., 1974). We have, at least tacitly, accepted this definition by saying that one who is released on parole is subject to control and supervision by state authorities and may be returned to prison for violation of rules or conditions under which his parole is granted. *Gulley* v. *Apple,* 213 Ark. 350, 210

S.W. 2d 514. In our view, this definition of parole more closely parallels the judicial suspension of a sentence that has been pronounced than the exclusive subjects of gubernatorial clemency - pardon, reprieve and commutation. We have specifically held that the statute allowing postponement or suspension of sentence did not violate Art. 6 § 18. *Emerson* v. *Boyles,* 170 Ark. 621, 280 S.W. 1005; *Murphy* v. *State,* 171 Ark. 620, 286 S.W. 871, 48 ALR 1189. By like reasoning, Ark. Stat. Ann. § 41-4707 does not either.

Appellant next contends that his confession was involuntary as a matter of law and fact under the undisputed evidence and, therefore, inadmissible. We do not agree. In order for us to reverse the holding of the circuit judge that the state had met its burden of proving that the in-custody confession was voluntary, we must find from an independent determination, based upon the totality of the circumstances, that it was clearly against the preponderance of the evidence. *Degler* v. *State,* 257 Ark. 388, 517 S.W. 2d 515.

In support of his contention, Tanner asserts that his confession was obtained by trickery, that he did not have the assistance of counsel, and that he had been deprived of food and sleep for a long period of time. Tanner did not testify at the Denno hearing and did not produce any witnesses there. The testimony of the officers is, as Tanner concedes, undisputed. We find that it was clearly sufficient to overcome the presumption against voluntariness, if accorded full weight, as it was.

Sheriff Marlin Hawkins was informed of the murders about 1:00 a.m. on August 16. He caused an investigation to be commenced. He went to Tanner's residence, along with Lt. Howard Chandler, an Arkansas State Police criminal investigator, Dr. Rodney Carlton, the State Medical Examiner, and Deputy Sheriff Earl Smith at 5:00 to 5:30 p.m. and found Tanner out in his yard. Tanner came to the automobile and sat in it beside Hawkins. Hawkins testified that Lt. Chandler advised Tanner of his constitutional rights and that Tanner said he didn't want an attorney because he hadn't done anything. Hawkins told Tanner that they were investigating the murder of Mrs. Keith and her two children and told

Tanner that there was a rumor that there had been blood on his clothes. The sheriff then asked Tanner where he got the blood. Tanner explained that, while driving his truck hauling logs from Dover to Menifee about 2:00 p.m. on August 15, he had rendered assistance to two boys who had an accident in a vehicle bearing a Kentucky license. According to Tanner, the boys had blood in their hair and this was the source of the blood on his clothes. Tanner told Hawkins that his bloody clothes were in a tub on the back porch of the Tanner house. When Hawkins asked Tanner when he quit work, Tanner replied that it was about 7:30 p.m. and that he had bought a 6-pack of beer and had gone to Little Rock, but he did not know where he went and what he did there. Hawkins then asked Tanner when he had learned there had been a murder and Tanner said that when he returned to his home about 11:00 p.m., his wife told him of it. Hawkins remarked that this was strange because no one knew there had been a murder until Mr. Keith arrived at his home about 12:45 a.m. on August 16. Hawkins then went to check on Tanner's story, and left further interrogation to Chandler.

Lt. Chandler corroborated Hawkins' testimony about his advice to Tanner of Miranda rights. He said that Tanner said that he would tell the officers what they wanted to know. According to Chandler, after Hawkins and Smith left, Tanner told Chandler of his activities on the day in question. This narration was virtually identical to that related to Hawkins, except that Tanner told Chandler he was notified of the death about 1:30 a.m., and said that he quit work at 5:30 or 6:00 p.m.

Tanner was taken into custody as a prime suspect and Deputy Sheriff Farrell Bradshaw brought him to the courthouse in Morrilton at approximately 7:30 p.m. Robert Jackson, a deputy sheriff, talked to Tanner there about 7:40 p.m. He said that he then advised Tanner of his constitutional rights and that Tanner signed a waiver of Miranda rights at 7:48 p.m. Jackson advised Tanner of the nature of the investigation and told Tanner that he was the subject of that investigation. Tanner again made his statement about the accident, but Jackson told him that, although there had

been such an accident, there had been no injuries.[1] According to Jackson, Tanner then said that he was not responsible for the murders and would take a "lie detector test" to prove his innocence. Jackson said that when Tanner insisted upon such a test, he contacted Sgt. Don Walls, polygraph examiner for the Arkansas State Police, and arranged for one. Jackson, Tanner and Deputy Sheriff John Hawkins, who had also participated in the questioning of Tanner at the courthouse, arrived at State Police Headquarters about 9:15 p.m. Capt. McDonald of the Arkansas State Police was called and trace metal tests were conducted by him when he arrived at headquarters 30 minutes later. This test to determine whether Tanner had handled a weapon such as a knife found at the murder scene was inconclusive. Capt. McDonald, during this time, advised Tanner of his rights, but Jackson could not recall specifically what McDonald had said. At some time after arrival at State Police Headquarters, Tanner reiterated his account of the source of the blood on his clothing. The Conway County officers and Tanner remained with Capt. McDonald until 11:30 p.m. Sgt. Walls then took charge of Tanner and went into Walls' office in an adjoining room to prepare Tanner for the polygraph examination. Sgt. Walls emerged about 12:35 a.m. and advised Jackson and Hawkins that Tanner wanted to make a statement.

Walls testified that he prepared Tannner for the examination by interviewing him for approximately one hour to get acquainted with him, obtain background information and advise him of the type of questions that would be asked. According to Walls, full development of the subject's background is time consuming, but essential to proper framing of questions in conducting a polygraph examination. He said that no one else was in the room while this was being done. Walls stated that the examination was never conducted, because Tanner said that he had a statement he wanted to make. Walls then called Hawkins and Jackson and in their presence advised Tanner of his rights. Jackson testified that Tanner then said he had something he wanted to get off his chest.

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[1]Jackson did not investigate. This information came to him from other officers.

Tanner then made an oral statement of which handwritten notes were made by Walls and signed by Tanner. The notes were commenced at approximately 12:45 a.m. and completed in approximately one hour. Tanner then wrote out his statement in his own handwriting. He started at about 1:40 a.m. and took about an hour. Walls testified that his notes and Tanner's written confession were substantially identical.

Jackson had had no supper that evening and felt sure that Tanner had had none. The Conway County officers left the State Police Headquarters about 3:20 a.m. and arrived at Morrilton about 4:20 a.m. Walls had advised Tanner that he was under arrest on the murder charges at about 3:10. This officer had at that time been advised of the issuance of warrants in Conway County. Tanner was placed in a cell in the Conway County jail with 12 or 14 other prisoners, three of whom had been charged with murder. When arraigned about 10:00 a.m. that morning in the circuit court, Tanner had suffered a beating and was taken to a hospital for treatment. There was no evidence to indicate that any officer struck Tanner or used any physical force on him, and there is no contention by appellant that there was. Appellant emphasizes the fact that at the moment before he signed his confession he was not told of his right to counsel. The evidence would indicate that he had been told of this right four or five times in the preceding hours, once just before he gave the statement.

We certainly cannot say that the circuit judge's finding that the presumption of involuntariness had been overcome was clearly against the preponderance of the evidence. Furthermore, there was no evidence that required that the state call Deputy Sheriff Hawkins to testify in order to meet its burden of proof. See *Gammel and Spann* v. *State,* 259 Ark. 96, 531 S.W. 2d 474 (1976). The reason for requiring the testimony of all material witnesses who were connected with a controverted confession is that otherwise testimony charging violence, threats, coercion, or offers of reward, leniency and assistance stands uncontroverted. See *Russey* v. *State,* 257 Ark. 570, 519 S.W. 2d 751; *Smith* v. *State,* 254 Ark. 538, 494 S.W. 2d 489. Here there was no testimony for Hawkins to

controvert. There was no reversible error in connection with the admission of the confession.

Appellant next challenges the admission of certain photographs showing the bodies of the victims of a very brutal assault because, he says, their only purpose was to inflame the minds of the jury. His argument is that the witnesses could and did adequately describe the scene, the position of the bodies, the lay of the surroundings and every other essential fact and circumstance, including the manner of the killing and the area where the victims were stabbed and struck. He also argues that there was no need for corroboration of the witnesses who testified, relying upon *Smith* v. *State,* 216 Ark. 1, 223 S.W. 1011. There we quoted respectable authority that admissibility of photographs depends not on whether the objects portrayed could be described in words, but rather on whether they would be useful to enable the witness to better describe and the jury to better understand the testimony. But we there recognized that the question of admissibility and relevancy of photographs must lie largely within the discretion of the trial judge. We also recognized that the description of the character of wounds inflicted upon the victim is always admissible in evidence, that there was no rule limiting the description to word of mouth and the fact that a photograph was cumulative to oral testimony did not affect its materiality. We took an apt quotation from *Nicholas* v. *State,* 182 Ark. 309, 31 S.W. 2d 527, which included this statement: "We do not think the most accurate method of reflecting a truth should be eliminated, but, just to the contrary, such a method should be approved and accepted." The mere fact that a photograph which depicts the wounds and injuries inflicted upon a body are gruesome is not sufficient to justify excluding it. Indeed the very thing that makes the photograph appear gruesome is often relevant and very material on such issues as malice, premeditation and deliberation. *Witham* v. *State,* 258 Ark. 348, 524 S.W. 2d 244 (1975).

It was shown that the photographs taken within two hours of the discovery of the bodies of the dead woman and her children accurately depicted the scene found by officers when they went to the Keith mobile home where the victims

had been slaughtered. One of the objects shown was a broken knife which was undoubtedly one of the murder weapons. The assistant state medical examiner who arrived at the scene within two hours after the photographs were taken, pointed out in testimony in chambers that each of the photographs illustrated that the victims, whose bodies showed evidence that they had been both beaten and stabbed, were alive when stabbed and that the photographs would be helpful to the jury in following and understanding his testimony. There were both black and white and color photographs. This pathologist said that the color pictures showed detail that he could not see in the black and white prints. He did point out in the presence of the jury the features in at least some of the photographs which depicted conditions which lead him to the conclusion that the victims were alive when stabbed and that the stabbing was the cause of death. Admittedly neither this witness nor the chief medical examiner who performed an autopsy on Mrs. Keith used any of the photographs in arriving at their conclusions, but both used the photographs to illustrate things that they had observed about the bodies in arriving at their conclusions. This testimony demonstrates admissibility of the photographs because they shed light on material issues and enabled witnesses to better describe that which was depicted and the jury to understand the testimony. *Perry* v. *State,* 255 Ark. 378, 500 S.W. 2d 387.

It is also noteworthy that the photographs tended to corroborate the appellant's confession, the voluntariness of which was submitted to the jury. See *Shipman* v. *State,* 252 Ark. 285, 478 S.W. 2d 421.

Clearly there was no abuse of discretion in the admission of these photographs.

Other objections made by appellant in the trial court, but not argued here, have been carefully examined and found to be without merit. Objections to questions pertaining to the death penalty on voir dire of prospective jurors and excusal of some because of their convictions about the death penalty have been mooted by the jury verdict, as have objections to the bifurcated trial procedure and instructions as to

aggravating and mitigating circumstances in the punishment phase of the trial. There was no abuse of discretion in the disallowance of a challenge for cause to a juror employed as a nurse at the Conway County Hospital.

We have also considered an objection made by appellant to procedures relating to the making of peremptory challenges. Although the defendant exercised peremptory challenges, the state did not until eleven jurors were in the box. The judge then asked whether the state accepted these eleven and the prosecuting attorney challenged two of them. After appellant's objection was overruled, the court advised that appellant would be accorded the same privilege as soon as eleven had been tentatively accepted and appellant's counsel responded, "We will see what happens." Thereafter the state excused another prospective juror when there were eleven in the box and the objection was renewed. The next time the State excused one juror when there were eleven tentatively accepted, no objection was made by appellant. After the prosecuting attorney had again excused a prospective juror when there were eleven, the court inquired, "Does the defendant still remain silent?" Appellant's attorney responded, "I guess so." Still later, on two occasions when there were eleven in the box, the state challenged none, but appellant challenged one of the jurors.

The names of the jurors had been called individually and they had been examined individually on voir dire by both attorneys. There was no delay until exhaustion, or near exhaustion of challenges. The procedure followed was not identical to that in *Clark* v. *State,* 258 Ark. 490, 527 S.W. 2d 619 (1975). Under these circumstances, we must agree with the Attorney General that appellant acquiesced in the procedure. Furthermore, we did not say in *Clark* that the court had no discretion to allow a challenge after a tentative acceptance of a prospective juror but before the jury selection had been completed, at least where the adverse party has not exhausted his peremptory challenges. See *Ruloff* v. *State,* 142 Ark. 477, 219 S.W. 781.

Appellant objected to the testimony of Sgt. Walls relating to the preparation of an individual for a polygraph

examination. There was no error here. In the first place, the examination was being had at appellant's request. But more importantly it was necessary on the question of voluntariness of statements made by Tanner (which was submitted to the jury as to weight and credibility) that there be an explanation of what took place during the period of time appellant was alone with this officer.

It would unduly extend this opinion to recite numerous other objections made by appellant. In their consideration, we have been materially aided by a review of most of them by the Attorney General. It is sufficient to say that we have considered these and others the Attorney General listed as frivolous and find no prejudicial error.

The judgment is affirmed.

Jim BEAM and Bill BEAM,
d/b/a BEAM BROS. CONTRACTORS *v.*
MONSANTO COMPANY, Inc., a
Corporation

75-148 532 S.W. 2d 175

Opinion delivered February 9, 1976

Batchelor & Batchelor, by: *Fines F. Batchelor, Jr.,* for appellants.

William M. Stocks, for appellee.

J. FRED JONES, Justice. This is an appeal by Jim Beam and Bill Beam, d/b/a Beam Brothers Contractors, Inc., from a circuit court order sustaining a demurrer to their counterclaim, as amended, in a suit filed by the appellee, Monsanto Company, Inc., for balance owned on open account. The final demurrer from which comes this appeal was on the grounds that the counterclaim, as amended, failed to state a cause of action under Ark. Stat. Ann. §§ 70-301—70-

307 (Repl. 1957), and because the relief sought under the counterclaim, as amended, was barred by the statute of limitations. The trial court sustained the demurrer on both grounds.

The points on which the appellants rely for reversal are designated as follows:

> "Appellants' pleadings state a cause of action in fraudulent misrepresentation in sales resulting in damages.
>
> The trial court erred in holding that the Arkansas Unfair Practices Act, Ark. Stats. 70-301 — 70-314 has no application to vertical competition, by sustaining demurrer to prayer for relief and damages.
>
> The trial court erred in holding that the statute of limitations had run upon claims of appellants, as a matter of law, based upon the pleadings.
>
> The trial court erred in refusing to compel discovery by requiring appellee to respond to interrogatories served.
>
> The trial court erred in denying summary judgment in favor of appellants.
>
> Under Arkansas Practice, a demurrer may not be filed after the filing of an answer in the action."

This litigation was commenced on March 25, 1970, when Monsanto filed suit against Beam Brothers for balance on account, for oil and related products purchased and used by Beam Brothers in mixing asphalt concrete paving material at their plant at Fort Smith and later at Prescott, Arkansas. By amendment filed June 8, 1970, Monsanto alleged that Beam Brothers was indebted to Monsanto in the amount of $14,341.24 for merchandise and material furnished between March 19, 1969, and September 30, 1969. A number of amendments, motions, interrogatories and answers thereto were filed by the parties and on November 30, 1971, Beam Brothers filed a separate answer and counterclaim designated

"Cross-Complaint" in which they alleged an assignment which should have been applied on the alleged indebtedness, and otherwise they denied the allegations in the complaint. In paragraph III of their answer Beam Brothers alleged as follows:

> "These defendants further specifically allege that the plaintiff specifically represented to defendants that it was selling to them the A C Oil for the making of asphalt concrete by said defendants at as low a price as it was selling to anyone else, when, in fact, from approximately May, 1966, through the last purchase of said oil from plaintiff, which plaintiff alleges to have been September 25, 1969, plaintiff was charging these defendants more per ton for said oil than it was charging to other customers who were buying such materials of like quantity and quality in different locations, sections, communities, cities, and portions thereof in this State with the intent to destroy competition of these defendants who were regular established dealers in such commodities, products and services and prevent these defendants from competing with other persons, firms and corporations, in violation of Ark. Stats. 70-301 and following, and that any amounts which plaintiff claims to be owed to it, in fact any be found to be owed, would be owed under a contract, expressed or implied, and made by and between persons, firms and corporations in violation of the provisions of Ark. Stats. 70-301 through 70-307, therefore under the provisions of Ark. Stats. 70-309, said contract is illegal and no recovery can be had thereon or by reason thereof."

The designated cross-complaint then alleged in part as follows:

> "These defendants were previously engaged in contracting business which includes bidding upon Arkansas Highway Department, highway jobs, building streets, driveways, parking areas and other improvements of asphalt construction, and as a part thereof operated a plant which made asphalt from its various components including, but not limited to an A C type oil which was

purchased from plaintiff, sand gravel, and other ingredients, from [for] such manufacturing said asphaltic cement which was used in their business. While this business was originally commenced in the area of Fort Smith, Arkansas, it was moved to Prescott, Arkansas, where it operated at all times material hereto.

Said plaintiff being a person, firm or corporation doing business in the State of Arkansas and engaged in the production, manufacture, distribution or sale of any commodity or product, or service or output of a service trade, or general use or consumption, unlawfully, and with the intent to destroy the competition of a regularly established dealer in such commodity, product of service, did discriminate between different sections, communities and cities and portions thereof, and between different locations in such sections, communities, cities and portions thereof in this State by selling and furnishing said commodity, product and service at a lower rate to one section, community and city, or any portion thereof, and in one location in such section, community and city and any portion thereof than in another, after making allowance for difference, if any, in the grade or quality, quantity and in the actual cost of transportation from point of production or manufacture. That by reason thereof, these defendants were unable to competitively bid upon various jobs, and particularly Arkansas State, Federal Aid Highway jobs, and by reason thereof, these defendants were, in fact, completely put out of business.

By reason of such unlawful and wrongful actions as herein before set out on the part of plaintiff, these defendants were damaged in the amount of $15,000.00 by over charge upon said oil products, and were caused to lose their entire business, and presently have numerous judgments and liens filed against them, are unable to bond jobs, which is essential in their business operation, have lost all of their equipment and earnings, together with real estate, to their damage in the amount of $750,000.00, or a total actual damages to these defendants in the amount of $765,000.00, and therefore, under the

provisions of Ark. Stats. 70-301 and following, and 70-310 in particular, these defendants are entitled to damages against plaintiff in the amount of three times the amount of the actual damages, or a total of $2,295,-000.00.

WHEREFORE PREMISES CONSIDERED, the defendants, Jim Beam and Bill Beam, respectively pray that the plaintiff, Monsanto Company, Inc., a corporation, take nothing against them by reason of its complaint herein filed, and that they have judgment against said plaintiff, Monsanto Company, Inc., a corporation, in the amount of $2,295,000.00, the same being three times the amount of their actual damage of $765,000.00, and that they have all other just and legal relief to which they might be entitled."

On January 3, 1972, Monsanto filed a reply and demurrer to the counterclaim. The reply denied the allegations set out in the counterclaim and for demurrer Monsanto alleged as follows:

"1. The counterclaim, styled cross-complaint, fails to state a cause of action under Ark. Stats. Section 70-301 through 70-307.

2. The relief sought in the counterclaim is barred by the appropriate statute of limitations, and particularly Ark. Stats. Section 37-204."

On January 7, 1972, Beam Brothers filed a response to Monsanto's reply and demurrer in which they reasserted that Ark. Stat. Ann. §§ 70-303 — 70-313 were applicable to the case and under paragraph III of this instrument they stated as follows:

"Although these defendants, Beam, carefully studied and attempted to determine what prices were being charged, the plaintiff did fraudulently conceal its actions, and using all efforts available to them, to their knowledge and the exercise of diligence, these defendants were unable to determine or learn of the wrongful

acts and concealment of plaintiff until on or about the 1st day of June, 1970, and therefore, the Statute of Limitations did not begin to run against them until that time, and this being a statutory right not otherwise provided for, the five year Statute of Limitations of Ark. Stats. 37-213 applies."

On May 31, 1972, the trial court sustained the demurrer with leave to amend. On June 9, 1972, Beam Brothers filed their first amendment reciting substantially the same allegations as in their original counterclaim. Monsanto again demurred to the amended counterclaim and the demurrer was again sustained by the trial court with leave to amend. On September 10, 1973, Beam Brothers filed their second amendment to their counterclaim alleging in part as follows:

"Plaintiff, by and through its agents, servants, and employees, acting within the scope of their agency, service and employment, did represent to defendants, that plaintiff was selling to defendants, materials at the same price the same were being sold to other contractors in the same business, at the time knowing said representations to be false, expecting plaintiffs to rely thereon, to their detriment, which they reasonably did, and such false representations and facts being material, and contracts for various jobs, including Arkansas State Highway jobs, were bid on the basis of such representations as being a principal ratio and percentage of materials to be furnished, thereby intentionally causing defendants to overbid upon jobs in proportion to such overcharge for their materials, and fail to obtain jobs, which resulted in the intended loss of defendants' entire business operation, resulting therefore in actual damages to defendants in the amount of $765,000.00, and entitling said defendants to punitive damages against plaintiff in the amount of $1,530,000.00, and although defendants used due diligence, they were unable to learn of such wrongful actions upon plaintiff's part until less than 3 years prior hereto."

Monsanto filed an amended reply and answer to the second amendment stating that it adopted all former pleadings;

that the amended complaint did not state a cause of action; that the action stated was barred by the statute of limitations, and that it denied the allegations in the counterclaim as amended by second amendment. Following additional motions and other pleadings not germane to the issues on this appeal, Monsanto filed an additional demurrer on the same grounds as the previous demurrers and this demurrer was also sustained by the order appealed from, which recited as follows:

> "1. The counterclaim, as amended by all amendments, fails to state a cause of action under Ark. Stats. Section 70-301 through 70-307.
>
> 2. The relief sought by the counterclaim as amended by all amendments is barred by the applicable statute of limitations."

Ark. Stat. Ann. §§ 70-303 — 70-313 (Repl. 1957) is the "Unfair Practices Act" and it simply does not apply to the alleged facts in this case. Section 70-301 provides as follows:

> "It shall be unlawful for any person, firm, or corporation, doing business in the State of Arkansas and engaged in the production, manufacture, distribution or sale of any commodity or product, or service or output of a service trade, of general use or consumption, or the product or service of any public utility, with the intent to destroy the competition of any regular established dealer in such commodity, product or service or to prevent the competition of any person, firm, private corporation or municipal or other public corporation, who or which in good faith, intends and attempts to become such dealer, to discriminate between different sections, communities or cities or portions thereof, or between different locations in such sections, communities, cities or portions thereof in this State, by selling or furnishing such commodity, product or service at a lower rate in one section, community or city, or any portion thereof, or in one location in such section, community, or city or any portion thereof, than in another after making allowance for difference, if any, in the grade or quality,

quantity, and in the actual cost of transportation from the point of production, if a raw product or commodity or from the point of manufacture, if a manufactured product or commodity. This act [§§ 70-301 — 70-314] shall not be construed to prohibit the meeting in good faith of a competitive rate, or to prevent a reasonable classification of service by public utlitiés for the purpose of establishing rates. The inhibition hereof against locality discrimination shall embrace any scheme of special rebates, collateral contracts or any device of any nature whereby such discrimination is, in substance or fact, effected in violation of the spirit and intent of this act."

Section 70-310 provides as follows:

"Any person, firm, private corporation or municipal or other public corporation, or trade association, may maintain an action to enjoin a continuance of any act or acts in violation of sections 1 to 7, inclusive [§§ 70-301 — 70-307], of this act and, if injured thereby, for the recovery of damages. If, in such action, the court shall find that the defendant is violating or has violated any of the provisions of sections 1 to 7, inclusive [§§ 70-301 — 70-307], of this act, it shall enjoin the defendant from a continuance thereof. It shall not be necessary that actual damages to the plaintiff be alleged or proved. In addition to such injunctive relief, the plaintiff in said action shall be entitled to recover from the defendant three [3] times the amount of the actual damages, if any, sustained.

Any defendant in an action brought under the provisions of this section or any witness desired by the State, may be required to testify under the provisions of sections 3110 - 4137-4139-4140-4141-4142-4143-4150-4151-4152-4153-4192-7151 of Crawford and Moses' Digest of the Statutes as amended of this State, in addition the books and records of any such defendant may be brought into court and introduced, by reference, into evidence; provided, however, that no information so obtained may be used against the defendant as a basis

for a misdemeanor prosecution under the provisions of sections 1 to 7, inclusive [§§70-301 — 70-307], and 11 [§70-311] of this act."

The purpose of the Act is set out in § 70-313 as follows:

"The Legislature declares that the purpose of this act [§§ 70-301 — 70-314] is to safeguard the public against the creation or perpetuation of monopolies and to foster and encourage competition, by prohibiting unfair and discriminatory practices by which fair and honest competition is destroyed or prevented. This act shall be literally construed that its beneficial purposes may be subserved."

We now consider the appellants' points in the order listed. As to appellants' first point, both parties agree that the last counterclaim pleaded by the appellants in their amendment on September 10, 1973, alleged common law fraud or deceit. The three-year statute of limitations applies to fraud and deceit. Ark. Stat. Ann. § 37-206 (Repl. 1962); *White* v. *McBride*, 245 Ark. 594, 434 S.W. 2d 79 (1968). So the key issue on this point is whether the appellants alleged a cause of action for fraud or deceit in their first counterclaim as amended on November 29, 1971 and on June 9, 1972. The counterclaim as thus amended obviously did not allege such cause of action. Consequently the appellants' action for deceit only existed prior to September 10, 1973, if their September 10, 1973, amendment or counterclaim was merely an expansion or amplification of an allegation of deceit expressed in their first or second counterclaim and not an introduction of a new cause of action. *Bridgman* v. *Drilling,* 218 Ark. 772, 238 S.W. 2d 645 (1951). We are of the opinion that the amendment of September 10, 1973, stated a new cause of action and the trial court was correct in stating that, "The relief sought by the counterclaim as amended by all amendments is barred by the applicable statute of limitations."

The appellants argue that the trial court erred in granting this demurrer because in testing a case on demurrer the court is required to construe allegations in the pleadings

liberally in favor of the pleader. Citing *Quinn* v. *Stuckey,* 229 Ark. 956, 319 S.W. 2d 839 (1959). In *Quinn* this court said:

> "At the outset it is well to state the rule for testing a case on demurrer. In *Tyler* v. *Morgan,* 214 Ark. 667, 217 S.W. 2d 606, we said:
>
> 'Appellees demurred to this complaint on the ground that it did not state facts sufficient to constitute a cause of action. The trial court sustained the demurrer and this appeal followed.
>
> The question presented is: Treating all allegations in the complaint, *which are well pleaded,* as true, and construing them liberally in favor of the pleader, as we must, was a cause of action stated? * * *' " (Emphasis added).

To be well pleaded fraud or deceit must be specifically alleged. In *Burns* v. *Burns,* 199 Ark. 673, 135 S.W. 2d 670 (1940), we said:

> "This court has many times held that where fraud is relied upon the complaint must state something more than mere conclusions, but the facts relied upon as constituting the fraud must also be clearly set forth in the complaint to justify the court in overruling a demurrer."

In the early case of *McIlroy* v. *Buckner,* 35 Ark. 555 (1880) this court said:

> "It is not sufficient to plead fraud generally, or merely to characterize actions as fraudulent. The facts and circumstances constituting the fraud should be set forth. There should be some concealment, misrepresentation, craft, finesse, or abuse of confidence, by which another is misled, to his detriment; and these, or some of them, must be alleged and proved. Mere epithets, or adverbs characterizing conduct, which in itself, may be innocent, amount to nothing."

This court has adhered to the general rule that fraud, as an

affirmative defense, must be specifically pleaded by the party claiming it. *Bridges* v. *Harold L. Schaefer, Inc.*, 207 Ark. 122, 179 S.W. 2d 176 (1944); *Van Houten* v. *Better Health Ins. Assn. of America*, 238 Ark. 815, 384 S.W. 2d 465 (1964).

Prosser, Law of Torts 4th ed. § 105 at p. 685 states the elements of the tort cause of action in deceit as follows:

> "1. A false representation made by the defendant. In the ordinary case, this representation must be one of fact.
>
> 2. Knowledge or belief on the part of the defendant that the representation is false — or, what is regarded as equivalent, that he has not a sufficient basis of information to make it. This element often is given the technical name of 'scienter.'
>
> 3. An intention to induce the plaintiff to act or to refrain from action in reliance upon the misrepresentation.
>
> 4. Justifiable reliance upon the representation on the part of the plaintiff, in taking action or refraining from it.
>
> 5. Damage to the plaintiff, resulting from such reliance."

In *Cleveland* v. *Biggers*, 163 Ark. 377, 260 S.W. 432 (1924), this court approved a pleading of fraud as sufficient to support damages, saying:

> "We think, however, that a cause of action for damages was stated. By fair intendment the complaint does allege a representation and its falsity, that the vendees relied upon said representation, and had a right so to rely, and were deceived thereby, that the false representations were material to the contract, and resulted in plaintiffs' damage, and were made to accomplish that purpose."

An examination of the appellants' counterclaim as amended by the first and second amendments reveals that they neither specifically set out the misrepresentations, nor

pleaded the elements of deceit. They did not state that Monsanto's representation as to its price of A C oil was false at the time made, or that price was material to the transaction, or that appellants relied upon this representation. In their third counterclaim appellants specifically allege these elements. However, the trial judge was correct in determining that the appellants' third counterclaim was an attempt to bring in a new cause of action barred by the statute of limitations.

As to the appellants' second point, the order of the trial court stated, "The counterclaim, as amended by all amendments, fails to state a cause of action under Ark. Stats. Section 70-301 through 70-307." The appellee argued in the trial court and also on this appeal that since it was not in competition with the appellants, there was no violation of the Arkansas Unfair Practices Act. Appellants argue that as buyers of appellee's goods, they were in "vertical competition" with appellee and that the trial court erred in not considering this "vertical competition." The appellants' argument is without merit. Aside from the purpose as recited in the statute, § 70-313, *supra,* the parties have cited three cases in which this court has also stated the purpose of the statute. *Baratti* v. *Koser Gin Co.,* 206 Ark. 813, 177 S.W. 2d 750 (1944); *Concrete, Inc.* v. *Arkhola Sand & Gravel Co.,* 228 Ark. 1016, 311 S.W. 2d 770 (1958); *Concrete, Inc.* v. *Arkhola Sand & Gravel Co.,* 230 Ark. 315, 322 S.W. 2d 452 (1959). All three of these cases involved competition between sellers. In each case this court said that the Unfair Practices Act makes it unlawful to lower prices in certain areas with the intent to destroy competition. But, appellants argue these cases cannot be controlling in a situation involving "vertical competition"; that is, competition between seller and buyer. The reason appellants' argument is without merit is found not in case authority, but in the construction of the statute. The Arkansas Unfair Practices Act is penal in nature and imposes liabilities unknown at common law; therefore, it must be strictly construed in favor of those upon whom the burden is sought to be imposed, and that which is not clearly expressed will not be taken as intended. *Davis* v. *Fowler,* 230 Ark. 39, 320 S.W. 2d 938 (1959). The first section of the Unfair Practices Act, § 70-301, *supra,* applies to the,

> ". . . production, manufacture, distribution or sale of any commodity . . . of general use or consumption . . . with the intent to destroy the competition of any regular established *dealer in such commodity* . . . or to prevent the competition of any person, firm . . . [or] corporation . . . who or which in good faith, *intends and attempts to become such dealer,* to discriminate between different sections . . . in this State, by selling or furnishing such commodity, product or service at a lower rate in one section . . . than in another. . . ." (Our emphasis).

It is apparent that the statute is intended to foster competition for the primary benefit of the general public by protecting dealers, especially small dealers from unfair competition by large dealers. The term "dealer" is not defined in the statute but its common meaning, as defined in Random House Dictionary, is "one who buys and sells articles without changing their condition." Appellants' argument for "vertical competition" would broaden the Act to not only protect dealers, those who buy and sell, from unfair competition by other dealers, but would also protect buyers from competition by the various and sundry business buyers who use and purchase the same or similar product for use in their various businesses. The concern of the Unfair Practices Act is to prevent goods which are unfairly priced below the goods of competitors from temporarily entering the market and forcing the competitor out of business, thus gaining a monopoly within a given locality after which time the prices may be raised without limit and without competition to the final detriment of the public interest. The emergency clause of the Unfair Practices Act recites as follows:

> "The sale at less than cost of goods obtained at forced, bankrupted, close out, and other sales outside of the ordinary channels of trade is destroying healthy competition and thereby forestalling recovery. If such practices are not immediately stopped many more businesses will be forced into bankruptcy, this increasing the prevailing condition of depression. In order to prevent such occurrences it is necessary that this act go into effect immediately. Approved March 17, 1937."

What we have already said disposes of the appellants' third and fifth points, and we find no merit to the appellants' fourth point under the facts in this case.

Under appellants' sixth point they contend that under Arkansas practice a demurrer may not be filed after the filing of an answer in the action. The appellants overlook the fact that appellee's response to appellants' second amendment to Separate Answer and Counterclaim, entitled Plaintiff's Amended Reply and Answer filed October 12, 1973, included a demurrer. It is a well settled rule of law that a pleading will not be judged by what it is called but by what it contains. *Smith Chickeries* v. *Cummings,* 224 Ark. 743, 276 S.W. 2d 48 (1955); *Askew* v. *Murdock Acceptance Corp.,* 225 Ark. 68, 279 S.W. 2d 557 (1955); *Stroud* v. *Barksdale Lbr. Co.,* 229 Ark. 111, 313 S.W. 2d 376 (1958); *Little Rock Land Co.* v. *Raper,* 245 Ark. 641, 433 S.W. 2d 836 (1968). Paragraph three of the appellee's response contained the classic statement for a general demurrer. "Plaintiff further states that the counterclaim as amended fails to state a cause of action."

The judgment is affirmed.

HORSESHOE BEND BUILDERS, Employer,
THE TRAVELERS INSURANCE COMPANY
v. Frank A. SOSA, Jr., Employee

75-212 532 S.W. 2d 182

Opinion delivered February 9, 1976

Wright, Lindsey & Jennings, for appellants.

Murphy & Blair, by: *H. David Blair,* for appellee.

J. FRED JONES, Justice. This is a workmen's compensation case and the question is whether there was any substantial evidence to support the Commission's finding, as affirmed by the circuit court, that the claim was controverted by the appellant insurance carrier and in awarding attorney's fee against the carrier in addition to compensation awarded to the appellee-claimant.

The facts appear as follows: On July 23, 1973, the appellee-claimant, Mr. Sosa, injured his left leg[1] when he fell from a scaffold while working as a carpenter's helper on a building at Horseshoe Bend. The appellee was sent to Dr. Carhart, an osteopath and only physician in Horseshoe Bend, and apparently an A8 or first report of injury form prescribed by the Commission was sent to the compensation carrier by the employer indicating the injury to be of a minor nature with no compensable lost time indicated. The appellee did not return to the job site or contact his employer;

[1]Apparently consisting of herniated muscle or muscle sheath in the left leg resulting in a release of blood and formation of a blood clot.

however, he did continue to go to Dr. Carhart for a period of approximately two weeks and when Dr. Carhart indicated to the appellee that he intended to dismiss him as able to work the appellee contacted his attorney, Mr. Blair. Through attorney Blair's assistance the appellee obtained an appointment with Dr. Langevin, a general surgeon in West Plains, Missouri, who first saw the appellee on August 9, 1973.

On August 15, 1973, Dr. Langevin reported to Mr. Blair that the appellee was seen by the doctor on August 9, 1973, complaining of lumbo sacral pain and inability to bear weight on his left leg. He then stated:

> "Examination revealed a large sub periosteal hematoma over the left tibia, gross blemish discoloration down the left lower leg, and tenderness over the sacroiliac joints and right buttock.
>
> * * *
>
> In my opinion, permanent disability would not be expected but a hematoma such as he has on this left leg, can be debility for some time."

The record is not clear on the point but apparently the appellee was paid some amount of compensation while under the treatment of Dr. Langevin. In any event on October 2, 1973, Dr. Langevin reported to the compensation carrier as follows:

> "Since the last time we made a report, I saw Mr. Sosa twice, 8-23-73 and 8-30-73. On the last visit I aspirated 7cc of blood from the hematoma over the left tibial area.
>
> I have not seen him since 8-30-73 and assumed that he had not returned because he was well."

On October 4, 1973, the appellee's attorney, Mr. Blair, wrote a letter to Mr. Ray Henthorne, the compensation carrier's representative, as follows:

> "I interpret Dr. Langevin's letter to you of October 2,

> 1973, to indicate that Mr. Sosa's healing period was terminated on August 30, 1973. I assume that you will pay him benefits to this time, which should conclude his claim.
>
> I am enclosing herewith a copy of a statement from Dr. Langevin dated October 10, 1973, which, to my knowledge, has not been paid, and also a statement dated August 15, 1973, for medical services to Mr. Sosa, which I have already paid myself. If you could pay the October statement directly to Dr. Langevin and reimburse me on the August statement I would appreciate it very much."

Apparently the amounts were paid and the claim considered terminated by the carrier as of August 30, 1973, as requested and suggested by the appellee's attorney in the October 4 letter, *supra,* and as hereafter indicated in correspondence dated December 14.

On December 4, 1973, Dr. Langevin made another report to Mr. Blair which stated in part as follows:

> "This [is] a note concerning the patient Frank Sosa I talked to you about on the telephone.
>
> As I told you I had not seen him since 8-30-73 and presumed he was well until he walked into my office 11-12-73. At that time he had a rather severe swelling of lymphedema of the left lower leg from the knee down which was also painful and extremely tender."

Dr. Langevin then stated that the appellee was hospitalized; the swelling reduced by treatment and that he was fitted with an elastic stocking and instructed to wear it at all times during the day. He concluded this report as follows:

> "I will follow him in the clinic until we see if this is going to be a permanent deficit."

On December 10, 1973, the appellee's attorney wrote another letter to Mr. Henthorne advising of the most recent

medical report from Dr. Langevin and enclosed a copy of the report and Dr. Langevin's bill. This letter then concluded as follows:

> "I believe Mr. Sosa would be still entitled to temporary permanent [sic] benefits and if you could pay them from the time they were terminated to date I would appreciate it. Also, if you would please take care of the enclosed statement from Dr. Langevin I would appreciate that also.
>
> If there is any problem about any of these items please let me know.
>
> When I have some further word on him I will relay it to you."

On December 14, 1973, Mr. Blair wrote another letter to Mr. Henthorne and this letter was apparently returned by Mr. Henthorne with Mr. Henthorne's handwritten reply on the bottom thereof. The letter from Mr. Blair recited as follows:

> "I received and thank you for the check in the amount of $37.50 for payment of the outstanding medical expenses in connection with the above-numbered claim.
>
> I assume that the check for back temporary total was forwarded directly to Mr. Sosa. If I am in error on this please let me know."

The handwritten reply from Mr. Henthorne recited as follows:

> "Sosa pd $333.00 comp; I've also pd Dr. Langevin $20.00 and you & clmt $37.50.[2] Apparently add'l TTD benefits will be due and I'll discuss that with you on my next visit to Batesville."

On January 11, 1974, Mr. Blair mailed to the carrier an

[2]Apparently the reimbursement check to attorney Blair was made payable to him and his client.

additional statement from Dr. Langevin which indicated that the appellee was still under his care; and on January 17, 1974, Mr. Henthorne wrote a letter to the secretary of the Commission with copy to attorney Blair, as follows:

> "Concerning your letter of January 4, 1973 and our conversation of January 14, 1974, please be advised that the above captioned case has been accepted as a compensable workmen's compensation claim from the beginning and has not been controverted for any reason. We have been working with attorney David Blair for quite some time now and will continue to do so until the claimant has been released by his physician.
>
> Should you have any questions concerning this matter, please correspond with me at my address in Jonesboro."

On January 22, 1974, Mr. Blair wrote a letter to Mr. Henthorne as follows:

> "I had a call today from Frank Sosa, telling me that he had not received any compensation benefits since a check for $207.00 which he received in December.
>
> Mr. Sosa was injured on July 23, 1973. He has been disabled by that injury since that time and is entitled to Workmen's Compensation benefits at the rate of $63.00 per week. According to my calculations he is entitled to approximately $1,266.00 temporary total disability benefits but he has only received $330.00.
>
> Incidentally, Mr. Sosa is continuing to see Dr. Langevin in West Plains.
>
> I am also informed by Mr. Sosa that he is having a rather desperate time in getting by due to a lack of income.
>
> Therefore, I must request either that his benefits be paid up to date or that this matter be set immediately for hearing, and by copy of this letter I am making that request upon the Commission."

On February 6, 1974, Mr. Blair sent another statement from Dr. Langevin to Mr. Henthorne and on the same date Mr. Henthorne wrote a letter to Mr. Blair with copy to the Commission and to the appellee. This letter was as follows:

> "In reference to the above captioned matter, we received an A-8 from our insured on July 27, 1973, indicating one week's disability on the part of the claimant. Dr. Carhart was the attending physician at that time. Due to the fact that there seemed to be no lost time in the excess of one week, no temporary total benefits would be payable. I mentioned that we received this A-8 on July 27, 1973, but actually that was the date on the form, our Little Rock office not receiving the form until August 6, 1973. I then received a letter from the Workmen's Compensation Commission enclosing an A-7 you had filed and I called you on August 15, 1973 to discuss the matter. You then advised me that although Dr. Carhart had indicated that claimant could return to work, he was not able to so you sent him to Dr. Langevin in West Plains, Missouri. You also told me you would get a report from him and forward it to me. At this point, there was no medical at all to substantiate that the claimant was unable to work, and on August 22, 1973 I received your letter of August 20, 1973 along with the report from Dr. Langevin indicating that he had seen the claimant once, August 9, 1973. On this very date, I sent a temporary total draft to the claimant in the amount of $126.00 for the priod of July 24, 1973 to August 7, 1973 and dictated the letter to the Workmen's Compensation Commission advising them that the claim had been accepted as compensable. I heard no more from you or Dr. Langevin by September 29, 1973, so I called you and you said that you had heard nothing from them either and would try to get in touch with one or both parties and give me an up-to-date medical report. On September 25, 1973 I wrote Dr. Langevin requesting the medical and his bill. His report of October 2, 1973 stated that he had only seen Mr. Sosa twice since his initial report, these visits being on August 23 and August 30, 1973, and he assumed that he had not returned because he was well. Your letter to me dated

October 4 1973 indicated that you had interpreted Dr. Langevin's letter as meaning that Sosa had reached the end of his healing period on August 30, 1973, and that we should pay temporary total benefits to that time and close out the claim. We agree to this, and benefits were subsequently paid out and finals sent. Since that time, there has been additional correspondence from you demanding that we pick up temporary total benefit payments where they were last left off and bring them up to date. Also, you had filed another A-7 with the Commission prior to writing me.

I have been in Batesville on two different occasions since this correspondence began again but have not been able to reach you. As we have previously accepted this claim as being compensable, we will quite naturally continue to give full consideration to the possibility that additional temporary total is due. However, you can see that there is a definite question as to how much temporary total we owe in addition to what has previously been paid. All I have at this time [is] Dr. Langevin's letter to you indicating that he had not seen Mr. Sosa since August, assuming he was well, and that he suddenly walks in on November, 1973 with a swollen leg. I am attempting to obtain the necessary medical from Dr. Langevin and would appreciate any reports that you might have received from him.

I see no reason that we cannot work this matter out among ourselves, and if you would care to bring this claim to a conclusion on that basis, please feel free to get in touch with me at my office in Jonesboro. I intend to be in Batesville again next week and will attempt to contact you at that time to see how you want to handle the matter."

On February 11, 1974, Mr. Blair answered Mr. Henthorne's letter as follows:

"I am on this date writing to Dr. Langevin asking him for a report clarifying the questions raised in your recent letter. As soon as I receive it I will forward it to you.

> You have Mr. Sosa's address and if you want to take a statement from him verifying his disability from this injury you certainly have my permission to do so, and if there is any further information I am able to furnish you please let me know.
>
> I anticipate that we will be able to resolve this matter without a hearing but I think we should go ahead and get the hearing scheduled in the event we are unable to do so. Mr. Sosa has been out of work since last summer and is in a pretty tough position."

On February 13, 1974, Dr. Langevin reported to Mr. Blair that the appellee still had swelling in his leg when he did not use support, but that it would probably be 18 to 24 months before it could be determined whether there was any permanent disability. Dr. Langevin reported that he thought riding heavy equipment would be out as far as the appellee was concerned, but that he should be able to do work that did not require prolonged standing.

On February 14, 1974, Mr. Blair wrote a letter to Mr. Henthorne with copy to the Commission and to the claimant authorizing Mr. Henthorne to contact the claimant direct and take a recorded statement from him. Apparently Mr. Henthorne did contact the appellee and apparently had him examined at the Ozark Orthopedic Clinic in Harrison because under date of August 2, 1974, Dr. Charles Ledbetter reported to the compensation carrier that he found, on examination of Mr. Sosa on that date, in part as follows:

> "The impression is: 1. Resolved subperiosteal hematoma, left proximal tibia. 2. History of thrombophlebitis, left. 3. Peroneal muscle hernia, left. It is my impression that this man's disability would be less than 5%."

Under date of September 4, 1974, the claimant's supervisor for the compensation carrier wrote a letter to Mr. Sosa with copy to the attorneys and the Compensation Commission as follows:

> "This letter concerns your workmen's compensation claim arising on July 23, 1973 while employed by Horseshoe Bend Builders. We are in receipt of a report of Dr. Charles Ledbetter of August 2, 1974 concerning his examination and evaluation of that date. Such report shows that you are released from treatment and that permanent partial disability resulting from the accident and injuries in question would be less than 5% to the body as a whole. We are accepting this rating of 5% to the body and will make payment of permanent partial disability on that basis.
>
> Enclosed please find our draft in the amount of $252.00 representing permanent partial disability benefits for the period of August 2, 1974 to August 30, 1974. Beginning September 27, 1974 we will issue our draft every four weeks in the amount of $252.00 until a total of 22.5 weeks of benefits have been paid."

This letter apparently referred to payments for a five per cent loss of use of the leg and not to temporary total disability.

At the hearing before the referee on April 26, 1974, it was stipulated that the employer-employee-carrier relationship existed on July 23, 1973, when the claimant did sustain a compensable injury, and that the claimant had been paid some temporary total disability and medical benefits.

It was the contention of the claimant that he had been totally disabled from July 23, 1973; that he was still totally disabled and would continue to be totally disabled and require medical treatment for 12 to 24 months in the future. The claimant then contended that the claim had been controverted but this was denied by the compensation carrier. The attorney for the compensation carrier stated as follows:

> "Your Honor, we have never controverted the compensability of the claim or any temporary total disability which has been substantiated by any medical reports or any evidence furnished by the claimant. The last medical report that we had available indicated as of August 30, 1973, the claimant had not been back to see

the doctor that was treating him and on the basis of that report, Travelers terminated the temporary disability as of that date. Subsequently they learned the claimant had not returned to work and we made some efforts to substantiate that with additional medical reports and had some discussions with the claimant's attorneys and we've never been able to establish with any degree of certainty how much time the claimant missed or whether or not it was related to the injury, so we're here today to — we really don't intend to controvert any period of temporary total disability that the claimant has had since the accident if it's substantiated by the medical reports or it's been a time when he's actually been employed since the accident."

It was then agreed that correspondence between the attorneys and claims representative, in relation to the claim, would be submitted in evidence.

It is certainly apparent from the record in this case that the matter was handled in a careless or dilatory manner from its inception but it is difficult to tell who was most at fault.

Mr. Sosa apparently sustained a herniated muscle in his left leg resulting in a blood clot attended by intermittent swelling and pain. It would appear from his testimony that he never did return to his former employment following his injury but sought other employment, and sought medical attention and additional legal advice from his attorney only when his leg would swell. He testified in part as follows:

"Q. Did you try to work, did you try to go back to your job at Horseshoe Bend after August 30?

A. I didn't think I wanted to go back to carpentry any more.

Q. Did you ever go back out there and talk to them about trying to do any more work?

A. I haven't seen anyone.

Q. You've just never been back since the day you got hurt?

A. That's right.

Q. You've made no effort to return to work out there?

A. No sir.

Q. What was the reason for your trip to St. Louis?

A. Visiting, I'd never been there."

There was some evidence that the appellee did attempt to contact the compensation carrier's representative by telephone but was unable to do so, and there was also evidence that the insurance representative attempted to contact the appellee and was unable to do so. The appellee admitted receiving one or two letters from the insurance carrier's representative requesting a meeting for the purpose of discussing his condition. He said he probably received such letter dated March 6 (respondent's exhibit 3) but then he said: "I was selling property, I couldn't get away, he called and I couldn't break away." The appellee said that he never did submit any of his medical bills to the compensation insurance carrier. He said he remembered seeing Dr. Langevin on August 30, 1973, when the doctor aspirated some blood from the clot on his leg. He said he was fitted with an elastic stocking and that as long as he kept it on, his leg did not swell, but when the stocking came down or he removed it, the leg would swell again and become painful. He said he went to Dr. Langevin a little over a month and then went to St. Louis with some friends to visit. He said that while in St. Louis he applied for unemployment compensation which was denied; that he then worked three days pushing a lawn mower cutting grass in St. Louis and that when his leg began to swell again, he returned to Arkansas. He said he attempted to find work when he returned to Arkansas and did obtain a job operating a backhoe, but that after working six days his leg swelled again and he had to quit. He said that when his leg would swell, he would return to Dr. Langevin.

The Commission found, as did the referee, that the appellee was temporarily disabled from July 23, 1973, through August 2, 1974, and there is no appeal from the award of compensation based on that finding. The referee found that the claim had not been controverted but the full Commission concluded that it had been. The full Commission was rather critical of the manner in which the appellants serviced this claim and we are unable to say some criticism was not justified. The Commission stated that there was no suggestion that the employer filed the required "Employer's First Report of Injury,"[3] or that compensation was paid within the statutory time limit of 15 days; that following Dr. Charles Ledbetter's anatomical impairment rating in his report of August 2, 1974, payment of accrued compensation in the amount of $252 covering the first four weeks of compensation due as a result of the physician's rating was not issued to the appellee until September 4, 1974. The Commission then recited from a letter by the carrier indicating that future payments would be made every four weeks in the amount of $252 until a total of 22.5 weeks of benefits had been paid. The Commission stated that this was in violation of Ark. Stat. Ann. § 81-1319 (b) (Repl. 1960) which provides for the payment of compensation benefits every two weeks. In its statement of the case the Commission stated, "Claimant further revealed he had worked a total of six days since July 23, 1973." The Commission apparently overlooked the additional three days the claimant said he worked while in St. Louis, Missouri.

It is apparent from the overall record that following the appellee's initial injury he contacted his attorney before or about the time his first compensation would have been due. The attorney sent the appellee to a physician of his and the appellee's choice who made most of his reports to the appellee's attorney, who would forward the reports and medical bills to the compensation carrier. The record does not reveal the nature of the requests for medical reports made by the appellee's attorney or the compensation carrier, but none of the medical reports say that the appellee was unable to work. It is apparent that the appellee's doctor, his at-

[3]Apparently the A-8 report which the employer sent to the carrier was never filed with the Commission.

torney, and the compensation carrier thought the appellee's healing period ended on August 30, 1973. The appellee was apparently paid through that date and the claim considered closed by all parties concerned until the appellee's leg swelled and became painful and he returned to the doctor on December 11, 1973. We are of the opinion that the appellant carrier was entitled to some evidence, medical or otherwise, that the appellee was again experiencing temporary total disability because of his injury before resuming compensation payments.

The appellant-carrier may have been dilatory, even to the point of negligence, in its follow up on the appellee's injury and any wage loss occasioned thereby, but the carrier attempted to deal through the appellee's attorney who apparently was having some difficulty in keeping in touch with the appellee and keeping abreast of his condition. In any event dilatory payments of compensation does not amount to a controversion *per se*. Ark. Stat. Ann. § 81-1319 (Repl. 1960) provides the time and manner for making workmen's compensation payments and subsection (d) of § 81-1319 provides as follows:

> "Each employer desiring to controvert the right to compensation shall file with the Commission, on or before the fifteenth (15th) day following notice of the alleged injury or death, a statement on a form prescribed by the Commission that the right to compensation is controverted on the grounds therefor, the names of the claimant, employer, and carrier, if any, and the date and place of the alleged injury or death. Failure to file such statement of controversion shall not preclude the urging of any defense to the claim subsequently filed, nor shall the filing of a statement of controversion preclude the urging of additional defenses to those contained in such statement of controversion."

Subsections (e) and (f) provide for penalties for failure to make timely payments and subsection (i) provides for investigations to be made by the Commission upon its own initiative.

Ark. Stat. Ann. § 81-1332 (Repl. 1960) provides in part as follows:

> "Whenever the Commission finds that a claim has been controverted, in whole or in part, the Commission shall direct that fees for legal services be paid by the employer or carrier in addition to compensation awarded, and such fees shall be allowed only on the amount of compensation controverted and awarded. Whenever the Commission finds a claim has not been controverted, but further finds that bona fide legal services have been rendered in respect to the claim, then the Commission shall direct the payment of such fees out of the compensation awarded."

The mere failure of an employer or compensation carrier to pay compensation benefits to an injured employee does not in and of itself amount to a controversion. Especially is this true when the compensation insurance carrier accepts the injury as compensable and it and the claimant's attorney are attempting to determine the periods and extent of the claimant's disability.

In *Pike Cty. Poultry Co.* v. *Kelly,* 243 Ark. 460, 420 S.W. 2d 523, cited by the appellee, it was not denied that part of the claim was controverted. In that case we pointed out the appellee's testimony that after November 29, 1965, she went to her doctor for treatment several times because she was suffering with her back; that she was not able to work and was still disabled. We then recited some of the medical findings supporting the claimant's contention and then in that case we said:

> "It is not denied that the above testimony (and more of the same purport) was controverted by appellant."

The appellee in the case at bar says:

> "In view of the action, or inaction of Appellant, clearly the services of any attorney were reasonably required by Appellee in order to secure his compensation benefits. Since a hearing was required to determine Appellee's

claim, it is difficult to perceive how Appellant can now content the claim was [not] controverted. Under the circumstances of this case Appellee was justified in employing counsel, and this expense should be left where the Commission placed it." Citing *Pike Cty. Poultry Co.* v. *Kelly, supra.*

The appellee was injured on July 23, 1973. He was not entitled to payment of compensation in any event until August 7, 1973. His attorney arranged for his examination by Dr. Langevin on August 9, 1973, so it would appear that he was represented by employed counsel from the very beginning in this case. We do not say that all controversions must be on forms prescribed by the Commission, and we do not overrule anything we said in *Littlejohn* v. *Earle Industries,* 239 Ark. 439, 389 S.W. 2d 898, cited by the appellee in his trial brief. The distinguishing language in that case is set out as follows:

"The appellant was injured on June 18, 1963. His attorney properly filed his claim with the Commission shortly thereafter. The appellees then requested a thirty-day extension before stating their position on controverting the claim. Over appellant's objection, a ten-day extension was granted. On September 23, 1963, the appellees stated they 'neither admitted nor denied that the claimant was entitled to compensation.' The appellees later offered to pay compensation to the claimant on the basis of 10% disability conditioned upon an order of final discharge by the Commission since the claim appeared 'suspicious.' The appellant responded by asserting the evaluation of permanent disability was premature since appellant maintained that he was unable to return to work on October 6, 1963, despite his own medical reports. The claimant steadfastly protested that he had not fully recovered from his back injury and an operation on August 24th to correct this injury."

The initial burden, of course, rests upon the claimant in any case to make out a claim for compensation. When the claim is once accepted by the respondent as compensable, the burden rests upon the respondent to make compensation

payments and continue them during the continuation of the disability. We are of the opinion that the difficulty in this case boils down to a claimant who was difficult to find and keep up with; an attorney who was, perhaps, too busy to go hunting for his client; a doctor who never reported as to whether his patient was or was not disabled to work; and, a compensation carrier, perhaps understaffed and overworked, who depended on the appellee's attorney more than on the initiative of its own claims staff in seeking out the claimant and servicing his claim by prompt payment or controversion. In the case at bar the appellant-respondent may have been guilty of undue delay in payment, but we are of the opinion that the appellee-claimant's right to compensation was not controverted within the meaning of the Act under the evidence in this case.

The judgment is reversed and this case is remanded to the circuit court with directions to remand to the Commission for a determination on attorney's fee not inconsistent with this opinion.

Reversed and remanded.

WHITE RIVER SAND AND GRAVEL REMOVAL COMMISSION and Richard R. HEATH, Director of Arkansas Dept. of Finance and Administration *v.* HAYES BROTHERS LAND AND TIMBER COMPANY, Inc.

75-239 532 S.W. 2d 191

Opinion delivered February 9, 1976

Jim Guy Tucker, Atty. Gen., by: *Michael G. Epley,* Asst. Atty. Gen., for appellants.

Murphy & Blair, by: *H. David Blair,* for appellee.

FRANK HOLT, Justice. Act 232 of 1971 (Ark. Stat. Ann. § 41-4422 [Supp. 1975]) applies only to the removal of sand and gravel from a limited portion of the White River. Appellee, a riparian landowner, filed an application for a permit to remove sand and gravel from that part of the river. The commission, created by this act, denied the application. The trial court found on appeal that Act 232 is local legislation and, therefore, unconstitutional by virtue of Amendment 14, Arkansas Constitution (1874). Appellants assert the act is valid and, therefore, the trial court erred. We hold the issue is moot because Act 524 of 1975 repeals by implication Act 232 of 1971.

We have consistently held that when the legislature, by a later act, covers anew the whole subject matter embraced in any former act, then the later act repeals by implication any previous act on that subject. *King* v. *McDowel,* 107 Ark. 381, 155 S.W. 501 (1913); *Western Union Telegraph Company* v. *State,* 82 Ark. 302, 101 S.W. 745 (1907); and *Pulaski County* v. *Downer,* 10 Ark. 588 (1850). In the case at bar it is apparent from reading the two acts that the legislature intended for Act 524 of 1975 to cover the entire subject anew and be a substitute for Act 232 of 1971.

The purpose of the 1971 act is to control the removal of

sand and gravel from the bed of a described part of the White River, a navigable stream, to create a commission to promulgate regulations and designate those areas from which the sand and gravel may be removed. The commission was directed to give consideration to local needs for building and construction, the effect of the removal of sand and gravel upon fish and the preservation of the river as a tourist attraction. The commission consists of the Director of what is now the Department of Parks and Tourism, the Director of the Game and Fish Commission and the State Revenue Commissioner. The act vests in the Commissioner of Revenues the power to issue franchises for the removal of sand and gravel from the limited area of the river in accordance with rules promulgated by that commission.

The 1975 act is entitled:

> An act to vest in the Department of Commerce the authority and responsibility for granting leases and permits for taking sand and gravel, minerals, and timber from state-owned lands; to establish the Natural Resources Committee and to prescribe its functions and duties; to provide for appropriate investigation and supervision of the activities of such leaseholders and permittees on state-owned lands; and for other purposes.

Section 1 prohibits the removal of "any sand and gravel **** from the beds or bars of navigable rivers and lakes in this State. . . . " without a lease or permit issued by the Department of Commerce after application to that agency. Section 2 creates "The Natural Resources Committee" which is composed of the "Director of the Department of Commerce, the Director of the Oil and Gas Commission, the State Geologist, the Director of the Forestry Commission, and the Director of the Soil and Water Conservation Commission, with the Director of the Department of Commerce as Chairman." Section 3 provides that upon application for a lease or permit with the Director of the Department of Commerce for the removal of sand and gravel, he must notify, in addition to members of the Resources Committee, other state agencies; namely, the Game and Fish Commission, the Department of Parks and Tourism, the Department of Pollution Control and

Ecology, "or any other appropriate State agency which has or may have a particular interest in the area proposed to be covered by the lease or permit, and any such interested agency shall have an opportunity to investigate the proposed production or taking of sand, gravel" and then to "report its findings and recommendations to the Department of Commerce regarding the same, including any recommendations for conditions or limitations to be imposed on the lessee with respect to the production of sand, gravel, **** under such lease or permit." This section further authorizes the Department of Commerce to deny or grant a permit or lease for the removal of sand and gravel under such conditions and requirements as it deems appropriate for the best interests of the state. However, the written consent of a state agency must be secured where it owns or has an interest in any property. Section 13 provides:

> *It is the purpose and intent* of this Act to charge the Department of Commerce with the authority and responsibility for considering applications for and granting leases and permits for the taking of sand, gravel **** from the beds and bars of navigable rivers and lakes in this State **** and to supervise activities on state-owned lands by lease-holders and permittees. (Emphasis added.)

The language of Act 524 of 1975 is unmistakably clear that the legislature intended to cover anew and exclusively the subject of the removal of sand and gravel from our navigable streams and substitute the 1975 act (consisting of fifteen sections) for the 1971 act (consisting of six sections). by doing so, it appears the intention of the legislature was to create a uniform system for the removal of sand and gravel from the beds of *all* the navigable streams instead of a limited portion of *one* (the 1971 act) in our state.

Appeal moot.

Arthur R. DOWNS *v.* STATE of Arkansas

CR 75-174 532 S.W. 2d 427

Opinion delivered February 9, 1976
[Rehearing denied March 8, 1976.]

Harold L. Hall, Public Defender, by: *Michael Castleman,* Dep. Public Defender, for appellant.

Jim Guy Tucker, Atty. Gen., by: *Walter W. Nixon III,* Asst. Atty. Gen., for appellee.

ELSIJANE T. ROY, Justice. On October 23, 1973, an individual identifying himself as "Art" called the Narcotics Division of the Little Rock Police Department on its unlisted number and asked Undercover Detective Horace Walters if he were the person interested in buying some heroin. Walters

responded affirmatively, met appellant Arthur Downs and a $2600 purchase price was discussed.

On October 26, 1973, appellant called again, and Walters went to meet him at the Union 76 Truck Stop on Interstate 40. While there Walters purchased a small, tinfoil wrapped sample of heroin from appellant for $15.00.

Walters and appellant agreed to meet later at the Razorback Drive-In in Little Rock, which they did. While there appellant removed a box from the trunk of his car, and he and Walters drove to a nearby parking lot where police officers were secreted. Upon a signal from Walters the officers converged on Walters and appellant, arresting both of them. The box containing what appeared to be heroin was removed from the hood of the car, tagged and later taken to the Arkansas State Health Department for analysis. Subsequent analysis on the contents proved positive for heroin, as had analysis earlier performed on the smaller sample. Appellant Downs was charged with one count each of possession and sale of heroin, tried by the court, found guilty and sentenced to concurrent 20 year terms on each count.

As error appellant urges that the State failed to properly connect him with the evidence used to charge him with both possession and sale of heroin. On appellate review we consider only that evidence most favorable to the appellee and affirm if there is any substantial evidence. *Williams* v. *State,* 257 Ark. 8, 513 S.W. 2d 793 (1974).

With regard to the charge of possession of heroin, appellant contends that no testimony was given at trial identifying the substance as having been in his possession or as being the same substance taken from the automobile at the time of his arrest; further, that the officers handling the heroin did not establish an unbroken chain of custody as is necessary before the evidence is properly admissible. Appellant assigns practically identical arguments to the charge of sale of heroin.

Detective Walters, who purchased the tinfoil package of heroin, gave it property tag number 803 and personally plac-

ed it in the narcotics safe. Later at trial he specifically identified it as being the same substance he had purchased earlier.

Officer Ron Thompson testified that at approximately 3 p.m. on October 26, 1973, he transported evidence with property tag number 803 to the State Laboratory and turned it over to Don Wise, a chemist for the State Department of Health, who signed for it.

Chemist Don Wise testified that at 3 p.m. on October 26, 1973, he received from Officer Thompson a two and a half by four inch manila envelope containing a tinfoil package of brown powder and bearing property tag number 803. Wise assigned the package sample number 02042 and chemically analyzed the sample, obtaining a positive test for heroin. Wise then produced the package in court, identified and described it and testified that it contained the powder he had tested. The evidence was then introduced as State Exhibit No. 1.

Appellant has produced no testimony or other evidence to even suggest that the package purchased from defendant by Detective Walters was tampered with in any way.

As to State's Exhibit No. 2, Detective Walters testified that he saw appellant take a box from his car, which he later saw at the parking lot, and he again saw the same shotgun shell box at police headquarters.

Lieutenant Walter E. Simpson testified as follows:

> A. The shotgun shell box, which did contain the narcotics, what was later determined to be a narcotic substance, heroin, was on the hood as I came. Mr. Downs was there along with Officer Walters. We all hit at the same time, and I grabbed the box which did contain the shotgun shells on top, and underneath there was some balloon type item which did contain the powdery substance.

Lieutenant Simpson further testified that after the arrest

and seizure of the evidence he and Detective Jerry Royster wrote a tag sheet giving it tag number 808. Then Simpson and Royster attached the tag to the substance and placed it in the narcotics safe.

Detective Royster confirmed in every detail the testimony of Lieutenant Simpson relating to transporting the evidence from the scene of the arrest to the Police Department, tagging it with number 808, placing it in a manila envelope, and storing it in the narcotics safe.

Detective Richard Fulks testified that on November 6, 1973, at 1:30 p.m., he transported the evidence stored under property tag number 808 to the Arkansas State Health Department and turned it over to Chemist Charles T. Bounds for chemical analysis and that the evidence was assigned lab sample number 02101 by Bounds.

Bounds testified that he received the envelope with property tag 808 attached from Detective Fulks at 1:30 p.m. on November 6, 1973, and that the sample number 02101 was then assigned to the package. He further testified that the envelope contained a sealed rubber balloon and a brownish gray powdery material, which he later determined contained heroin. Bounds then positively identified the package, which he had with him in court, as the same that had been delivered to him by Detective Fulks and analyzed by him.

As to appellant's speculative assertion that the evidence *could* have been tampered with, in *Fight* v. *State,* 254 Ark. 927, 497 S.W. 2d 262 (1973), we stated:

> The purpose of the chain of identification is to prevent the introduction of evidence which is not authentic.

In *Wickliffe and Scott* v. *State,* 258 Ark. 544, 527 S.W. 2d 640, (1975), we said:

> In *West* v. *United States,* 359 F. 2d 50, 55 (8th Circ. 1966), cert. den. 385 U.S. 867 (1966), the court said: "Appellant seems to be arguing that as long as it was conceivable that the evidence could have been tampered

with, it should not have been admitted. This, however, is not the law. The government need not exclude all possibilities of tampering. The Court need only be satisfied that in reasonable probability the article had not been changed in important respects."

This issue also has been discussed in *Witham* v. *State,* 258 Ark. 348, 524 S.W. 2d 244 (1975); *Freeman* v. *State,* 238 Ark. 804, 385 S.W. 2d 156 (1964); and *Rogers* v. *State,* 258 Ark. 314, 524 S.W. 2d 227 (1975).

We have not held here, nor in earlier cases, that appellant's failure to substantiate the contention of tampering per se renders the evidence admissible. It is but one factor to be weighed with others in passing on the authenticity of the evidence. However, the instant appeal contains ample proof of the complete chain of custody and of the authenticity of the evidence admitted.

Affirmed.

CALVERT FIRE INSURANCE COMPANY
v. Gerald FRANCIS et al

75-316 532 S.W. 2d 429

Opinion delivered February 17, 1976

Matthews, Purtle, Osterloh & Weber, by: *Gail O. Matthews* and *Roy Gene Sanders,* for appellant.

Hardin & Rickard, by: *Curtis E. Rickard,* for appellees.

GEORGE ROSE SMITH, Justice. In 1973 the plaintiff, Gerald Francis, a dealer in travel trailers and campers, sustained a fire loss of $27,085.64. Two insurers, Calvert Fire Insurance Company and Lloyd's of London, had issued policies covering the damaged property. Calvert paid $14,-046.61 of the loss, as its asserted pro rata share, and contended that Lloyd's was liable for the remaining $13,039.03. Lloyd's admits liability for only $150, the value of a used unit not insured by Calvert's policy.

Francis brought this action for a declaratory judgment to determine which insurer is liable for the $12,989.03 still at issue. There is no real dispute about the facts. The trial court held, without specifying its reasons, that Calvert is liable. Lloyd's presents two arguments in support of the trial court's decision.

First, Lloyd's argues that the situation is the same as that presented in *Ark. Grain Corp.* v. *Lloyd's,* 240 Ark. 750, 402 S.W. 2d 118 (1966). There one policy had a "pro rata" clause, limiting that insurer to its proportionate part of the total loss if there was other insurance on the property. The second policy had an "excess" clause, limiting that insurer to liability only for the excess remaining after any other insurance had been paid in full. We sustained the second insurer's contention that it suffered no liability, because the face amount of the pro rata policy exceeded the total loss.

That situation, however, does not obtain here. Calvert's basic policy does contain a pro rata clause. But a rider, incorporated in the original policy and issued at the same time,

contains an excess clause that supersedes the pro rata clause, because the rider provides that it is subject to all terms of the basic policy not inconsistent with the rider. Here there is an inconsistency; so the rider governs. Lloyd's does not dispute the general rule that where each of two policies contains an excess clause, the clauses are considered to be mutually repugnant and ineffective. Appleman, Insurance Law & Practice, § 3912 (rev. ed., 1972); Couch on Insurance 2d, § 62:79 (1966). That leaves proportionate liability between the two insurers as the common-sense solution, for otherwise the insured might have no protection even though he paid for two policies.

Secondly, Lloyd's insists that its policy covers only Francis's equity in the damaged trailers and campers, over and above an indebtedness financed by Commercial Credit Corporation and secured by a floor-plan arrangement with that creditor. Lloyd's policy, however, makes no reference whatever to its insured's equity in the property. To the contrary, it simply insures the vehicles in question in the amount of $25,000, which is more than twelve times the $1,956.06 equity that Francis had in the property. In fact, the only proof tending to support Lloyd's argument is Gerald Francis's testimony that he purchased the Lloyd's policy because he thought that the Calvert policy covered only the amount that was being financed by Commercial Credit under the floor plan. It goes without saying that the insured's subjective intent in obtaining the Lloyd's policy does not change the plain language of that contract.

The judgment is reversed and the cause remanded for the entry of a declaratory judgment holding Lloyd's liable for $13,039.03, with interest, the statutory 12% penalty, and a $2,500 attorney's fee.

Harry M. CHANEY et al *v.* Kelly BRYANT, Secretary of State[1]

75-258 532 S.W. 2d 741

Opinion delivered February 17, 1976

[redacted]

[1]This action was commenced against Kelly Bryant as Secretary of State and a decree rendered in his favor. No one has bothered to move for any substitution of parties. Since the litigation was against the late Mr. Bryant in his official capacity any judgment or decree would be binding on his successors in office.

McArthur, Loftin & Wilson, for appellants.

Jim Guy Tucker, Atty. Gen., by: *Lonnie A. Powers,* Dep. Atty. Gen., for appellee.

JOHN A. FOGLEMAN, Justice. By an amended complaint, appellants sought to have Amendment 54 to our state constitution, which was proposed by the General Assembly and submitted to the people at the 1974 General Election, declared void on the ground that the ballot title was misleading in that it misrepresented the changes the adoption of this amendment would bring about. Appellee filed a demurrer on the ground that it does not state facts sufficient to constitute a cause of action because no facts were alleged that violated any rights of appellants. This demurrer was sustained and the complaint dismissed. Appellants argue that the court erred in sustaining the demurrer, saying that factual issues are involved. We disagree with this argument.

This amendment was proposed by the General Assembly as a substitute for Art. 19 § 15. According to the allegations of the complaint, the ballot title read as follows:

> Proposing an amendment to the Constitution requiring competitive bidding for the purchase of printing, stationery, and supplies.

This was the exact title of Senate Joint Resolution 6 of 1973, by which the amendment was proposed.

Appellants rely on numerous cases involving proposals for acts and constitutional amendments by initiative, in preelection attacks on ballot titles. None of them are applicable. There are two entirely different methods by which constitutional amendments may be proposed, and they are governed by entirely different procedures and requirements. *Coulter* v. *Dodge,* 197 Ark. 812, 125 S.W. 2d 115; *Berry* v. *Hall,* 232 Ark. 648, 339 S.W. 2d 433. Art. 19, § 22 of the Arkansas Constitution governs those proposed by the General Assembly. Amendment 7 is primarily concerned with initiated proposals, and its provisions do not govern those proposed by the General Assembly, except where the language of that amendment expressly applies. *Berry* v. *Hall,* supra. Cf. *Brickhouse* v. *Hill,* 167 Ark. 513, 268 S.W. 865. There is no language in Amendment 7 pertaining to ballot titles for legislative proposals of constitutional amendments. Art. 19, § 22 only requires that proposals by the General Assembly be so submitted as to enable the people to vote on each amendment separately.

There is no clearcut statutory requirement of any ballot title for an amendment proposed by the General Assembly. Ark. Stat. Ann. § 2-208 (Repl. 1956) relating to ballot titles applies to initiated proposals only. The Governor, Secretary of State and State Comptroller (now Director of the Department of Finance and Administration) are required to fix and declare a number and popular name by which each proposed amendment shall be designated in all legal notices and publications, proceedings and publicity affecting it. Ark. Stat. Ann. § 2-209, 214 (Repl. 1956). The only mentions of any ballot title in the statutes which could possibly have any

bearing on proposals of the General Assembly are the requirements that notices of the proposed measures "contain the number, the popular name, the ballot title and a complete text" and that the Secretary of State furnish the State and County Boards of Election Commissioners a certified copy of "the ballot title and popular name for each proposed measure." Ark. Stat. Ann. § 2-212, 216 (Repl. 1956). The popular name actually serves the constitutional requirement of submission in a manner enabling the voters to vote on the proposed amendments separately. We have said that it is a device useful to facilitate voter discussion prior to election, but that it need not contain detailed information or include exceptions which might be required of a ballot title. *Pafford* v. *Hall*, 217 Ark. 734, 233 S.W. 2d 72. We note that the notice published included the popular name "State Printing Contracts." The publication otherwise consisted of the designated number and the complete text of the Joint Resolution by which it was proposed.

Legislative proposals are distinguished on the ballot from those initiated in a manner that the voters can differentiate between them. Ark. Stat. Ann. § 2-216. It is notable that the constitution requires that amendments proposed by the General Assembly be published for six months before the election in a newspaper in each county, but only requires one pre-filing publication of an initiated proposal and such other publications as may be required by law. Art. 19, § 22 and Amendment 7. The statutes require publication of initiated proposals, to commence only eight weeks prior to the election. Ark. Stat. Ann. § 2-212. It is also significant, in considering the reasons underlying differential treatment of the two types of proposals, that a legislative proposal must be entered at length in the legislative journals. Art. 19, § 22. *McAdams* v. *Henley,* 169 Ark. 97, 273 S.W. 355, 41 ALR 629; *Coulter* v. *Dodge,* supra. On the other hand, there is no permanent official record of initiated proposals. Furthermore, we must keep in mind that, when proposing a constitutional amendment, the General Assembly acts in the character and capacity of a constitutional convention and not in the exercise of its ordinary legislative authority. *McAdams* v. *Henley,* supra.

The question whether an amendment has been adopted

is a judicial one. *Rice* v. *Palmer*, 78 Ark. 432, 96 S.W. 396. If constitutional requirements for submission of an amendment proposed by the General Assembly are disregarded or compliance totally omitted, the courts, upon appropriate application, will hold that the amendment was not properly adopted, a favorable vote at a general election notwithstanding. *McAdams* v. *Henley*, supra. Still, it is quite generally held that after a proposed constitutional amendment has been ratified by the people, every reasonable presumption, both of law and fact, will be indulged in favor of its validity. *Southern Railway Co.* v. *Fowler*, 497 S.W. 2d 891 (Tenn., 1973); *Board of Liquidation, etc.* v. *Whitney-Central Trust & Savings Bank*, 168 La. 560, 122 S. 850 (1929); *Hammond* v. *Clark*, 136 Ga. 313, 71 S.E. 479 (1911); *People* v. *Sours*, 31 Colo. 369, 74 P. 167 (1903); *Keenan* v. *Price*, 68 Idaho 423, 195 P. 2d 662 (1948); *State* v. *Cooney*, 70 Mont. 355, 225 P. 1007 (1924); *Larkin* v. *Gronna*, 69 N.D. 234, 285 N.W. 59 (1939). See *McKenzie* v. *City of DeWitt*, 196 Ark. 1115, 121 S.W. 2d 71.

The proposition is well stated in *Board of Liquidation, etc.* v. *Whitney-Central Trust & Savings Bank*, supra, viz:

> *** In reaching the decision, the court must necessarily have in mind the universal rule that, whenever a constitutional amendment is attacked as not constitutionally adopted, the question presented is, not whether it is possible to condemn, but whether it is possible to uphold; that every reasonable presumption, both of law and fact, is to be indulged in favor of the legality of the amendment, which will not be overthrown, unless illegality appears beyond a reasonable doubt. *People* v. *Sours*, 31 Colo. 369, 74 P. 167, 102 Am. St. Rep. 34; *People* v. *Prevost*, 55 Colo. 199, 134 P. 129; *Martien* v. *Porter*, 68 Mont. 450, 219 P. 817.

To the same effect, *Keenan* v. *Price*, supra; *State* v. *Cooney*, supra, *State* v. *Alderson*, 49 Mont. 387, 142 P. 210 (1914). In some cases, emphasis is given to the inherent political power of the people as the ultimate sovereign to alter or reform their government as they may think proper as expressed in Art. 2, § 2 of our Constitution. See *People* v. *Sours*, supra; *State* v. *Cooney*, supra.

The view is taken on a legislative proposal that substance is more important than form and the will of the legislature in proposing it and of the people in ratifying it at the proper time and in the proper manner is not to be lightly disregarded, where the manner of compliance (as distinguished from a total disregard or omission) with a procedural constitutional requirement is involved, and the question has not been raised prior to the election. *Hammond* v. *Clark,* supra; *Constitutional Prohibitory Amendment,* 24 Kan. 700 (1889); *Keenan* v. *Price,* supra; *State* v. *Alderson,* supra. See *Brockelhurst* v. *State,* 195 Ark. 67, 111 S.W. 2d 527; *Whitaker* v. *Mitchell,* 179 Ark. 993, 18 S.W. 2d 1026; *Hogins* v. *Bullock,* 92 Ark. 67, 121 S.W. 1064. A defect in submission which is a mere irregularity is cured by adoption by the people when the amendment has been duly proposed and actually published and submitted to the people without any question having been raised prior to the election. *Sylvester* v. *Tindall,* 154 Fla. 663, 18 S. 2d 892 (1944); *Keenan* v. *Price,* supra. Cf. *Brockelhurst* v. *State,* supra.

Where the vital requirements for a proposed amendment have been met by the vote of legislators and entry of the measure on the legislative journals as required by the Constitution and there has been substantial, though not literal, compliance with procedural requirements for submission, the courts should not invalidate the adoption of the amendment by popular vote. *State* v. *O'Brien,* 134 W. Va. 1, 60 S.E. 2d 772 (1948); *Keenan* v. *Price,* supra; *State* v. *Alderson,* supra. Mr. Justice Brewer (later of the United States Supreme Court) in speaking of a constitutional provision on amendments, similar to our own, said that the two vital elements were the assent of the required majority of the legislature and a majority of the popular vote (which he called the paramount act) and, beyond this, other provisions are machinery and forms. *Constitutional Prohibitory Amendment,*[2] supra. See also, *Keenan* v. *Price,* supra. In that case Justice Brewer and the Kansas court answered in the negative the question whether the secretary of state might, by failure to comply strictly with publication requirements either through ignorance or design, thwart the popular decision. The vast

[2]We are not unaware of the fact that unlike the Kansas court in this case, we have held that failure to enter the proposed amendment upon the legislative journals is fatal. See *McAdams* v. *Henley,* supra.

difference between compelling strict observance of rules governing submission of proposed constitutional amendments prior to the election and considering the failure to do so after the people have spoken by their vote was pointed out in *Larkin* v. *Gronna,* 69 N.D. 234, 285 N.W. 59 (1939).

These holdings are simply applications of the legal philosophy that the courts have a duty to sustain elections which have resulted in a full and fair expression of the public will. We have heretofore brought this philosophy into play in cases where post-election attacks on election results have been grounded upon procedural irregularities. See *Rich* v. *Walker,* 237 Ark. 586, 374 S.W. 2d 476; *McKenzie* v. *City of DeWitt,* 196 Ark. 1115, 121 S.W. 2d 71. We have no reservations about applying it here. It would be absurd for the courts to overturn the approval of this amendment by a substantial majority of our voters for the defect alleged, in view of the lack of a specific constitutional or statutory provision requiring or providing specifications for a ballot title for a constitutional amendment proposed by the General Assembly and in view of the publication before submission.[3]

The chancellor correctly held that, as a matter of law, the complaint failed to state a cause of action, so the judgment is affirmed.

GEORGE ROSE SMITH and BYRD, JJ., concur.

[3]In the absence of an allegation to the contrary, it must be presumed that all officers performed their official duties pertaining to the election on the proposed amendment. *McKenzie* v. *City of DeWitt,* supra.

Francis Edward KLIMAS *v.* STATE of Arkansas

CR 75-187 534 S.W. 2d 202

Opinion delivered February 17, 1976

[Supplemental opinion on Rehearing P. 309.]

Thurman Ragar Jr., for appellant.

Jim Guy Tucker, Atty. Gen., by: *Jackson Jones*, Asst. Atty. Gen., for appellee.

JOHN A. FOGLEMAN, Justice. Francis Edward Klimas was found guilty of the burglary of the Dixie Wood Preserving Company's building near Pine Bluff and of grand larceny of property therein. He asserts three points for reversal. We find error on one point which will require either a reduction of sentence or a reversal. That point has to do with the enhancement of appellant's sentence under the Habitual Criminal Act [Ark. Stat. Ann. § 43-2328 — 30 (Repl. 1964).] Appellant contends, and we agree, that there was error in the admission of evidence of previous convictions.

After the return of the jury verdict, the state offered evidence of seven felony convictions in the form of certified copies of the records of the Department of Corrections of Missouri State Penitentiary. Admittedly these copies complied with the requirements of Ark. Stat. Ann. § 43-2330. Appellant objected to their introduction, however, because none of them showed that Klimas had the assistance of counsel at the times of his conviction. The state contended then and argues now that when court records are not used to prove a prior conviction, the state is not required to show that the accused had the assistance of counsel when the record offered is silent on the matter. The state has not favored us with any authority so holding, and we do not think that such a bypass of the constitutional principle on which the decision of *Burgett* v. *Texas*, 389 U.S. 109, 88 S. Ct. 258, 19 L. Ed. 2d 319 (1967) was based will stand muster. In *Burgett*, it was held that presuming waiver of the right to counsel from a silent record is impermissible and that the admission into evidence of a prior criminal conviction which is constitutionally infirm under the standards of *Gideon* v. *Wainwright*, 372 U.S. 335, 83 S. Ct. 792, 9 L. Ed. 2d 799, 93 ALR 2d 733 (1963) is inherently prejudicial.[1]

We first dealt with *Burgett* precepts in *Wilburn* v. *State*, 253 Ark. 608, 487 S.W. 2d 600, where the Attorney General

[1]The state does not suggest and we do not perceive that it can be said in this case that the error was harmless, although under other circumstances this question might be worthy of consideration.

conceded, and we agreed, that a docket entry of a judgment of conviction which was silent as to the defendant's representation by counsel and his waiver of the right to assistance of counsel was improperly admitted into evidence. Both appellant and appellee have ignored our treatment of the matter in *McConahay* v. *State,* 257 Ark. 328, 516 S.W. 2d 887. The opinion there does not disclose the nature of the documents offered to sustain the habitual criminal charge, but here again the state conceded and we held that the documents were deficient and inadmissible in evidence because they were silent concerning the defendant's representation by counsel. Nothing whatever was said about the holding being restricted to court records or to indicate that it would not apply to any record offered in evidence to show prior convictions. To clearly illustrate the inappropriateness of the argument advanced by the state, we point out that the United States Supreme Court, in two sequels to *Burgett,* has applied the *Burgett* rule to evidence of convictions other than records. In both *United States* v. *Tucker,* 404 U.S. 443, 92 S. Ct. 589, 30 L. Ed. 2d 592 (1972) and *Loper* v. *Beto,* 405 U.S. 473, 92 S. Ct. 1014, 31 L. Ed. 2d 374 (1972), the court dealt with convictions admitted by a defendant on cross-examination for impeachment purposes.

It seems clear to us that when evidence, in whatever form, of a prior conviction is offered which is silent as to representation of the defendant by counsel or his waiver of the right of assistance of counsel, the state must first lay a foundation for its admission by evidence tending to show that defendant was, in fact, represented by counsel or that he had knowingly and intelligently waived his right to the assistance of counsel.

Appellant also contends that his cross-examination of Arlie Weeks, a professed accomplice, was unduly limited by the circuit judge in that he was not permitted to show that Weeks was motivated to testify by the knowledge that the prosecuting attorney would be consulted before action would be taken upon Weeks' application for parole. It appears that after Weeks confessed this burglary and grand larceny, his parole on a previous charge was revoked. The state does not actually contend that there was no error in the court's

sustaining an objection to the question whether Weeks was aware that the prosecuting attorney is asked to make a recommendation to the parole board before a convict is paroled. It actually argues that any error in this respect was harmless. There is no doubt that the ruling in this case was erroneous and an abuse of the trial court's discretion to limit cross-examination on matters of credibility.

An accused should be accorded a wide latitude in cross-examination to impeach the credibility of a witness against him. See, *May* v. *State*, 254 Ark. 194, 492 S.W. 2d 888. The latitude of this right of cross-examination is even broader and that of the court's discretion to limit it is somewhat narrower than in other instances. *Alford* v. *United States*, 282 U.S. 687, 51 S. Ct. 218, 75 L. Ed. 624 (1930); *State* v. *Hart*, 239 N.C. 709, 80 S.E. 2d 901, 41 ALR 2d 1199 (1954); *State* v. *Williams*, 487 P. 2d 100, 6 Or. Ap. 189 (1971) cert. den. 406 U.S. 973 (1972); *Mason* v. *State*, 132 Neb. 7, 270 N.W. 661 (1937); *State* v. *Roberson*, 215 N.C. 784, 3 S.E. 2d 277 (1939). This is particularly so when the witness is, or may be found to be, an accomplice. *Boyd* v. *State*, 215 Ark. 156, 219 S.W. 2d 623; *Stone* v. *State*, 162 Ark. 154, 258 S.W. 116. See also, *State* v. *Little*, 87 Ariz. 295, 350 P. 2d 756, 86 ALR 2d 1120 (1960); Annot 62 ALR 2d 610 (1958). It is generally permissible for a defendant to show by cross-examination anything bearing on the possible bias of the testimony of a material witness. *Bethel* v. *State*, 162 Ark. 76, 257 S.W. 740; *Ringer* v. *State*, 74 Ark. 262, 85 S.W. 410; Annot. 62 ALR 2d 611 (1958). This rule applies to testimony given under expectation or hope of immunity or leniency or under the coercive effect of his detention by authorities. *Stone* v. *State*, supra; *Boyd* v. *State*, supra. See also, *Campbell* v. *State*, 169 Ark. 286, 273 S.W. 1035; *Alford* v. *U.S.*, supra. The test is the expectation of the witness and not the actuality of a promise. *State* v. *Little*, supra; *Spaeth* v. *United States*, 232 F. 2d 776, 62 ALR 2d 606 (6 Cir., 1956).

The right of a defendant to show the bias of a witness does not lie within the court's discretion. *Wright* v. *State*, 133 Ark. 16, 201 S.W. 1107. Remarks of the court in *Spaeth* are particularly applicable here. The court there said:

******** In all the circumstances, it would have been

> proper to permit careful scrutiny of Sanzo's motive for testifying against Dr. Spaeth. His testimony could well have been guided by his hope of an early parole as a reward for becoming a Government witness against appellant. It is not intended remotely to convey the impression that the United States Attorney might have promised Sanzo a recommendation for parole as a consideration for his testimony. Mere hope upon the part of Sanzo that he would be so rewarded would supply sufficient motive for his testimony against Dr. Spaeth.

Denial of cross-examination to show the possible bias or prejudice of a witness may constitute constitutional error of the first magnitude as violating the Sixth Amendment right of confrontation. *Davis* v. *Alaska,* 415 U.S. 308, 94 S. Ct. 1105, 39 L. Ed. 2d 347 (1974).

Weeks admitted that he knew how the parole system in Arkansas worked, but the court sustained an objection to an inquiry whether appellant was aware that the prosecuting attorney is asked to make a recommendation to the parole board before there is a parole. After objection was made but before it was sustained, the witness answered that he did not. We find no further inquiry along this line, probably because of the unfavorable answer given by the witness. No effort was made to pursue the matter in any other fashion. Under these circumstances we agree with the state that the error was harmless.

Appellant also contends that the testimony of Weeks, who would have been an accomplice if his testimony had been believed, was not sufficiently corroborated to sustain the jury verdict. In reviewing the evidence, it must be remembered that the corroborating independent evidence need not be sufficient, in and of itself, to sustain a conviction. It is only necessary that it tend in some degree to connect the accused with the crime. *Stout* v. *State,* 249 Ark. 24, 458 S.W. 2d 42. It may be circumstantial, so long as it is substantial. *Jones* v. *State,* 254 Ark. 769, 496 S.W. 2d 423. Even though one, or a combination of several circumstances might not be sufficient, all of the circumstances when considered together may constitute a chain constituting substantial evidence ten-

ding to connect an accused with the crime charged sufficient to make a question for the jury. *King* v. *State*, 254 Ark. 509, 494 S.W. 2d 476. Any substantial evidence, even though slight and not altogether satisfactory and convincing, is sufficient to warrant submitting the question of its sufficiency to the jury. *Mankey* v. *State*, 192 Ark. 901, 96 S.W. 2d 463. Possession of recently stolen property is a proper circumstance to consider both on the charge of larceny and that of burglary, even if it be found in an automobile in which the accused is a passenger. *Thacker* v. *State*, 253 Ark. 864, 489 S.W. 2d 500; *Lee* v. *State*, 200 Ark. 964, 141 S.W. 2d 842. A conviction of two defendants of burglary and grand larceny has been sustained upon evidence that the stolen property was found in a room occupied by the two. *Lee* v. *State*, 200 Ark. 1189, 141 S.W. 2d 845.

There was evidence that the Dixie Wood Preserving Company plant had been burglarized. The production manager discovered the burglary and found that a "coke" machine and a Pepsi Cola machine had been broken into and severely damaged. A check made out to Potlatch Corporation, some walkie-talkie radios, "plus coins and stuff" out of the machines were missing. This witness identified radios which had been found in an apartment occupied by Klimas and Weeks as a part of those taken. The witness could not state the amount of money taken from the machines. Weeks testified that the two had burglarized the place and the drink machines and removed the change from them. He said that there was a total of $58 which was divided in half and that Klimas put his part in a glass jar in the apartment shared by him and Klimas.

William E. Moore, a criminal investigator for Jefferson County, went to the apartment where Klimas and Weeks lived and searched it pursuant to consent given by Weeks. He found five walkie-talkie radios and a portable one in a brown paper bag in a closet. He also found two plastic containers with nickels, dimes and quarters in them in two different chests of drawers. Klimas was present when the search was made. He made no objection to the search. One of the plastic containers was found in a chest of drawers, which was identified by Klimas as his chest. Moore said that Klimas iden-

tified the coins as his and said that he was saving them. The closet from which the radios were taken appears to have been used by both Klimas and Weeks. The chests of drawers were located in a room to which both Klimas and Weeks had access. When the search was being conducted in the presence of Klimas, Weeks told the officer that the things in the closet belonged to Klimas. There was no denial by Klimas, who was not then in custody.

Klimas relies upon *Cockrell* v. *State,* 256 Ark. 19, 505 S.W. 2d 204, and *Bright* v. *State,* 212 Ark. 852, 208 S.W. 168, as authority demonstrating the insufficiency of the evidence. But both cases may be easily distinguished. In *Cockrell,* two stolen guns were found in the defendant's automobile while it was being driven by the accomplice, who lived with the defendant and had free use of his car, especially when the defendant was working at night. There was nothing except the ownership of the car tending to connect the defendant with the larceny of the guns. In *Bright,* it was not contended that the *amount* of money found on the defendant was sufficient "to form the basis for an independent presumption of guilt," of a burglary and larceny in which the evidence indicated that as much as $6,000 had been stolen. With this factor eliminated, the court found no corroboration in the fact that defendant had a bad reputation and had been seen with the accomplices, his half-brothers, an hour or two before the burglary with which he was charged.

This case can also be distinguished from *Cook* v. *State,* 75 Ark. 540, 87 S.W. 1176, where we held that testimony that the accused had been seen with a *handful* of pennies shortly after a chewing gum slot machine had been taken from a burglarized railroad depot was not corroborative of the testimony of an accomplice who said that he and the accused had broken into the place, taken the slot machine, broken it open and divided equally the *four* pennies they found in it, because there was no other evidence that the machine had any pennies in it. Here, there was testimony that coins were taken from the machines, even though the manager was not able to say how many or how much was taken.

When we view the total circumstances consisting of the

finding of some of the property stolen in an apartment shared by the accomplice and the defendant, the uncontroverted statement of the accomplice in the presence of appellant that thte things in the closet where they were found belonged to appellant, the fact that coins were taken from the machines at the burglarized premises, and the fact that a substantial number of coins were found in a chest belonging to appellant in a container identical to that in which similar coins were found in a chest belonging to the accomplice, together with appellant's admission that the chest was his and his assertion that the coins were also, they are substantial, even though slight, corroboration of the testimony of the accomplice. They were at least sufficient to present a question for the jury as to their sufficiency. The issue of the sufficiency of the corroboration and the requirement that circumstantial evidence be inconsistent with any reasonable conclusion other than the defendant's guilt were submitted to the jury by instructions to which no objection was made.

Since we find error in the proceedings to determine appellant's sentence, we must reverse the judgment and remand the case for a new trial, unless the Attorney General, within 17 calendar days, accepts a reduction of appellant's sentence to three years, the minimum on the charges on which he was tried.

Mr. Justice Byrd would reverse on the court's sustaining the state's objection to cross-examination of the accomplice.

Supplemental Opinion On Rehearing

Delivered March 15, 1976

JOHN A. FOGLEMAN, Justice. The state has filed a petition for rehearing, pointing out that, in our disposition of this case, we overlooked the fact that evidence of six prior felony convictions of appellant was introduced in addition to the Missouri convictions for which an adequate foundation was not laid. In view of these unchallenged Arkansas convictions, the minimum sentence on each charge would have been 21 years, making a total minimum of 42 years on the two offenses and not 3 years as we indicated in the original opinion in this case. See Ark. Stat. Ann. §§ 41-1003, 41-3907 (Repl. 1964) and 43-2328 (Supp. 1975). Any possible prejudice to appellant would be removed by reduction of the sentence to 42 years. See *Wilburn* v. *State,* 253 Ark. 608, 487 S.W. 2d 600; *McConahay* v. *State,* 257 Ark. 328, 516 S.W. 2d 887.

We accordingly revise the disposition indicated in the original opinion wherein the Attorney General was given the option of a new trial or accepting a reduction of the sentence to 3 years. Instead, the case will be remanded for a new trial, unless the Attorney General, within 17 calendar days, accepts a reduction of appellant's sentence to 42 years.

David SMITH et al *v.* Terrence ANDERSON et al

75-204 532 S.W. 2d 745

Opinion delivered February 17, 1976

Schieffler, Yates & Porter, for appellants.

Roscoe & Epes, P.A., for appellees.

CONLEY BYRD, Justice. This is a suit by appellant David Smith, a minor, by his next friend for damages for malicious prosecution. The only issue is whether the trial court acted correctly in directing a verdict for the appellees, Terrence Anderson and West's-Gibson Products Company of West Helena, Inc.

The record shows that Terrence Anderson was the manager of West's-Gibson Products Company of West Helena, Inc. and that as a result of information obtained from Jan May, one of the cashiers in the store, Terrence Anderson executed an affidavit for a warrant of arrest for David Smith on charges of forgery and uttering. At a hearing before the Juvenile Court Referee on March 1, 1973, appellant was placed on a one-year probation for obtaining money under false pretenses. On appeal to the County Judge, pursuant to Acts of 1969, No. 404 § 2 appellant was found not guilty of forgery, uttering or obtaining money under false pretenses.

Appellant acknowledges the effect of our cases such as *Alexander* v. *Laman*, 225 Ark. 498, 283 S.W. 2d 345 (1955), which hold that a judgment of conviction by a court of competent jurisdiction is conclusive evidence of the existence of probable cause, even though the judgment is later reversed, and to avoid the effect thereof contends that the findings of guilt by the juvenile could not be used against the minor because of Ark. Stat. Ann. § 45-205 (Repl. 1964), which provides:

> "A disposition of any child under this act or in any evidence given in such cause, shall not, in any civil, criminal or other cause or proceeding whatever, in any court, be lawful or proper evidence against such child for any purpose whatever, except in subsequent cases against the same child under this act; . . "

We find no merit to this contention by appellant. It was incumbent upon appellant, as an essential element of his cause of action, to show that the appellees acted without probable cause in having him arrested. In discharging this burden, appellant called the county clerk and introduced the juvenile court records to show the dismissal of the charges placed against him. Having relied upon the records as evidence in his favor, appellant is not in a position to complain that appellees insisted that the whole record be introduced. The general rule is that one who relies upon a part of a judicial record must introduce the whole record, not just the part that is favorable to him. See *Strawn* v. *Norris*, 23 Ark. 542 (1861), *Arkansas State Highway Comm'n* v. *Pittman*, 251 Ark. 709, 473 S.W. 2d 924 (1971) and 30 Am. Jur. 2d *Evidence* § 986 (1967).

In *Fortin* v. *Parrish & Reeves*, 258 Ark. 277, 524 S. W. 2d 236 (1975), we held that a juvenile court referee was a de facto judge and in so doing stated:

> "The principal is that the acts of an officer *de facto* are binding upon the public as though done by one in office *de jure* and that this right to the office cannot be questioned except in a direct proceeding to which he is a party, is well settled. . . . "

Since the findings by the juvenile court referee furnished conclusive evidence of probable cause on the part of appellees, we need not review the other evidence in the record.

Affirmed.

HARRIS, C.J., dissents.

Johnnie L. PIERCE *v.* Joline PIERCE

75-261 532 S.W. 2d 747

Opinion delivered February 17, 1976

William E. Johnson and *John F. Gibson,* for appellant.

Switzer, Switzer & Draper, for appellee.

CONLEY BYRD, Justice. The issue on this appeal is whether the trial court properly set aside a default divorce decree in favor of the appellant Johnnie L. Pierce.

The record shows that appellant Johnnie L. Pierce and appellee Joline Pierce had been married for a number of years. They had a daughter, age 27, and a son, age 18. Appellant ran an automobile garage at which appellee had worked during some parts of the marriage. On April 6, 1974, appellee, without notice to appellant or any member of her family, left in the company of one Johnny McManus, an employee of appellant, for parts unknown. Appellant, fearing that his wife had been kidnapped, went to the sheriff's office for assistance. Neither appellant nor his children heard from appellee until approximately Easter. On April 22, 1974, appellant filed suit for divorce and attempted to obtain service upon appellee by warning order pursuant to Ark. Stat. Ann. § 27-354 (Repl. 1962). At that time he truthfully stated in his affidavit for a warning order that he did not know the present address of appellee. On May 16, 1974, having learned for the first time that appellee was in Mahia, Texas, the appellant, his daughter and his son drove to Mahia, Texas, and returned with appellee just two days before the son's graduation from high school. Appellee lived in the family home until June 8, when she again left to live with Johnny McManus in Mahia, Texas. On July 1, 1974, the attorney ad

litem filed his report showing that he had been unable to contact the appellee and that her whereabouts were unknown. On July 2, 1974, appellant took a default divorce decree. The petition of appellee to set aside the decree was filed on October 30, 1974.

At the trial on the petition to vacate, appellee readily admitted that she was still living with Johnny McManus. She also admitted that between the dates of May 16 and June 8, 1974, appellant told her about the divorce but says that he told her he was dropping it. Appellant disputes appellee's assertion that he told her he was dropping the divorce. His testimony was that she ran off before the divorce became final.

The general purpose of process is stated in 62 Am. Jur. 2d *Process* § 67 (1972) as follows:

> "The object of all process, whether by personal notice or by substitution or publication, is to give the person to be affected by the judgment sought notice thereof and an opportunity to defend. The efficacy of substituted or constructive service of process, when allowable, rests upon the presumption that notice will be given in a manner which is calculated to impart knowledge to the person who is to be notified. Its adequacy, so far as due process of law is concerned, is dependent on whether or not the particular form of service is reasonably calculated to give the defendant actual notice of the proceedings and an opportunity to be heard. In providing for substituted or constructive service, a statute must incorporate provisions reasonably designed to give the defendant notice of the initiation of litigation against him or a reasonable method of emparting such notice; otherwise it is not consistent with the requirement of due process of law . . . ."

Our law on the subject follows the general rule. See *Davis* v. *Schimmel, Trustee,* 252 Ark. 1201, 482 S.W. 2d 785 (1972), where we stated:

> "Where an action is based on constructive service, no action is commenced or cause pending until the proceedings provided for in the governing statute are

complied with and if there is no such compliance, the proceedings are void, and the court has no power to take affirmative action. . . . "

In *Swartz* v. *Drinker,* 192 Ark. 198, 90 S.W. 2d 483 (1936), we held that there must be a strict compliance with the requirements of our constructive service statutes and if there was not such compliance no action was commenced. In *Frank* v. *Frank,* 175 Ark. 285, 298 S.W. 1026 (1927), we pointed out that, until 30 days have expired after the appointment of an attorney ad litem and he has made his report, a court is without jurisdiction to take any affirmative action on constructive service.

Under this record we find the following facts undisputed:

1. Appellant was truthful on April 22, 1974, when he stated in his affidavit for a warning order that appellee was a non-resident whose address was unknown;

2. Before the 30 day period for attorney ad litem report was due appellee again became a resident of the state and lived with appellant for three weeks.

3. After appellee left on June 8, 1974, appellant knew that she was living with Johnny McManus in Mahia, Texas.

4. The report of the attorney ad litem was filed for record on July 1, 1974, certifying that after due diligence to ascertain the whereabouts of appellee it was his " . . . belief she is a non-resident of the State of Arkansas whose address is unknown."

Thus, under the foregoing decisions it would appear that, since appellee, to the knowledge of appellant, again became a resident of this State before the expiration of 30 days from the appointment of the attorney ad litem, the April 22nd affidavit for a warning order on the basis that she was a non-resident lost its efficacy for purposes of giving the court jurisdiction of the parties. Accordingly, the court had no jurisdiction of appellee on July 2, 1974, for purposes of rendering a decree of divorce. Without such jurisdiction, the decree was properly vacated without any necessity for showing a meritorious defense.

Affirmed.

Maurice DERRICK *v.* STATE of Arkansas

CR 75-144 532 S.W. 2d 431

Opinion delivered February 17, 1976

Erwin L. Davis, for appellant.

Jim Guy Tucker, Atty. Gen., by: *Jack T. Lassiter,* Asst. Atty. Gen., for appellee.

FRANK HOLT, Justice. Appellant was convicted by a jury of possession of a controlled substance, heroin, with intent to deliver. Ark. Stat. Ann. § 82-2617 (Supp. 1975). His punishment was assessed at 30 years in the Arkansas Department of Correction. Appellant first contends for reversal that the trial court erred in overruling his motion for a continuance in order to give him sufficient time for a psychiatric evaluation. We do not agree.

Appellant was charged with the alleged offense on July 11, 1974, and the case was tried on September 27, 1974. It appears from the record that appellant was represented by employed counsel from the date of his arraignment on July 11. On the day before the trial appellant (by counsel) filed his unverified motion for a continuance alleging that on September 16, 1974, he was partially examined at a local Guidance Center for psychological and psychiatric evaluation and, further, that on September 25, or two days preceding the trial, the court had ordered that appellant's examination be completed the next day at the local center. According to appellant's unverified motion, the appellant was not transported by the officials to the center resulting in the examination not being completed. The court denied the motion for a continuance on the trial date stating "[I]t's been three months and he could have had anybody he wanted to. He is not a pauper. He can't wait until the day before the trial, and then bring up something just for the purpose of continuance. **** I've told you that you had from July the 11th

to get any psychiatrist you wanted to." He then observed that the appellant could have availed himself of psychiatric evaluation during the time he was in jail.

Appellant recognizes that the granting of a motion for a continuance is within the sound discretion of the trial court and a refusal to grant a continuance will not be reversed absent a showing of a clear abuse of discretion. *Grissom* v. *State,* 254 Ark. 81, 491 S.W. 2d 595 (1973); and *Thacker* v. *State,* 253 Ark. 864, 489 S.W. 2d 500 (1973). Ark. Stat. Ann. § 43-1705 (Repl. 1964). In the case at bar the thrust of appellant's argument is that "[T]he question here is not whether Appellant should have been examined by a psychiatrist — that was decided by the Circuit Judge in the affirmative — but whether a continuance should have been granted so that the Court's own Order could be carried out." Whenever a psychiatric examination at public expense is deemed necessary by the appellant or the trial court, the statutory standards are set forth in Ark. Stat. Ann. § 43-1301 (Supp. 1975). It does not appear that insanity was ever made an issue as is required by the statutory standards. Here it is significant that the issue was never presented by a proffer of proof. Neither did the appellant, by affidavit, indicate to the court that he was incompetent on the date of the alleged offense or incompetent to stand trial and, therefore, was entitled to a continuance. Ordinarily a motion for a continuance must be supported by an affidavit. Ark. Stat. Ann. § 43-1706 (Repl. 1964) and Ark. Stat. Ann. § 27-1403 (Repl. 1962). The record does not indicate that the court was ever apprised of the results or findings of the asserted incomplete examination. Certainly, in the circumstances, we cannot say the trial court abused its discretion by refusing a continuance.

Appellant next asserts that the trial court erred in overruling his motion for a mistrial based upon prejudicial newspaper and radio publicity. We have determined this issue adversely to appellant in *Freeman, Roland and Boyd* v. *State,* 258 Ark. 496, 527 S.W. 2d 623 (1975). These appellants were tried together with appellant here and all received thirty year sentences. There we affirmed. Appellant contends that the false publicity at the beginning of his trial that he had pleaded guilty and received a thirty year sentence

had a prejudicial effect upon the jury. Appellant argues in effect that *Freeman* is not controlling because the articles were more prejudicial to him than they were to his codefendants. The trial court carefully ascertained from the jurors, as we related in *Freeman,* that they were unaware of any news articles or comments about the trial. At appellant's request the court sequestered the jury. The following day, upon resumption of the trial, the court again ascertained from the jurors that they were not exposed to any publicity from any source about the trial. The court then offered appellant's counsel (and his codefendants' counsel) the opportunity to question the jurors or present any evidence that the jury might have some knowledge about the asserted prejudicial publicity. The offer was declined. As in *Freeman* we hold the court properly overruled his motion for a mistrial based upon prejudicial news coverage.

Neither can we agree with appellant's contention that the trial court erred in admitting into evidence two pistols which were found in the automobile occupied by appellant's codefendants at the time of the alleged offense. Appellant argues that the weapons were inadmissible as to him because they were irrelevant to the issue as to whether "he possessed Heroin with intent to sell, and could not in any way be said to be part of the res gestae of any offense committed by him." Again, this same issue was presented in *Freeman,* by appellant's three codefendants with whom he stood trial. In *Freeman* we held these weapons were part of the res gestae and pertinent evidence on the question of intent. There we said that "narcotics transactions are frequently attended by morally offensive circumstances, and immoral participants. The possession of two pistols by the appellants at the time such transaction was allegedly attempted would appear to have some probative force on the question of what business the men were about." In the case at bar, in linking appellant's participation with his codefendants, the state adduced evidence that on the day of the alleged offense, the appellant and two of his codefendants drove to Arkansas from an adjoining state in the automobile where the weapons were found. There was evidence that a brown package containing the heroin was taken from that automobile by his codefendants and then given to the appellant who was standing near-

by at a motel. Appellant immediately delivered it to an undercover agent there, where appellant was to receive $16,000 as prearranged. We need not detail further evidence since this alone is amply sufficient to demonstrate that appellant was a part of the whole transaction and, therefore, the weapons were relevant to the issue for which he was standing trial.

Appellant next contends that the nonresponsive answer of a prosecuting witness was prejudicial. This witness was asked by appellant's counsel "[W]as that the first mention of this pound of heroin?" The witness replied "[N]o, sir, when I purchased five (5) ounces of heroin off of him on June 4th he said . . . . " In our view this was proper evidence to show appellant's intent or design since it was not too remote in time from the alleged offense. *Tarkington* v. *State,* 250 Ark. 972, 469 S.W. 2d 93 (1971); *Kurck* v. *State,* 242 Ark. 742, 415 S.W. 2d 61 (1967); and *Keese and Pilgreen* v. *State,* 223 Ark. 261, 265 S.W. 2d 542 (1954). Further, in the case at bar, at the request of counsel, the court admonished the jury to disregard the answer. Appellant argues that the court, by using the words "any prior purchases" in his admonishment, commented on the evidence. We do not agree. Suffice it to say, however, there is no objection nor motion for a mistrial based upon the cautionary instruction.

Appellant's last assertion for reversal is that the trial court erred in overruling his motion for a severance. Ark. Stat. Ann. § 43-1802 (Repl. 1964) provides that "when indicted for a felony less than capital, defendants may be tried jointly or separately, in the discretion of the trial court." On appeal we do not disturb the refusal of a severance by the trial court unless there is an abuse of discretion. *Ballew* v. *State,* 246 Ark. 1191, 441 S.W. 2d 453 (1969). Here appellant argues that he could not assert his defense of entrapment. Suffice it to say the motion contained no such allegation. We have already said that the pistols were admissible against appellant as being relevant to the alleged offense. This would be true if he were granted a separate trial. Appellant has not demonstrated an abuse of discretion by the court in denying his motion for a severance.

Affirmed.

Alice WILLETT *v.* F. Giles WILLETT

75-269 532 S.W. 2d 756

Opinion delivered February 23, 1976

Laster & Lane, for appellant.

William R. Wilson Jr., P.A. for appellee.

GEORGE ROSE SMITH, Justice. The only question here is whether a money judgment entered in Illinois is entitled to full faith and credit in Arkansas. We affirm the trial court's refusal to enforce the Illinois judgment.

In 1961 the appellant obtained a divorce in Illinois, where both parties were living. The decree ordered the appellee to pay child support and certain medical expenses. In 1969, after the appellee had moved to Arkansas, the appellant filed a petition in the Illinois case for judgment against the appellee in the amount of his arrearages. On July 16, 1969, the appellee received by mail, in Arkansas, notice that the appellant's petition would be heard in Illinois on July 17. Upon the advice of an Arkansas attorney the appellee made no attempt to resist the petition. On July 17 the Illinois court entered judgment against the appellee for $8,760, with interest. In 1972 the appellant brought this action to enforce the Illinois judgment.

The trial court was right in refusing to recognize the judgment. Even though the Illinois court had continuing

jurisdiction in the case, the appellee was entitled, as a matter of due process, to reasonable notice of the petition for judgment. Leflar, American Conflicts Law, § 28 (rev. ed., 1968). The one day's notice that was given cannot be said to be reasonable in the circumstances. Consequently the Illinois judgment is not entitled to full faith and credit. *Griffin* v. *Griffin*, 327 U.S. 220 (1946).

Affirmed.

AERO MAYFLOWER TRANSIT COMPANY *v.* Jack HOFBERGER

75-277 532 S.W. 2d 759

Opinion delivered February 23, 1976

Harkness, Friedman & Kusin, for appellant.

Charles M. Bleil and *Atchley, Russell, Waldrop & Hlavinka,* for appellee.

JOHN A. FOGLEMAN, Justice. Aero Mayflower Transit Company sued Jack Hofberger to recover $1,517.76 for moving household goods from Hillsdale, Michigan to El Dorado, Arkansas. This appeal comes from a judgment in favor of appellee by the circuit judge, trial by jury having been waived. We find no error and affirm.

Hofberger was employed by Permaneer Corporation in Hillsdale. He accepted employment by El Dorado Industries at El Dorado, Arkansas, with the understanding that the new employer would pay all relocation expenses. He obtained an estimate of the cost from the Mayflower Moving Service in Michigan through its agent in Jackson, Michigan. The agent asked Hofberger if it was a company move and Hofberger replied that the charges would be paid by El Dorado Industries, making it clear that under no circumstances would he pay these charges. Thereafter, Hofberger contacted Roberson as agent for appellant in El Dorado to discuss the move. Hofberger testified that he told Roberson that this was a company move, and that Hofberger was not to pay the bill. He said that Roberson agreed and a company authorization was obtained. Roberson admitted that he understood that El Dorado Industries was to pay for the move. He obtained a written acknowledgment that it would pay the charges which was in the form of a "Purchase Order" signed by a vice-president of El Dorado Industries. Hofberger said that if this authorization had not been obtained and if Roberson had not agreed to look to El Dorado Industries, the move would not have been made.

In spite of the requirement of the Interstate Commerce Commission that the person extended credit be billed within seven days (9 CRF § 1322.1), appellant first billed El Dorado Industries about one month after the move. The bill was not paid. El Dorado Industries encountered financial difficulties and went out of business. Four months later appellant first made demand for payment upon Hofberger who had signed the bill of lading as shipper and acknowledged the receipt of the goods as consignee. In the letter by which demand was

made appellant stated that it had not expected to have to turn to appellee for payment, but that he was primarily liable for the charges along with El Dorado Industries. Appellant also stated that knowledge of this obligation would probably come to Hofberger as a complete surprise and apologized, saying it had no other course of action because it was required by the Interstate Commerce Act, Title 49 U.S.C. 323 to enforce the obligation against him.

We do not interpret the applicable federal statutes and decisions of the United States Supreme Court to impose an absolute liability on the consignee in these circumstances, as appellant does, although it appears that some courts have done so in situations of this sort. See, e.g., *Aero Mayflower Transit Co.* v. *Hankey,* 140 S. 2d 465 (La. App. 1963); *National Van Lines, Inc.* v. *Herbert,* 81 S.D. 633, 148 N.W. 2d 36 (1966). On the other hand, some courts have sustained judgments denying recovery to the carrier where substantial evidence of an express contract or of an estoppel was similar to that before us. *Southern Pacific Transportation Co.* v. *Campbell Soup Co.*, 455 F. 2d 1219 (8 Cir., 1972); *Consolidated Freightways Corp. of Del.* v. *Admiral Corp.*, 442 F. 2d 56 (7 Cir., 1971); *Tom Hicks Transfer Co.* v. *Ford, Bacon & Davis Texas Inc.*, 482 S.W. 2d 364 (Tex. Civ. App. 1972).[1] See also *Lyon Van Lines* v. *Cole,* 9 Wash. App. 382, 512 P. 2d 1108 (1973). The rationale of these cases is that the intention of the act was only to prevent rate discrimination and that the holdings of the United States Supreme Court in such cases as *Illinois Steel Co.* v. *B. & O. R. Co.*, 320 U.S. 508, 513, 64 S. Ct. 322, 88 L. Ed. 259 (1944); *Louisville & N. R. Co.* v. *United States,* 267 U.S. 395, 397, 45 S. Ct. 233, 69 L. Ed. 789 (1925); *Louisville & N.R. Co.* v. *Central Iron Co.*, 265 U.S. 59, 70, 44 S. Ct. 441, 68 L. Ed. 900 (1924); and *Pittsburgh, C., C. & St. L. R. Co.* v. *Fink,* 250 U.S. 577, 581, 40 S. Ct. 27, 63 L. Ed. 1151 (1919) prevented such discrimination by holding the consignee liable to pay the full legal charge under uniform shipping rates in the event of an undercharge through either contract or mistake (even where the consignee accepted the shipment with the understanding that the charges were prepaid, and even when the consignee had remitted the amount of the incorrect charges to the

[1]Contra: See *American Red Ball Transit Co.* v. *McCarthy*, 323 A. 2d 897 (N. H. 1974).

shipper) but that the consignee's liability was not absolute where no undercharge is involved and he had a specific contract that he was not liable or where the carrier's conduct estopped it from imposing liability on the consignee. These courts take the view that estoppel cannot operate as a means of avoiding the statutory requirement of equal rates, but that the defense of estoppel has not been eliminated under all circumstances.

There is no suggestion of any undercharge in this case. There was substantial evidence that Hofberger contracted against liability and that there were circumstances estopping appellant from asserting liability against Hofberger, based on the terms on which the shipment was accepted and the belated billing to both the employer and the employee. The circuit court judgment was based upon estoppel and since it had substantial evidentiary support, it is affirmed.

Cecil GATEWOOD *v.* STATE of Arkansas

CR 75-184 532 S.W. 2d 749

Opinion delivered February 23, 1976

Harold L. Hall, Public Defender, for appellant.

Jim Guy Tucker, Atty. Gen., by: *B.J. McCoy,* Asst. Atty. Gen., for appellee.

JOHN A. FOGLEMAN, Justice. Cecil Gatewood, a white person, and Lucky Time Rucker, a black one, were charged with the robbery of Merle Boyer, proprietor of Boyer's Antique Shop at 900 South Cedar in Little Rock, and of Venerda Spencer, a customer of that establishment. It was alleged in the information on each charge that a firearm was used and the sentence imposed by the court on trial after waiver of a jury trial was enhanced because of use of a firearm.

The robbery occurred on June 3, 1975. Appellant contends that the evidence was not sufficient to sustain the court's finding that Gatewood was guilty and that, since the court did not make a specific finding that Gatewood used a firearm and there was no testimony that Gatewood himself either held or used a pistol in connection with the robbery, the portion of the sentence based upon this factor should be eliminated. We find no error and affirm.

A black boy, positively identified by both Boyer and Mrs. Spencer as Rucker, came into the store, pulled out a pistol, demanded Boyer's money and specifically called for Boyer's red tackle box under the counter. That box was used for making change and in it Boyer kept checks and currency. He estimated the amount of money at around $50 and the number of checks at 15 or 20 for a total of $350. After Boyer had given Rucker the tackle box, Rucker told Mrs. Spencer he wanted her handbag which was lying on the counter in

front of her. When she reached for the purse, Rucker commanded her to stop, reached around her and took the handbag which contained three checkbooks, a billfold, some credit cards, some pens and approximately $10. He then left the store. Boyer immediately called the police.

Boyer estimated the time as around 1:30 p.m. Mrs. Spencer said that it was about 1:15. Mrs. Spencer saw a white boy outside the store during the robbery but not well enough to identify him.

Sgt. Ron Gatewood (no relation) of the Little Rock Police Department commenced his investigation of the crime at 1:20 p.m. He received information as he proceeded west on Maryland Street which caused him, with other officers, to go to a dwelling house at the southwest corner of Maryland and Abigail. When Sgt. Gatewood approached the house, Cecil Gatewood came out, shook hands with the sergeant, identified himself, and when the officer inquired about the whereabouts of the young black man that had been with him a few minutes previously, replied that he had left, walking north on Abigail Street about 20 or 30 minutes earlier. When the sergeant asked, appellant said he did not mind if the officers went in the house and looked around to make sure that the young black man had actually gone. Officer Bullerwell and Sgt. Gatewood entered the living room, and as Bullerwell started to go into the central or back part of the house, appellant moved close to the sergeant and whispered, "He's in the back of the house with a .38 and he'll kill us all." Sgt. Gatewood called Bullerwell back and asked appellant, "Who's in the back of the house?" and received the reply, "The black dude." When the sergeant then talked with appellant about the black guy "sticking up the store," appellant seemed anxious to leave. The officer then told appellant to go out in the front yard and lie down.

Sgt. Gatewood had called for help when he was told that there was an armed man in the house. He left Detective Knestrict with appellant and went with Bullerwell and Detective Baer in a search of the house. Bullerwell found Rucker hiding under a bed in the front bedroom. Rucker declined an invitation to come out, but the officers lifted the

bed, got him out from under it and handcuffed him.

Bullerwell advised Rucker of his constitutional rights, by reading from a standard card issued by the Little Rock Police Department. When one of the officers asked where the gun was, Rucker advised that another dude who was hiding in the attic was the one they wanted, that he had the gun and was the one that was going to kill the officers. After the officers found the attic and were unable to get a response to a warning to anyone up there to come out, Officer Bullerwell and Detective Baer entered the attic and found and recovered a .38 caliber Smith and Wesson revolver and, tucked between boards, a purse (later identified by Mrs. Spencer). Detective Baer found Boyer's red tackle box, containing $27.87 in change, in a bedroom closet, where, upon inquiry, appellant told him it would be. The officers found no one in the attic and no one other than appellant and Rucker in the house.

Of course, we have viewed the evidence in the light most favorable to the state, as required. In that light it is sufficient. We have held in many cases that possession of recently stolen property without reasonable explanation is sufficient evidence of burglary and of larceny. *Williams* v. *State,* 258 Ark. 207, 523 S.W. 2d 377; *Kelly* v. *State,* 191 Ark. 674, 87 S.W. 2d 400; *Duty* v. *State,* 212 Ark. 890, 208 S.W. 2d 162. We have not had occasion to pass on the question whether that fact in and of itself, is sufficient evidence of robbery. Other jurisdictions hold that it is, even when the possession is joint, unless there is evidence of circumstances casting reasonable doubt upon the permissible inference that it is. *State* v. *Langley,* 242 A. 2d 688 (Me., 1968); *People* v. *Curtis,* 7 Ill. App. 3d 520, 288 N.E. 2d 35 (1972); *People* v. *Hanson,* 97 Ill. App. 2d 338, 240 N.E. 2d 226 (1968); *People* v. *Leving,* 371 Ill. 448, 21 N.E. 2d 391 (1939). See also, *Chubbs* v. *State,* 204 Ga. 762, 51 S.E. 2d 851. As to the effect of joint possession, cf. *Lee* v. *State,* 200 Ark. 964, 141 S.W. 2d 842; *Davis* v. *State,* 255 Ark. 405, 500 S.W. 2d 775; *Cox* v. *State,* 254 Ark. 1, 491 S.W. 2d 802, cert. den. 414 U.S. 923, 94 S. Ct. 230, 38 L. Ed. 2d 157. It is at least evidence that the possessor was a party to the robbery. *Commonwealth* v. *Wilson,* 394 Pa. 588, 148 A. 2d 234 (1959), cert. den. 361 U.S. 844, 80 S. Ct. 97, 4 L. Ed. 2d 82. In any event, when one is shown to be the possessor of recently stolen

property, only slight corroborative evidence of other inculpatory circumstances will be sufficient to support a conviction of robbery. *People* v. *Mulqueen,* 9 Cal. App. 3d 532, 88 Cal. Rptr. 235 (1970); *People* v. *Blair,* 2 Cal. App. 3d 249, 82 Cal. Rptr. 673 (1969).

The finding within a few minutes after the robbery of a substantial part of the stolen property and of a revolver hidden in a house in which only appellant, a white person, and Rucker, a black person, were present, corroborated by testimony that a white person was seen outside the store when the robbery by the black person took place and the conduct and statements of appellant when the police officers came to the house certainly was sufficient substantial evidence that appellant was a participant in the robbery.

Since we find sufficient evidence that appellant was a participant in the crime, we need not treat his argument on the question of enhancement of punishment. We rejected it in *Gammell and Spann* v. *State,* 259 Ark. 96, 531 S.W. 2d 474 (1976).

The judgment is affirmed.

Galen Ray SANDERS *v.* STATE of Arkansas

CR 75-197 532 S.W. 2d 752

Opinion delivered February 23, 1976

Don Langston, for appellant.

Jim Guy Tucker, Atty. Gen., by: *James Guy Petty Jr.,* Dep. Atty. Gen., for appellee.

JOHN A. FOGLEMAN, Justice. Galen Ray Sanders was found guilty of assault with a deadly weapon after a jury trial on a charge of assault with intent to kill. He moved to quash his arrest and to suppress incriminating statements made by him to the police which he alleged to be the fruit of the arrest. The ground for the motion to quash the arrest was lack of probable cause for his arrest without a warrant. The ground for his motion to suppress his statements to police was basically the illegal arrest. We find that the arresting officers had probable cause and affirm the judgment.

Appellant was charged with having assaulted Ricky Banning, son of William L. Banning. Both were employed by Shipley Baking Company, the son having gone to work after some employees had gone on strike. They left work shortly before 8:30 p.m. The Bannings came out the back door of the bakery and got into the father's pickup truck on the parking lot at the bakery. The son was shot as they were leaving the parking lot. The father, who was driving, looked through the rear view mirror of his pickup truck, because he had heard a

noise which seemed to come from that direction, followed by three similar sounds in rapid succession. He saw three or four people standing around a vehicle which he recognized as one belonging to Sanders. The Bannings proceeded to the police station. Just before the father, who was driving, pulled into the driveway to the police station, they met the Sanders vehicle, a 1971 Chevrolet pickup truck with a white camper shell, which was travelling in the opposite direction at an abnormal speed for the area and came very close to the Bannings. The Bannings could not see who was driving. They proceeded into the station and the father told Detective Hill that his son had been shot, that he had seen the Sanders vehicle at the scene, that he had seen "people" standing around the vehicle, that he had met the Sanders vehicle en route to the police station and that whoever was driving came very close, either trying to get in front of the Banning vehicle or to see into it as it turned into the police station.

The Bannings then went to the hospital. The father returned to the police station after the son had seen a doctor. The son arrived at the police station 15 or 20 minutes later and they signed statements typed by Hill. Sanders was brought into the station while the Bannings were there. Sanders had been arrested by Detectives Sharp and Hill. As Hill was leaving the police station to go to Sanders' residence at about 9:40 p.m. he met Sharp. Hill had obtained Sanders' address from a computer. They proceeded to the trailer park where Sanders lived. After obtaining directions to the address they had, they found the Sanders vehicle about 25 feet from the gate at the entry to Sanders' house trailer. Hill saw it as soon as they arrived. Hill had questioned employees at the Shipley Baking Company at about 8:45 p.m. and verified the ownership of the truck Banning had described. When the officers knocked on the door, Sanders' wife answered and called Sanders, who came to the door after a slight delay. Hill asked him to come outside, saying that he and Sharp wanted to talk to him. Although there are some conflicts in the testimony about the exact sequence of events thereafter, Sanders was told that he was under arrest for investigation of assault with intent to kill. He asked the officers if they had a warrant and told them that he was not going with them unless they had a warrant. Sanders' wife was at the door hysterically hollering

that he didn't have to go if they didn't have a warrant, and that "the lawyer" had said so. Sanders was told by Hill that no warrant was necessary because they had probable cause for the arrest for a felony, but Sanders kept repeating that he was not going unless they had a warrant and that his attorney had told him that he was not required to do so. Detective Sharp undertook to explain to Sanders that he would be right if a misdemeanor was involved, but that a "felony case" was involved. After Sanders' continued refusal, the officers subdued him, handcuffed him and took him to the police station.

When they were all in the police automobile after the arrest, Sanders was advised of his constitutional rights by Hill. Some of the incriminating statements which Sanders claims should have been suppressed were spontaneous but one was in response to a question by Hill. Hill stated that when he left the police station, he intended to arrest Sanders, even though an inference could be drawn from Hill's testimony at the preliminary hearing that he formed that intention after Sanders came out of the trailer. Neither Sanders nor his wife testified at the suppression hearing and the testimony of Sharp and Hill stood uncontradicted.

On appeal, all presumptions are favorable to the trial court's ruling on the legality of the arrest, and the burden of demonstrating error rests upon appellant. *Williams* v. *State*, 258 Ark. 207, 523 S.W. 2d 377. When we indulge these presumptions, we cannot say that the trial judge erred. The police officers had authority to make a warrantless arrest if they had reasonable grounds to believe that Sanders had committed the felony of assault with intent to kill. *Williams* v. *State*, supra. When we consider the totality of the circumstances beginning with the sighting of Sanders' vehicle at the scene of the shooting to its being found at his residence within a reasonably short time span during which it had been "driven at" the Banning vehicle as it started to enter the driveway to the police station, we think there was sufficient evidence to sustain a finding of probable cause for the arrest.

It is to be remembered that probable cause is only a reasonable ground of suspicion supported by circumstances sufficiently strong in themselves to warrant a cautious man to

believe that the accused committed a felony, but not tantamount to the quantum of proof required to support a conviction. *Graves* v. *State*, 256 Ark. 117, 505 S.W. 2d 748. *Johnson* v. *State*, 249 Ark. 208, 458 S.W. 2d 409. The existence of probable cause depends upon the facts and circumstances of which the arresting officer has knowledge at the moment of the arrest. *Beck* v. *Ohio*, 379 U.S. 89, 85 S. Ct. 223, 13 L. Ed. 2d 142 (1964).

Determination of probable cause is based upon the factual and practical considerations of everyday life upon which reasonable and prudent men, not legal technicians, act. *Draper* v. *United States*, 358 U.S. 307, 79 S. Ct. 329, 3 L. Ed. 2d 327 (1959); *Brinegar* v. *United States*, 338 U.S. 160, 69 S. Ct. 1302, 93 L. Ed. 1879 (1949). This practical, nontechnical concept has been said to afford the best compromise that has been found for accommodating competing interests, so that law enforcement will not be unduly hampered and law abiding citizens not left at the mercy of the whim and caprice of a police officer. *Beck* v. *Ohio*, supra; *Brinegar* v. *U.S.*, supra. In making this determination the reviewing court should follow a liberal rather than a strict course. *In re Watson's Petition*, 146 Mont. 125, 404 P. 2d 315 (1965).

To have probable cause for an arrest, it is not necessary that the arresting officer have the same type of specific evidence of each element of the offense as would be needed to support a conviction. *Adams* v. *Williams*, 407 U.S. 143, 92 S. Ct. 1921, 32 L. Ed. 2d 612 (1972). A probability is not a certainty or a conclusion beyond a reasonable doubt. *Lathers* v. *United States*, 396 F. 2d 524 (5 Cir., 1968). The question of probable cause is a pragmatic one to be decided in the light of the circumstances of a particular case, which are reviewed, not as a legal scholar determines the existence of consideration in support of a promise, but as a man of reasonable prudence and caution would determine whether the person arrested has committed a felony. *People* v. *Harper*, 365 Mich. 494, 113 N.W. 2d 808 (1962). The answers cannot be found by the application of a mathematical formula. *Mattern* v. *State*, 500 P. 2d 228 (Alaska, 1972). See also, 5 Am. Jur. 2d 740, Arrest § 48. Constitutional standards permit common sense, honest judgments by police officers in their probable cause

determinations. *Lathers* v. *United States*, supra.

In the words of Circuit Judge (now Chief Justice) Burger, speaking for the District of Columbia Circuit Court of Appeals, probable cause for arrest is to be evaluated from the viewpoint of a prudent and cautious police officer at the time of the arrest, not from the remote vantage point of a library. *Jackson* v. *United States*, 302 F. 2d 194 (1962), quoted with approval, *Feguer* v. *United States*, 302 F. 2d 214 (8th Cir. 1962), cert. den. 371 U.S. 872, 83 S. Ct. 123; *Minnesota* v. *Cox*, 294 Minn. 252, 200 N.W. 2d 305 (1972).

When we view the facts in a common sense, pragmatic manner, we find sufficient evidence to support a finding of probable cause for this arrest.[1]

Although appellant's further argument on this point is dependent upon the illegality of the arrest, there was sufficient evidence that the incriminating statements were not tainted by the arrest, even if it were illegal. Appellant relies on *Brown* v. *Illinois*, 422 U.S. 590, 95 S. Ct. 2254, 45 L. Ed. 2d 416 (1975), wherein it was held that the giving of the warnings prescribed by *Miranda* v. *Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966) did not, in and of itself, break the causal chain between an illegal arrest and subsequent inculpatory statements of the person arrested, so that the statements were admissible in evidence. The United States Supreme Court did not hold that the taint of the illegal arrest, followed by the giving of the Miranda warnings, reached any and every such statement made by the arrested person regardless of the circumstances. Rather, that court stated that it is entirely possible that persons arrested illegally frequently may decide to confess as an act of free will unaffected by the initial illegality, that the question of voluntariness must be answered in each case upon the particular facts of

[1]For other cases where probable cause for an arrest of an owner, occupant, or possessor of a motor vehicle was largely based upon recognition of the vehicle at the scene of a crime, see *People* v. *Thomas*, 33 Mich. App. 664, 190 N.W. 2d 250 (1971); *State* v. *Morsette*, 7 Wash. App. 783, 502 P. 2d 1234 (1972); *State* v. *Brown*, 261 Ia. 656, 155 N.W. 2d 416 (1968); *People* v. *Murphy*, 28 Mich. App. 150, 184 N.W. 2d 256 (1970); *People* v. *Wilson*, 16 A.D. 2d 207, 229 NYS Supp. 2d 685 (1962); *State* v. *Hamilton*, 264 N.C. 277, 141 S.E. 2d 506 (1965); cert. den. 384 U.S. 1020, 86 S. Ct. 1936, 16 L. Ed. 2d 1044.

the case, applying the standards of *Wong Sun* v. *United States,* 371 U.S. 471, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963). Those standards were quoted, viz:

> We need not hold that all evidence is "fruit of the poisonous tree" simply because it would not have come to light but for the illegal actions of the police. Rather, the more apt question in such a case is "whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint." Maguire, Evidence of Guilt, 221 (1959).

In *Brown* there was prolonged custodial interrogation and the record disclosed that the arrest was, in all probability, made for that purpose alone. There could be little doubt that the statements of Brown were the fruit of the poisonous tree and that the taint could hardly have been removed by the Miranda warnings. The situation here is decidedly different. After the arrest Sanders and the two officers got into the police car. Immediately thereafter, and apparently before anything else was said by anyone, Hill advised Sanders of his constitutional rights in detail and Sanders indicated that he understood. They travelled some distance before Sanders said anything. However, before the police station was reached and while Sanders was "laying back on the back seat just nonchalant-like," he spontaneously remarked, "A person sure can get in a lot of trouble when he's on strike" or "A man sure can get in a lot of trouble when he's on strike." To which Hill responded, "Yes you can, if there's a gun or shooting involved." Sanders then said, "I don't even own a .22." Although a .22 caliber bullet inflicted the wound suffered by young Banning, no mention had been made by the officers of the type of weapon involved. Subsequently, and apparently after arrival at the police station, Hill asked Sanders what he knew about the shooting and Sanders replied that he had not been involved in any way, but he knew who had done it, but that he had said enough and was not going to say any more until he talked to a lawyer.

Certainly *Brown* does not require that spontaneous,

voluntary statements of this nature be excluded. The really incriminating statements were made after a full explanation of Miranda rights and after Sanders had time for deliberation.The question asked at the police station followed those statements by Sanders, but no further question was asked when he indicated that he would have no more to say until he had consulted a lawyer. His remark substantiates the testimony that he understood his rights. Appellant has failed to demonstrate error in the admission of his statements into evidence on either ground argued by him.

Appellant also contends that the court erred in failing to give his requested instruction defining an accomplice and requiring the testimony of an accomplice to be corroborated. Even if we should find error in this respect, it would be harmless because the jury found Sanders guilty of assault with a deadly weapon, a misdemeanor. Corroboration of the testimony of an accomplice is not required for a misdemeanor conviction. See Ark. Stat. Ann. § 43-2116 (Repl. 1964).

Appellant asserted as a third point for reversal, the denial of his motions for a directed verdict. He concedes that there is no reversible error on this score, unless we sustain one of the points for reversal we have already treated.

The judgment is affirmed.

Dale SMITH et al *v.* Peter G. ESTES et al

75-153 533 S.W. 2d 190

Opinion delivered February 23, 1976
[Rehearing denied March 22, 1976.]

Croxton, Boyer & Keith, for appellants.

John Bailey and *Estes & Estes*, for appellees.

CONLEY BYRD, Justice. The appellants Dale Smith, et al, sought an appeal de novo, pursuant to Ark. Stat. Ann. § 48-311 (Supp. 1975), from the action of the Alcoholic Beverage Control Board permitting appellee By-Pass Beverage Co., an Arkansas corporation, to transfer a liquor permit in the City of Fayetteville from 231 Mill Street to 3118 South School Street. The trial court held that By-Pass Beverage Co. was a necessary party defendant and, since it was not made a party defendant within the 30 day time limit, dismissed the appeal. For reversal appellants contend that the appeal was taken within the 30 day period and that the order of the Alcoholic Beverage Control Board was subject to collateral attack as being null and void.

The record shows that on December 4, 1974, appellants filed a petition for appeal de novo from the decision of the Alcoholic Beverage Control Board in the trial court. In so far as here pertine : the petition alleged:

> "6. That on a date unknown to these Petitioners during the month of July, 1974, the said Peter G. Estes, Sr. acting both individually and as an officer and director of a proposed Arkansas Corporation, By-Pass Beverage Company, made application to the Alcohol Beverage Control Division, Department of Finance and Administration, State of Arkansas, for the transfer of liquor and beer permits issued to Ed Connell for a liquor store at 231 Mill Street, Fayetteville, Arkansas, from the said Ed Connell to the said Peter G. Estes, Sr. and the proposed corporation, namely, By-Pass Beverage Company.
>
> 7. That on a date unknown to the Petitioners during the month of September, 1974, the said Ed Connell made application to the said Alcohol Beverage Control

Division for a transfer of Liquor Permit No. 502 and Beer Permit No. 2147 from the premises located at 231 Mill Street to the premises located at 3118 South School Street, Fayetteville, Arkansas; and that the said application was made on behalf of himself and the said By-Pass Beverage Company.

8. That on or about October 9, 1974, the said Alcoholic Beverage Control Board authorized the transfer of liquor and beer permits issued to the said Ed Connell for a liquor store at 231 Mill street to the said Peter G. Estes, Sr., and the said permits are now in the name of the said Peter G. Estes, Sr.

9. That the said R. E. Brians, Administrator of the said Alcohol Beverage Control Division, on a date unknown to the Petitioners, denied the application for the transfer of the said liquor and beer permits from the premises at 231 Mill Street to the premises at 3118 South School Street, and the Defendant, Peter G. Estes, Sr., appealed the said Administrator's decision to the said Alcoholic Beverage Control Board. At a purported hearing on November 20, 1974, the said Alcoholic Beverage Control Board overruled the decision of the Administrator and authorized the transfer of the said liquor and beer permits from the premises at 231 Mill Street to the premises at 3118 South School Street. However, the said liquor and beer permits have not at this time been issued by the said Alcohol Beverage Control Division for the premises located at 3118 South School Street."

On January 29, 1975, both Peter G. Estes, Sr., and the Board filed motions to dismiss on the basis that By-Pass Beverage Co. was the real party in interest and that appellants had failed to make it a party to the appeal. Attached to the motions was an order of the Board reciting that the ruling was made on November 20, 1974. That order shows that By-Pass Beverage Co. was the applicant for transfer and the real party in interest. Also attached to the motions were certified copies of Liquor Permit No. 502 and Beer Permit No. 2147 issued on October 10, 1974, and Oc-

tober 24, 1974, respectively, showing By-Pass Beverage Co., d/b/a "Ozark Liquors," as holding the permits to do business at 231 Mill Street, Fayetteville.

On February 6, 1975, appellants filed their first amendment to their petition for appeal making By-Pass Beverage Co. a party defendant. The second amendment to the petition for appeal was filed on February 19, 1975, and for the first time made the following allegation:

> "13. At a purported hearing on November 20, 1974, the said Alcohol Beverage Control Board reversed the decision of the said R. E. Brians, Administrator, and approved the transfer of the location of the aforesaid liquor and beer permits from the premises at 231 Mill Street to the premises at 3118 South School Street; however, the Order authorizing the aforesaid transfer of the aforesaid liquor and beer permits was not signed by the said Kenneth Davis, Chairman of the said Alcohol Beverage Control Board, or made and entered by the said Alcohol Beverage Control Board, until January 28, 1975."

On February 21, 1975, the trial court dismissed the appeal because By-Pass Beverage Co. was the real party in interest, and the appeal as to it had not been perfected within the 30 days allowed for perfecting such appeals.

To reverse the trial court, appellants rely upon Ark. Stat. Ann. § 48-1314 (Repl. 1964), which provides:

> ". . . Within five [5] days after the hearing is concluded the Board shall render its written opinion, decision or order on such appeal. A copy of such opinion, decision or order shall be mailed by the Board by registered mail to the applicant, licensee or protester, and a copy shall be also delivered or mailed by the Board to the Director. Such order and decision shall be final and binding on the Director and the applicant, licensee or protester. Provided, however, that an appeal may be taken from any order suspending or revoking a license as provided for in this Act."

To avoid the effect of the appellants' argument, appellees point out that appellants took affirmative action with knowledge of the facts and that under the authorities such action on the part of appellants should be treated as a waiver of the rendition and service of the Board's order. For this assertion appellees rely upon *State ex rel. Grant* v. *First Judicial District Court,* 38 Utah 138, 110 P. 981 (1910). In that case on March 27, 1909, in a trial to a jury, a verdict was returned in favor of Grant. Two days later, Jeppesen, the defendant, filed a written motion to vacate and set aside the judgment. The justice of the peace denied the motion on the same day it was filed. Jeppesen filed an appeal 44 days later. Grant, the plaintiff, moved to dismiss the appeal because it was not filed within the 30 days allowed for taking such appeals. Since it was conceded that no notice of the entry of judgment had been given, the district court denied Grant's motion to dismiss because of a Utah statute which provided:

> "Any person dissatisfied with a judgment rendered in a justice's court, whether the same was rendered on default or after trial, may appeal therefrom to the district court of the county at any time within thirty days after the rendition of any final judgment. Notice of the entry of the judgment must be given to the losing party by the successful party either personally or by publication, and the time of appeal shall date from the service of said notice."

On a petition for prohibition, the Utah Supreme Court held that Jeppesen had waived the statutory notice in this language:

> "The rule, as declared by the weight of authority, seems to be that, when a statute provides that an appeal may be taken within a specified time after the service of notice of the rendition or the entry of judgment, a party seeking to limit the time of appeal is held to strict compliance with the statute. The party entitled to notice may have actual knowledge that the judgment has been rendered, but this alone is not sufficient to set the statute running. . . .

But these same authorities also hold that the party claiming to be aggrieved by the judgment may waive the giving of notice and by his own act set the statute running. Where, for example, a party dissatisfied with a judgment files a motion for a stay of execution, or by other direct proceeding attacks the judgment, and invokes the action of the court to relieve him, either wholly or in part, from the effect thereof, he will be deemed to have waived service of notice.

In 1 Spelling, New Tr. & App. Pr., sec. 363, the author, discussing the question of waiver of notice, says:

> 'It may not only be waived, but the party entitled to notice may do that which will estop him from denying that he has not been notified of the decision according to the statutory requirements. But even in that case his act may with propriety be spoken of as waiver. It constitutes a clear case of waiver for the movant to serve and file his notice of intention, or *file any paper reciting the filing of findings, without waiting to receive notice of the decision.*' "

We, too, conclude that appellants are bound by the recitations in their pleadings. Since they recited the findings of the Board on November 20, 1974, and made specific reference to permits # 502 and # 2147, they had full knowledge that By-Pass Beverage Co. was the real party in interest. Their failure to make By-Pass Beverage Co. a party seems to have occurred upon the theory that since the articles of incorporation for By-Pass Beverage Co. had not been filed in the County, it did not have corporate status. This theory on the part of appellants is completely contrary to the provisions of Ark. Stat. Ann. § 64-117(B) (Repl. 1966) which provides:

> B. Upon the filing with the Secretary of State of the original articles of incorporation, corporate existence shall forthwith begin; and neither such corporate existence nor the right to do business as a corporation shall be postponed until a duplicate of such articles is filed with the County Clerk, . . . "

Appellants also contend that their motion for summary judgment should have been granted because the order of the Board was null and void under Ark. Stat. Ann. § 48-312 (Repl. 1964), which provides:

> "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."

We find no merit to this contention because the statute is a restriction on the permittee and not to any subsequent actions by the Board.

Affirmed.

GEORGE ROSE SMITH and FOGLEMAN, JJ., dissent.

JOHN A. FOGLEMAN, Justice. I cannot subscribe to the majority opinion in this case because I do not think it treats the question at issue. The question, as I see it, does not turn upon the time when appellants received notice of the order of the Alcoholic Beverage Control Board. The real issue is whether the time for giving notice of appeal runs from the date the board announced its order or from the time the written order was filed.

As I understand the record, appellants filed their appeal from action taken by the board on December 4, 1974. They did not make By-Pass Beverage Company a party. The written order of the board was not made until January 28, 1975. On January 29, motion to dismiss the appeal for failure to make By-Pass Beverage Company a party was filed. On February 6, 1975, appellants amended their petition filed December 4, 1974, to make this company a party to the appeal. There was a second amendment filed February 19, 1975. The motions to dismiss were renewed. The circuit court treated the matter thus:

> On January 29, 1975, Separate Motions to dismiss

were filed by Peter G. Estes and the members of the Board to which were attached November 20, 1974, Order of the Board and copies of existing Permit No. 697 and No. 2965 showing permittee to be "By-Pass Beverage Co., Manager Agent: Peter G. Estes, Sr., 231 Mill Street, dated October 10, 1974, and October 24, 1974, respectively."

The motions of defendants contended that the real party involved By-Pass Beverage Co., a corporation, was not named or served by Petitioners and that Peter G. Estes, Sr. was served by an individual improperly and that the time for appeal of 30 days from November 20, 1974, Order had expired on December 20, 1974.

On February 6, 1975, Petitioners filed 1st Amendment to Petition to include "By-Pass Beverage Co., a corporation" as a defendant with Peter G. Estes, Sr.

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By-Pass Beverage Co., a corporation, was a necessary party to any appeal from the November 20, 1974, order and failure to name an indispensable party as defendant within 30 days makes the attempted appeal void and allows the November 20, 1974, order to become effective as of December 20, 1974, the expiration of 30 days.

The Motions for Summary Judgment filed February 19, 1975, by Petitioners is denied for failure to properly perfect an appeal within 30 days of and from November 20, 1974.

Later, on motion to vacate the order dismissing the appeal, the circuit court, in effect, confirmed its previous action, emphasizing the notice factor. I maintain that notice prior to the making of the written order is insignificant.

It does not appear to me that either Ark. Stat. Ann. § 48-1314 or § 48-1316 (Repl. 1964) governs an appeal by protesters. The action of the board seems to me to be

equivalent to the granting of a license. The statute (§ 48-1316) only fixes the time for appeal by a licensee. It provides:

> Within thirty (30) days after the mailing of the order of the Board, the licensee, if dissatisfied with the decision of the Board, may appeal to the Circuit Court of Pulaski County. The appeal shall be taken by the filing with the Clerk of the Circuit Court a transcript of the proceedings before the Board. The Circuit Court shall hear no new evidence on this appeal and shall render its judgment only on errors of law. An appeal from the judgment of the Circuit Court may be taken to the Supreme Court of Arkansas. [Acts 1951, No. 159, § 17, p. 331.]

If the time for appeal by a protestant is fixed by this section, then it is by analogy, i.e., that a protester should have the same time for appeal as the licensee. But this section does not permit evidence outside the record before the board to be introduced on appeal.

Appellant, however, relies upon the Arkansas Administrative Procedure Act, Ark. Stat. Ann. § 5-701 et seq (Supp. 1975). The Alcoholic Beverage Control Board is governed by that act. The act requires that proceedings for review be by petition in the circuit court. It must be filed "within 30 days after service upon petitioner of the agency's final decision." Ark. Stat. Ann. § 5-713 (Supp. 1975). This section permits testimony in the circuit court where, as here, irregularities in procedure not reflected in the record before the board are alleged.

It seems to me that every step taken by appellants was in conformity with § 5-713 and not in conformity with § 48-1316. It is crystal clear, however, that the 30 days allowed for appeal under § 48-1316 does not being to run until the *mailing* of the order of the board and under § 5-713 until the *service* upon the petitioner of the agency's final decision.

Even the Utah decision relied upon by the majority does not apply here. No appeal was taken as to By-Pass Beverage Company by the filing of the original petition. In the Utah

case the only party involved in the case was the party moving to dismiss. Even if it did apply, it is not in harmony with our own decisions.

Be that as it may, I think the amendment to the petition making By-Pass Beverage Company a party to the appeal was timely, because it was well within 30 days of the time that the order was signed, regardless of when or whether it was served.

Under our former statute allowing six months from the rendition (rather than entry) of a decree for appeal, we held that the time for appeal was not set in motion when the trial court made and submitted to counsel findings, concluding with this statement: "A decree in accordance with these findings will be signed by the Court when prepared and presented." Obviously, all parties had notice of these findings and their effect. But we held that the time for appeal did not start running until two weeks later when the decree was signed. *Bolls* v. *Craig*, 220 Ark. 880, 251 S.W. 2d 482. When the same statute was applicable, we held that the time for appeal did not commence to run until a sufficient written memorandum showing final disposition of the case had been made, even though the court's finding had been clearly made. *Poe* v. *Walker*, 183 Ark. 659, 37 S.W. 2d 866. The same principle was applied to a statute with a 30-day limitation. *Donley* v. *State*, 226 Ark. 49, 287 S.W. 2d 886.

After the present statute governing appeals to this court was passed, the approach taken was not materially changed. The only real change was statutory, i.e., the time for giving notice was set at 30 days and the time began to run, not from the rendition of the judgment, but from its entry. *Cranna* v. *Long*, 225 Ark. 153, 279 S.W. 2d 828. We held that this did not mean that a notice of appeal filed before entry of the judgment was void, but said that we did not mean to shorten the time within which a notice of appeal could be filed *after* the entry of the judgment. *Wilhelm* v. *McLaughlin*, 228 Ark. 582, 309 S.W. 2d 203.

In *Wilhelm* we quoted with approval from *Hays* v. *Dennis*, 11 Wash. 360, 36 P. 658. The quotation included this

language:

> *** The statutes governing appeals should be liberally construed, to the end that parties may have a review by this court of the rulings of the superior courts when they so desire. ***

We have also held that in *no event* will a litigant's time for filing notice of appeal to this court be less than 30 days after the entry of the judgment. *Zunamon* v. *Stevenson*, 247 Ark. 248, 445 S.W. 2d 102.

As I see it, a waiver, if there was one as to Estes, would not be a waiver as to By-Pass Beverage Company. An appeal as to Estes would not bar a subsequent timely appeal as to By-Pass Beverage Company. If we follow the rule of the majority opinion on appeals to this court we would have an intolerable situation. For example:

A judgment is rendered which is favorable to A and B. C, the losing party, files a notice of appeal insofar as the judgment in favor of A is concerned, without waiting for entry of the judgment. Although fully aware of the findings and judgment in favor of B, C does not file notice of appeal as to B until sometime more than 30 days after his first notice of appeal, but does file it within 30 days after the judgment is entered. We should have to hold that the appeal as to B was not timely. C, having full knowledge of the court's findings and conclusions when he filed the first notice, had waived the entry of the judgment so his notice as to B was not timely, and timely notice being jurisdictional, the appeal as to B would have to be dismissed. We shouldn't.

This 30-day limitation is a short one. We should view it liberally in favor of the right of review. We recognized in *Wilhelm* that a party might have valid reasons for taking the precaution of acting before the time limitation began to run. We should be extremely reluctant to hold that by doing so, he waived any rights, or lost any that he would otherwise have.

I am authorized to state that Mr. Justice George Rose Smith joins in this opinion.

Mark H. WILSON et al *v.*
Sharon Lynn White DECLERK

75-274 533 S.W. 2d 196

Opinion delivered February 23, 1976

Rose, Nash, Williamson, Carroll, Clay & Giroir, for appellants.

Homer Tanner, for appellee.

CONLEY BYRD, Justice. Appellee Sharon Lynn White DeClerk brought this action against appellants, Mark H.

Wilson et al, who were the brother, mother, and two sisters of decedent Joan Irene Wordehoff, to enforce a contract between Joan Irene Wordehoff and her husband to make reciprocal wills. From a decree declaring that Joan Irene Wordehoff was bound to perform the obligations of her agreement with her deceased husband, appellants appeal making the contentions hereinafter discussed.

The record shows that Raymond B. Wordehoff and his wife, Joan Irene Wordehoff, visited the law office of J. Harrod Berry on October 3, 1968. There they expressed an agreement to execute reciprocal wills. They returned on the next day and executed both wills with J. Harrod Berry and his wife signing as witnesses. The husband's will provided:

> "*Item* 6. My wife and I have agreed to execute identical wills and this will is in accordance with said agreement, and we have agreed that reasonable advance notice will be given the other before making any substantial change in the will."

The wife's will provided:

> "*Item 6.* My husband and I have agreed to execute identical wills and this will is in accordance with said agreement, and we have agreed that reasonable advance notice will be given the other before making any substantial change in the will."

Raymond B. Wordehoff died on February 7, 1973, and his wife, Joan Irene Wordehoff, caused his will to be probated. Subsequently, an order of the probate court was entered in the Estate of Raymond B. Wordehoff dismissing the probate of the will because there was "no real property subject to the probate of this Estate and the petitioner has personally assumed all obligations of the decedent, and that the petitioner and the decedent were married more than three years and the decedent has no children." Joan Irene Wordehoff died January 16, 1975, as the result of a fire that destroyed her home.

We find no merit in appellants' contention that the con-

tract to make the will has not been proven by evidence which is clear, cogent and convincing. The testimony by J. Harrod Berry, based upon both his recollection and the notes he made at the time, that the parties executed the wills in his office is rather conclusive as to the execution of the wills and the parties intentions at the time. Furthermore, the language in item #6 of each will leaves no doubt that the parties had an agreement at the time. Under that language the wife, after the death of the husband, could not renege on the agreement because of the impossibility of giving reasonable advance notice to her deceased husband.

Neither do we find any merit in the contention that the contract was unenforceable under the statute of frauds. Since the agreement to make reciprocal wills was embodied in both wills and each party executed his or her will in writing, the defense under the statute of frauds is not available.

Appellants also contend that Joan Irene Wordehoff died intestate and that her estate should pass according to statute. Whether Mrs. Wordehoff died intestate is a matter that must be decided by the probate court in a proper proceeding, but, of course, the statute on descent and distribution will not take priority over the contractual agreement.

The parties hereto have suggested on appeal that the personal representative of the estate of Mrs. Wordehoff should have been made a party to this proceeding. However, the failure to raise the issue in the trial court amounts to a waiver of the necessity of making the personal representative a party. See *Vaughan* v. *Screeton*, 181 Ark. 511, 27 S.W. 2d 789 (1930). This, of course, will not prevent the declaratory judgment from being binding on the heirs and distributees that are parties.

Affirmed.

WESTARK SPECIALTIES, INC. &
GRANITE STATE INSURANCE CO.
v. Michael E. LINDSEY

75-275 532 S.W. 2d 757

Opinion delivered February 23, 1976

Daily, West, Core & Coffman, for appellants.

Garner, Garner & Cloar, for appellee.

FRANK HOLT, Justice. In this workmen's compensation case, the Commission found appellee's eye injury was compensable and the circuit court affirmed. The sole contention on appeal is that the court and the Commission erred in con-

cluding the claimant sustained an injury which arose out of and in the course of his employment with the appellant Westark Specialties, Inc. It is argued that there is no causal connection between the accident-injury and appellee's employment. Specifically, appellants aver "is such an injury so reasonably incidental to the employment that it meets the requirement of arising out of the employment?" Ark. Stat. Ann. § 81-1302 (d) (Repl. 1960). Appellants correctly assert that the burden is upon the appellee claimant to prove that his injury arose in the course of his employment and additionally, it grew out of or resulted from his employment. Appellee-claimant responds that he has met the burden of proof by showing the incident, which caused his eye injury, arose out of a work connected quarrel. We agree with the appellee.

The law is well settled that in testing the sufficiency of the evidence on appeal we view it in the light most favorable to the Commission's finding and affirm where any substantial evidence exists to support its action. *Wilson Lbr. Co.* v. *Hughes,* 245 Ark. 168, 431 S.W. 2d 487 (1968); and *Sneed* v. *Colson Corp.,* 254 Ark. 1048, 497 S.W. 2d 673 (1973). Appellant agrees that there is little dispute about the facts and the real issue is one of law.

About the end of the workday, two of appellee's co-employees, Brown and Yutterman, were observed in an argument by their foreman. Brown was away from his work area and at Yutterman's station angrily pointing his finger at Yutterman. The foreman fired Brown. The foreman had previously warned Brown about his "smart mouth and popping off." This dispute arose because Brown was "razzing and kidding" a new co-employee. Yutterman told Brown " . . . let Willie do his work because he needs the work like you do." After being discharged, Brown waited outside the building for Yutterman "to get off work" and then asked him "why he had gotten me fired." An argument ensued between them. The appellee and his uncle had walked to the uncle's car where it was parked on a lot, adjacent to the building, regularly used and made available to the employees. They got into the car and were endorsing their pay checks when appellee unexpectedly suffered a bullet wound to one of his

eyes from a gun fired by Brown. Appellee and his uncle testified that as they sat in the car endorsing their checks, they observed Brown and Yutterman standing by the corner of the building engaged in an argument. The uncle testified Brown had a gun pointed toward Yutterman's head. Yutterman slapped at Brown and then the uncle heard the gun fire. The bullet hit his car and he heard appellee exclaim he was "hit in the eye." There was testimony that Brown was warned on a previous occasion by the foreman about having a gun on the premises.

In *Townsend Paneling* v. *Butler*, 247 Ark. 818, 448 S.W. 2d 347 (1969), we quoted with approval:

> 'It is generally held that injuries resulting from an assault are compensable where the assault is causally related to the employment, but that such injuries are not compensable where the assault arises out of purely personal reasons.'

There we upheld the Commission's finding that the claimant's injury was causally related to his employment since he was an innocent victim of a work related assault by his co-employee. We think this holding is applicable to the case at bar.

We also think Larson, Vol. 1, § 11, is pertinent here. There it is said:

> Assaults arise out of the employment either if the risk of assault is increased by the nature or setting of the work, *or if the reason for the assault was a quarrel having its origin in work.* (Emphasis added.)

Further, § 11.12 reads " . . . . causal connection with the employment may be shown by connecting with the employment the subject matter of the dispute leading to the assault."

Appellant, however, cites *Southland Corp.* v. *Hester*, 253 Ark. 959, 490 S.W. 2d 132 (1973), as controlling in the case at bar. We cannot agree. Suffice it to say that there the accidental death from the discharge of a firearm which the decedent

employee had in his possession on the premises was clearly not the result of any dispute or quarrel with a fellow employee as here. In the case at bar, had Yutterman suffered an injury from the hands of his co-employee Brown, then Yutterman would be entitled to compensation. *Townsend Paneling* v. *Butler, supra.* It logically and necessarily follows that the appellee here, who was also the innocent victim of a work related assault, is likewise entitled to compensation. Certainly, the evidence is amply substantial that appellee's injury was the result of a work related quarrel arising out of and causally related to his employment.

Affirmed.

Marion THOMAS, MARYLAND CASUALTY COMPANY, a Corporation, and FIDELITY & DEPOSIT COMPANY of MARYLAND, a corporation *v.* James. R. WILLIFORD

74-347 534 S.W. 2d 2

Opinion delivered February 23, 1976
[Rehearing denied April 5, 1976.]

Skillman, Currett & Davis, for appellants.

Reid, Burge & Prevallet, and *Wright, Lindsey & Jennings,* by: *David M. Powell,* for appellee.

DON M. SCHNIPPER, Special Justice. This is a taxpayers action brought by the Appellee on behalf of Crittenden Coun-

ty, Arkansas, to require Appellant, Marion Thomas, to account for and pay over certain sums of money alleged to have come into his hands while he held the office of Sheriff and Collector for said county. Appellee alleged that Appellant Thomas had wrongly and fraudulently misappropriated and converted these funds to his own use during the terms of his office, namely January 1, 1965 thru June 29, 1970. Appellants Maryland Casualty Company and Fidelity & Deposit Company of Maryland were joined in this action as Sureties on Appellant Thomas' statutory bonds.

This action was tried to the Chancellor by Assignment over a considerable period of time and the transcript of the proceedings consisted of approximately 2,500 pages. A detail outline of all allegations and specific transactions would be impractical and not necessary to this decision.

At the conclusion of the trial before the Chancellor by Assignment the Court prepared and filed its "Findings of Fact and Conclusions of Law", the net result of which was to require the Appellants to account for and pay over to Crittenden County approximately $35,000.00 plus interest and an additional $10,500.00 in attorneys' fees awarded attorneys for Appellee. From this award Appellant Thomas and Appellant Surety Companies have taken this appeal.

A number of the points for reversal relied upon by all of the Appellants revolve around the receipt by Appellant Thomas of the sum of $8,800.00 for the years 1965 through 1969 by and from Southland Racing Corporation.[1] The method of the making and receiving of these payments, according to the undisputed testimony, involved a very suspicious method including the submission of fictitious invoices, issuance of checks paying the invoices to a party other than Appellant Thomas, cashing of the checks by a uniform and law enforcement equipment supplier and the paying of the funds to Appellant Thomas in cash. The Trial Court found these funds to have been received by Appellant Thomas in a

[1]The undisputed evidence indicated Appellant Thomas received the sum of $1,700.10 during 1965, $1,700.00 for each of the years 1966, 1967 and 1968, and the sum of $2,000.00 during 1969.

"surreptitious manner", to have deprived the citizens of Crittenden County, Arkansas of the benefit thereof contrary to his office of public trust, and that the payments were in violation of the provisions of Article 19, Section 23 of the Arkansas Constitution and the Initiated Act No. 1 of Crittenden County, Arkansas. Having so found, the Trial Court then gave judgment against Appellants for this sum and awarded interest, penalties and attorneys' fees on this sum.

Appellant Thomas had alleged error by the Trial Court in requiring an accounting for these funds (hereinafter referred to as the Southland funds) as such were not "public funds" for which Appellant Thomas was charged. Appellant Surety Companies further urged this Court that the required accounting of the Southland funds was error as said funds were "gifts" to Appellant Thomas, for which neither he nor his Sureties should be required to account.

Article 19, Section 23 of the Arkansas Constitution reads as follows:

> "Section 23. MAXIMUM OF OFFICERS' SALARIES OR FEES. - No officer of this State, nor any county, city or town, shall receive, directly or indirectly, for salary, fees and perquisites more than FIVE THOUSAND DOLLARS net profits per annum in par funds and any and all sums in excess of this amount shall be paid into the State, county, city or town Treasury as shall hereafter be directed by appropriate legislation."

Initiated Act No. 1 of Crittenden County authorized compensation of the Sheriff and Collector at $5,000.00 per annum, "and in addition thereto the actual and necessary expense of travel incident to the duties of this office, and shall receive no other fee, commissions, perquisites, or other compensation, either directly or indirectly, for services rendered as such Sheriff and Collector." The evidence strongly indicates that these funds were not paid to Appellant Thomas for any services rendered or to be rendered by him or his office and were not in any way "breakage" money or other designated funds

to which Crittenden County, Arkansas and its citizens would have been entitled to demand or receive. No person connected with Southland Racing Corporation testified and the exact purpose of such payments was never established. The only real evidence adduced at the trial to explain the payment and receipt of such funds and the interest the county might have to such was the testimony of Appellant Thomas that he "considered it to be additional remuneration to me in addition to my salary".

Appellee forcefully argues that Appellant Thomas should be charged with these funds since, regardless of the purpose of such payment, they were received "by virtue of his office". See *White* v. *Williams,* 187 Ark. 113, 59 S.W. 2d 23 (1933) and *State* v. *Harmon,* 190 Ark. 621, 80 S.W. 2d 619 (1935). Further, since such funds were received "by virtue of his office" they must be considered a "Perquisite" within the definition of Article 19, Section 23 of the Arkansas Constitution and Initiated Act No. 1 of Crittenden County. In so holding we find the Trial Court committed error.

All the cases cited by Appellee (*White* v. *Williams,* Supra., *State* v. *Harmon,* Supra., and *Brewer* v. *Hawkins,* 248 Ark. 1325, 455 S.W. 2d 864 (1970)) involve monies which came into the hands of respective county officials from sources with which the respective counties were charged or were funds to which the respective counties were entitled. We do not find the gratuitous payments in the instant case to be analogous to fees for the feeding of prisoners, fees received for taking care of federal prisoners and cash bonds. We reaffirm the holding of each of the hereinabove cited cases. It is our finding that the Southland funds in the instant case, however, were not funds to which the county was entitled, had any interest in or could demand or file suit for collection. They were not paid for any public purpose nor to the detriment of any public obligation. They were not "Public funds" for which we believe Appellant Thomas could be charged and the receipt by him of such funds was not in violation of Article 19, Section 23 of the Arkansas Constitution or Initiated Act No. 1 of Crittenden County, Arkansas.

This Court has taken special notice of the manner in

which the Southland funds were paid to and received by Appellant Thomas. While holding these funds not to be "public funds", we in no way intend to approve of the method, legality or morality of such manner as might be the subject of a criminal prosecution. This, however, is a civil action for an accounting.

Contrary to the argument of Appellant Surety Companies, we do not hold that in a taxpayers suit for accounting it must be shown that some amount of wrongdoing in connection with the receipt of funds such as this existed. We do find, however, that there must be some interest of the county and its citizens to the funds received before a public official may be held responsible in a civil accounting action. We do not feel the proof of Appellee in the instant case was sufficient.

In reversing the Trial Court on the issue of the Southland funds we also, of necessity, must reverse on that Court's finding the Appellant Surety Companies liable for the payment of the Southland funds and in the awarding Appellee penalty and attorneys fees under Arkansas Statutes Ann., Section 66-3238. It should be noted that by this finding the amount for which the Appellant Surety Companies would be liable has been reduced below the demanded amounts as required for the awarding of such penalties and attorneys fees.

The next contention of Appellant on this appeal is that the Trial Court erred in applying the Statute of Limitations as to Appellant Thomas. Appellant Thomas argues that either Arkansas Statutes Ann., Section 37-203 or Section 37-204, both being two-year statutes, is applicable to the instant situation and not the four-year Statute of Limitation provided by Arkansas Statutes Ann., Section 37-207. Appellant further argued that there was no allegation or proof of any fraud or concealment on the part of Appellant Thomas that would toll any of the Statutes of Limitation. On this point this Court disagrees with Appellant as to all transactions except the payment and receipt of a $150.00 per month expense allowance. To the contrary the pleadings are replete with allegations of fraud, concealment and misappropriation on the part of Appellant Thomas and the proof by Appellee

more than met this burden. Accordingly, we find that the allegation and proof of fraud and concealment in the instant case was sufficient to toll any Statute of Limitation applicable under the circumstances and affirm the Trial Court in so holding.

Appellant Thomas next contends the Chancellor by Assignment erred in requiring him to account for certain funds which were the result of some 15 specific transactions and for which Appellant contended he had accounted and was entitled to credit. These transactions range from checks on Appellant's department accounts to individuals which were endorsed by the individuals and applied toward Appellant's personal obligations, to checks payable to cash, to checks in payment of allegedly fictitious law enforcement equipment supplier invoices, to a $150.00 per month expense allowance paid by the county to Appellant. This court has reviewed each of these transactions thoroughly and cannot say the Trial Court's findings on all points are against the preponderance of the evidence. Accordingly, we hereby affirm the chancellor's findings on all of the specific transactions.

While affirming the Trial Court judgment on the above unspecified transactions, we feel one such item raised by Appellant and presented to this Court on several occasions in recent years deserves discussion. According to the testimony of Appellant and other county officials, Appellant Thomas was paid $150.00 per month during the years 1965 through June 29, 1970 as an "expense" check, this payment being over and above his statutory salary and payment by the county of all travel expenses. No expense voucher or other proof of such expense was ever submitted to the county to substantiate such payment. The Trial Court found "The $10,050.00 paid to Defendant over the five-year period constituted an illegal exaction of public funds". In requiring an accounting and repayment of Appellant the Trial Court further held that the four-year Statute of Limitation of Arkansas Statutes Ann., Section 37-207 applied unless tolled by the showing of fraud or concealment on the part of the Appellant. Finding "the receipt by Defendant of the $150.00 per month allowance was open and notorious and was disclosed to the

Quorum Court each year", the Trial Court further held that the four-year Statute of Limitation began to run each year from the filing of Appellant's account and therefore only required Appellant to account for such expense payments for the years 1968, 1969 and 1970 in the amount of $4,650.00.

This Court has been faced with this proposition and situation a number of times. On each of these occasions we have upheld the validity of monthly or annual expense allowances for public officials provided such payments are reimbursement for actual, reasonable and necsssary expenses incurred in performing duties directly connected with, and incidental to, their official duties and proof of such expenses by way of vouchers or itemized statements is produced. The payment of the maximum authorized monthly or annual amounts without such proof by each official has been held to be an illegal exaction of public monies and a violation of the constitutional provision relating to the particular official. See *Berry* v. *Gordon,* 237 Ark. 547, 376 S.W. 2d 279 (1964); *Laman* v. *Smith,* 252 Ark. 290, 478 S.W. 2d 741 (1972); *Tedford et al* v. *Mears & Scott,* 258 Ark. 450 (1975). We hereby reaffirm our holdings from our previous reviews.

In the instant case the evidence is clear Appellant Thomas was receiving the $150.00 per month expense funds without the required proof of such expenses. This constituted an "illegal exaction" and the Trial Court correctly required Appellant Thomas to account for and repay all sums received and not barred by the four-year Statute of Limitation. Furthermore, the record fails to disclose any evidence of fraud or concealment on the part of Appellant Thomas in accepting the monthly expense allowances. We therefore find no evidence on which the Statute of Limitation could be said to have been tolled. The finding of the Trial Court on this contention of Appellant is, therefore, affirmed.

The Trial Court further charged Appellant a 5% per month penalty on 29 of the 43 specific items or transactions presented at the trial, specifically *excluding* several items the Court found Appellant to have accounted for, the $150.00 per month expense allowances for years excluded by the four-year Statute of Limitations and the repayment of the

Southland funds.

The Trial Court's requirement for the payment of such penalty was under authority of Arkansas Statutes Ann., Section 84-1416 which provides as follows:

> Every collector of the county revenue, having made settlement according to law, of the county revenue received and collected by him, shall pay the amount found due from him into the county treasury, and the treasurer shall give duplicate receipts therefore; one of which shall be filed by the collector in the office of the clerk of the county court.
>
> Every collector or sheriff who shall fail to make payment of the amount due from him on settlement, in the time and manner prescribed in the preceeding section, shall forfeit and pay to the county, the sum of 5 per centum (5%) per month on the sum wrongfully withheld, to be computed from the time the payment ought to have been made, until actual payment, which may be recovered, by suit on his official bond.

Appellant contends that the only funds on which he could be charged such a penalty would be taxes, fines or any monies collected for any purpose by law and belonging to the county. Appellant cites this Court to Arkansas Statutes Ann., Section 84-1401 to support his argument. Under the facts in this case we find the charge of the 5% penalty by the Trial Court to have been proper and that the specific items for which Appellant was charged are within the scope of the statute.

The judgment of the Trial Court is reversed in accordance with the findings herein and the cause remanded for Judgment consistent with this opinion.

FOGLEMAN, J. and HOLT, J., not participating.

JONES, J., concurs.

ROY, J. and Special Associate Justice J. L. HENDREN, dissent.

J. FRED JONES, Justice, concurring. I concur in the results reached by the majority in this case. Article 19, § 23, reads as follows:

> "No officer of this State, nor any county, city or town, shall receive, directly or indirectly, for salary, fees and perquisites more than five thousand dollars net profits per annum in par funds, and any and all sums in excess of this amount shall be paid into the State, county, city or town treasury as shall hereafter be directed by appropriate legislation."

When Article 19 was adopted most, if not all, sheriffs and collectors were on a "fee basis." They deducted their salaries from the fees they collected and paid the excess over to the county treasurers. In § 23 "perquisites" is in the same category as "salary" and "fees."

Perhaps by *dictionary definition,* "perquisites" could include any and all amounts received over and above fixed income regardless of the nature and source of such amounts, but certainly it is my view that § 23 did not contemplate "perquisites" in the form of bribes, or illegal exactions.

I am not saying, or even insinuating, that the evidence of record in this civil action indicates the money here involved was obtained through bribes or illegal exactions; I *am* saying, however, that the manner in which it was paid by Southland and received by Thomas, negates the contention that it was "perquisites" Thomas should have taken, or that he or the county should be permitted to keep, or that his bondsman should be liable for in a civil action.

It is true appellant Thomas testified that he considered the amounts he received from Southland Racing Corporation as additional remuneration for services he performed in his official capacity, but it must be remembered that Thomas and also his *bonding company* were being sued for an accounting.

If the amounts paid Thomas by Southland were for extra deputies in directing traffic and policing the dog races,

perhaps we would have a different situation than is presented on this appeal. But in that event, one would expect the payment to be made direct. There is no evidence as to whether the payments were made to enforce the law or to not enforce it.

To require an accounting and payment to the county of the funds here involved on the silent record as to why the funds were paid to Thomas in the first place, would, in my opinion, open the door to approving a county entitlement to funds coming into the hands of a sheriff while elected to office regardless of where the funds came from or how the sheriff obtained them.

If a sheriff or other officer mentioned in Article 19, § 23, could be forced in a civil action to account and pay over to the county money he should obtain through bribery or other unlawful means, it would only follow that such officer should account and pay over such funds without being forced by civil action. Such procedure could, of course, swell a public treasury with illgotten gains and result in an intolerable situation not contemplated or covered by Article 19, § 23.

It is entirely possible from the record before us that neither Southland nor Thomas had any criminal intent or ulterior motive in paying and receiving the money here involved; but the devious method by which the payments were made indicates that Southland and Thomas knew the money should not have been paid or received, and indicates that it should not be passed on to the county treasury as "perquisites" under Article 19, § 23, of the Constitution.

For the reasons stated I concur in the majority opinion.

J. L. HENDREN, Special Justice, dissenting. I respectfully dissent to that portion of the majority opinion reversing the decree of the Chancellor on Exchange (hereinafter referred to as Chancellor) with respect to the following points relied upon on this appeal by appellant, Sheriff Marion Thomas (hereinafter referred to as Sheriff Thomas) and his sureties, Fidelity & Deposit Company of Maryland and Maryland

Casualty Company (hereinafter collectively referred to as sureties), who are also appellants herein.

Appellant Sheriff Thomas' Point II:

THAT THE COURT ERRED IN FINDING THAT FUNDS RECEIVED BY APPELLANT FROM SOUTHLAND GREYHOUND TRACK WERE PUBLIC FUNDS, IN VIOLATION OF THE CONSTITUTION OF THE STATE OF ARKANSAS AND INITIATED ACT NO. 1 OF CRITTENDEN COUNTY.

Appellant sureties' Point II:

THE COURT ERRED IN ITS FINDING THAT THE SOUTHLAND FUNDS WERE RECEIVED BY APPELLANT, MARION THOMAS, IN AN OFFICIAL CAPACITY, AS EITHER PAYMENTS DUE THE COUNTY OR EXTRA COMPENSATION AS SHERIFF, SINCE THE PREPONDERANCE OF THE EVIDENCE ESTABLISHED THAT THE SOUTHLAND FUNDS WERE GIFTS TO THE APPELLANT, MARION THOMAS, FOR WHICH NEITHER HE NOR HIS SURETIES WERE ACCOUNTABLE TO THE APPELLEE.

Appellant sureties' Point III:

REGARDLESS OF THE NATURE OF THE SOUTHLAND FUNDS OR OF THE RECEIPT THEREOF BY THE APPELLANT, MARION THOMAS, THE APPELLANT, SURETY COMPANIES, WERE NOT LIABLE TO THE APPELLEE, THEREFORE, AS A MATTER OF LAW.

Appellant sureties' Point IV:

THE COURT ERRED IN AWARDING PENALTY AND ATTORNEYS' FEE UNDER ARK.

STAT. ANN., SECTION 66-3238 AGAINST APPELLANT, SURETY COMPANIES.

The above points have to do with the receipt by Sheriff Thomas, during the years 1965 through 1969, of the total sum of $8,800.10 from Southland Racing Corporation (hereinafter referred to as Southland). The Chancellor held that these Southland funds were received by Sheriff Thomas by virtue of his status as Sheriff; that the funds were, therefore, a "perquisite" within the meaning of Article XIX, Section 23 of the Arkansas Constitution; that without considering the Southland funds, Sheriff Thomas received the $5,000.00 per year compensation permitted him under Article XIX, Section 23; that the receipt by Sheriff Thomas of the Southland funds under the circumstances shown, constitutes a violation of Article XIX, Section 23; that Sheriff Thomas and his sureties must account for and pay over to Crittenden County the Southland funds pursuant to Article XIX, Section 23; and that the sureties are both liable for 12% penalties and attorneys' fees under Ark. Stat. Ann., Section 66-3238 since, when the Southland funds are added to other funds required by the decree to be paid to the county, the respective exposures of the sureties on their bonds are reached and exceeded.

The majority finds that the Chancellor erred in holding that the Southland funds in question were received by Sheriff Thomas "by virtue of his office" and since they were so received, they must be considered a "perquisite" within the definition of that term in Article XIX, Section 23 of the Constitution. The majority further expressed the view that the Southland funds were not funds to which the county was entitled; had any interest in or could demand or file suit for collection; that they were not paid for any public purpose, nor to the detriment of any public obligation; they were not "public funds" for which Sheriff Thomas could be charged; and the receipt of same by Sheriff Thomas was not in violation of Article XIX, Section 23 of the Constitution. In so holding, the majority comments that it is not thereby approving the method, legality or morality of the "manner" of Sheriff Thomas' receipt of the Southland funds since this is a civil accounting action and not a criminal prosecution.

Unlike the majority, I find no merit in any of the above-stated points for reversal relied upon by appellants and I am unable to agree with the foregoing views of the majority and the reasoning supporting the said views.

The points for reversal hereinabove mentioned, raise two basic issues:

(1) Were the Southland funds received by Sheriff Thomas by virtue of his being the incumbent in the office of Sheriff of Crittenden County?

(2) Where a public official receives from the public, in public funds, the $5,000.00 per year maximum compensation permitted him under Article XIX, Section 23 of the Arkansas Constitution, does this constitutional provision prohibit his receipt, at the same time, of secret private contributions made directly or indirectly to him, without the knowledge and consent of the public he serves?

In order to discuss the issues hereinabove set out, it is necessary to review the testimony and evidence in the record concerning the Southland funds and their receipt by Sheriff Thomas.

It was not disputed at trial and the proof clearly shows that during the years in question, Sheriff Thomas received from Crittenden County $5,000.00 per year, together with reimbursement for actual expenses incurred by him in connection with the discharge of his office as Sheriff of Crittenden County. Further, there was no dispute at trial and the proof clearly shows, that Sheriff Thomas received from Southland the sum of $1,700.10 during 1965; $1,700.00 for each of the years 1966, 1967, and 1968; and the sum of $2,000.00 during 1969, for a total of $8,800.10. Sheriff Thomas and his sureties concede these facts on this appeal.

The only testimony concerning the manner in which Sheriff Thomas received the $8,800.10 from Southland came from Charles Ralph York, the President of Farrior's, Inc., of Little Rock (a uniform and law enforcement equipment

supplier), and from Sheriff Thomas himself.

York testified that he received the payments from Southland hereinabove mentioned by way of checks issued by Southland to Farrior's for the alleged purpose of paying fictitious invoices, which were, either before or after the issuance of the checks, sent to Southland by Farrior's for various items of uniform clothing, which items never were, in fact, shipped at all. York further testified that he cashed the checks and delivered the funds therefrom over to Sheriff Thomas.

Sheriff Thomas admitted York told him Southland would send York checks, which York would then cash and deliver to him, since the checks were sent to York for the Sheriff. Sheriff Thomas denied knowing about this until he was approached concerning it by York. Sheriff Thomas also denied having anything to do with the preparation of the invoices sent by Farrior's to Southland, but acknowledged receipt of the funds from Southland by way of York and reporting them as income. Sheriff Thomas further testified he presumed he received the money because he held the office of Sheriff, but that the funds were not paid from public funds since the source of the money was Southland. Sheriff Thomas stated he considered the funds additional remuneration in addition to his salary, but maintained the funds were not from Crittenden County and were not public funds and he saw no reason why there was anything illegal about them. Sheriff Thomas further stated that Southland was not obligated to give the money to him and he accepted it because it wasn't public funds and they wanted to give it to him, as they had other Sheriffs.

The Chancellor sustained appellee's objection to a line of cross-examination apparently designed to draw out testimony that persons holding the office of Sheriff of Crittenden County prior to the incumbency of Sheriff Thomas, had received such funds from Southland. On appeal, the sureties claim error in this ruling and urge that, had the testimony been received, the evidence would have shown that York had been a conduit for Southland funds in the past and that the payments had no official purpose, but

were rather gifts to an incumbent Sheriff.

The Chancellor, having heard the testimony and observed the demeanor of both Charles Ralph York and Sheriff Marion Thomas, concluded that a preponderance of the evidence shows that the Southland funds had been received by Sheriff Thomas by virtue of his status as the Sheriff of Crittenden County and that he would not have received the funds had he not been the incumbent Sheriff. The Chancellor went on to say that since the Southland funds had come into Sheriff Thomas' possession by reason of his function as Sheriff, the funds were public funds for which he must account as trustee, citing *Brewer* v. *Hawkins,* 248 Ark. 1325, 455 S.W. 2d 864 (1970).

This Court has repeatedly held that we determine equity cases de novo, upon the record made in the Court below, but reverse only those cases where the Chancellor has found or decreed contrary to a preponderance of the testimony. *White* v. *Williams et al,* 192 Ark. 41, 89 S.W. 2d 27 (1936), and cases cited therein.

In the instant case, the allegations, and proof offered in support of same, are quite complicated and detailed, and numerous witnesses were heard by the Chancellor over a period of several months. The transcript of the trial proceedings consists of approximately 2,500 pages. The "Findings of Fact and Conclusions of Law" entered by the Chancellor are lengthy and detailed, reflecting meticulous and intensive analysis of the exhibits and testimony offered at trial. This, then, is a case in which the decision of the Chancellor should be given particular regard consistent with the foregoing principles followed by the Court.

A review of this lengthy record convinces the writer that the preponderance of the evidence received, and, indeed the evidence properly rejected by the Chancellor (concerning which rejection the sureties now complain) supports the Chancellor's finding that the Southland funds were received by Sheriff Thomas by virtue of his status as Sheriff of Crittenden County and that he would not have received them had he not been the incumbent Sheriff. Accordingly, I am un-

able to agree with the majority's view on the first issue hereinabove mentioned.

Turning to the second issue, I preface my discussion by stating three basic premises which I believe to be clearly established by a preponderance of evidence in the record: (1) During the years in question, Sheriff Thomas received the $5,000.00 per year maximum compensation permitted him under Article XIX, Section 23 of the Arkansas Constitution and the enabling legislation therefor; (2) During the years in question, Sheriff Thomas also received a total of $8,800.10 (the Southland funds) in a suspicious and surreptitious manner, which funds did not come into his hands pursuant to any valid law and which funds were received by him without the knowledge and consent of Crittenden County; and (3) Sheriff Thomas received the Southland funds by virtue of his status as Sheriff of Crittenden County and the same, therefore, constituted a "perquisite" under Article XIX, Section 23 of the Arkansas Constitution.

All parties to this appeal agree (and indeed it was never urged by appellee to the contrary below) that the Southland funds were not "public funds" in the sense that the state, or a sub-division thereof, paid them to Sheriff Thomas or in the sense that they came into Sheriff Thomas' hands pursuant to valid laws. As above-pointed out, a preponderance of the evidence shows that Sheriff Thomas received the Southland funds under color of his office and by virtue of his status as the incumbent Sheriff of Crittenden County, Arkansas. I think, therefore, that the Southland funds *were* "public funds" in the sense that their receipt by Sheriff Thomas by virtue of his office constituted their receipt by the public which he was then serving, to-wit: Crittenden County, Arkansas. This follows because a public office is a public trust and funds received by the holder of a public office by virtue of his status as the incumbent in that office are trust funds not received by him as an individual, but received by him as a trustee. *Fidelity & Deposit Co.* v. *Cowan,* 184 Ark. 75, 41 S.W. 2d 748 (1931); *Brewer* v. *Hawkins,* 248 Ark. 1325, 455 S.W. 2d 864 (1970). Further, this trustee relationship extends not only to "public funds" which are properly received by the holder of a public office, but also to funds received under color of

public office which are not "public funds" in the sense that the trustee had no legal right to collect or receive them and his principal likewise had no legal right to collect or receive them. *Parker* v. *Laws*, 249 Ark. 632, 460 S.W. 2d 337 (1970).

The *Parker* case was a taxpayer's suit to require a Deputy Prosecuting Attorney to account for alleged illegal court fees received by him. In *Parker* the Court quoted with approval from *Yuma County* v. *Wisener*, 45 Ariz. 475, 46 P. 2d 115 (1935), as follows at page 638 of 249 Ark., at page 340 of 460 S.W. 2d:

> ". . . It is the usual rule that where a public officer obtains money under color of office, which he had no legal right to collect, that he is not permitted in a suit to recover such sums, either from himself or his bondsmen, to contend that the state has no right to recover the money from him because it had not authorized him to collect it from the citizens whom he had deceived in regard to the law. (citing cases from other jurisdictions)."

In the case before us, Sheriff Thomas has contended and the majority has held, that since the Southland funds were not funds to which the county was entitled, had any interest in or could demand or file suit for collection, Sheriff Thomas cannot be charged with them (as being "public funds" for which he must account) and his receipt of same was not in violation of Article XIX, Section 23 of the Constitution. No authority is cited in support of this holding. In rejecting the sureties' argument that in a taxpayer's suit for an accounting, it must be shown that some amount of wrongdoing existed in connection with the receipt of funds such as the Southland funds, the majority finds that there must be some interest of the county and its citizens in the funds received before a public official may be held responsible in a civil accounting action and that, in the instant case, the proof of Appellee was insufficient. No authority is cited in support of this holding.

In my view, both these holdings of the majority are contrary to the decision in *Parker* v. *Laws*, supra. There, the funds sought to be recovered by the taxpayer were not funds to which the county was entitled, had any interest in or could

demand or file suit for collection. The funds were illegal Court fees belonging to private individuals, yet this Court permitted the suit against a public officer requiring him to account for same and, on remand, ordered the funds in question held in the registry of the Chancery Court for a reasonable time so that the private persons to whom they belonged could claim them. In so directing, the writer of the *Parker* opinion expressed the concern that if the funds were simply ordered paid over to the county, they might be expended for county purposes within the fiscal year before the claimants to same could effectively assert their rights, and proceeded to state, at page 638 of 249 Ark.:

> "To avoid that possible injustice, we direct that the sums be retained in the registry of the Chancery Court, as in the case of a bill of interpleader, until the rightful owners have had a reasonable notice and an opportunity to assert their claims. Any unclaimed balance will then be paid over to the county. In utilizing the equitable principles of interpleader, we are merely following the settled rule by which a court of Chancery devises a remedy to fit the need. *Renn* v. *Renn,* 207 Ark. 147, 179 S.W. 2d 657 (1944)."

I am unable to reconcile the majority's holding in this case with the holding in *Parker* v. *Laws,* supra. In my opinion, the *Parker* case is ample authority for requiring Sheriff Thomas to account for the Southland funds. Further, I believe the procedure outlined by the Court in the *Parker* case is appropriate here. The Southland funds should be paid into the registry of the Crittenden County Chancery Court, as in the case of a bill of interpleader, until Southland Racing Corporation and Farrior's, Inc., the source and conduit of the funds, respectively, have each had a reasonable notice and opportunity to assert any claim they may have to the same. If no such claim or claims are asserted, the balance should then be paid over to the County.

It is unnecessary to this decision to determine, with finality, what should be done with the Southland funds. The point is: Since Sheriff Thomas admittedly received the $5,000.00 per year maximum compensation permitted him un-

der Article XIX, Section 23 of the Constitution during the years in question, it is enough to hold that he cannot keep the Southland funds which were received in addition to his legally permitted compensation, and he must pay the said funds over to the proper authorities. See *State ex rel. Poinsett County* v. *Landers,* 183 Ark. 1138, 40 S.W. 2d 432 (1911).

Second, even if it be held that the Southland funds were not "public funds", the receipt and retention of same by Sheriff Thomas constitutes a violation of the clear wording and intent of said Article XIX, Section 23 which constitutional provision reads as follows:

> "Section 23. MAXIMUM OF OFFICERS' SALARIES OR FEES — No officer of this State, nor any county, city or town shall receive, directly or indirectly, for salary, fees and perquisites more than FIVE THOUSAND DOLLARS net profit per annum in par funds and any and all sums in excess of this amount shall be paid into the state, county, city or town treasurer as shall hereafter be directed by appropriate legislation."

This constitutional provision purports to limit what compensation a public officer may *receive* and specifically states that the limit applies to "net profit per annum in par funds" whether received "directly or indirectly" and whether received for "salary, fees . . (or) . . perquisites". The authors did not choose to specifically state that the limit applied only to "public funds" and I find no authority (and none is cited by the majority) justifying the majority's view that the limit applies only to "public funds".

The only cases discussed by the majority relative to their decision on the Southland funds were those cases cited by the appellee. Admittedly, these cases *do* involve "public funds" sought to be retained by a Sheriff in addition to the $5,000.00 per year permitted him by Article XIX, Section 23 of the Constitution. (*White* v. *Williams,* 187 Ark. 113, 59 S.W. 2d 23 (1933)) involved fees authorized by Act 81 of the General Assembly of 1931 for the feeding of prisoners in the county jail; *State* v. *Harmon,* 190 Ark. 621, 80 S.W. 2d 619 (1935) in-

volved fees for motor vehicle licenses authorized to be collected by the Sheriff under Act 65 of the General Assembly of 1929 and fees paid by the federal government to the Sheriff for feeding federal prisoners in the county jail; *Brewer* v. *Hawkins,* 248 Ark. 1325, 455 S.W. 2d 864 (1970) involved cash bonds posted by defendants in accordance with law, to insure their appearance before magistrate court). However, I do not read these decisions as holding that the limitations of Article XIX, Section 23 apply to only "public funds". To the contrary, in *White* v. *Williams,* 187 Ark. 113, 59 S.W. 2d 23 (1933) this Court indicated that the limitations of Article XIX, Section 23 applied to fees and perquisites received, directly or indirectly, from *any* source. There the Court decided that any profits made by a Sheriff on amounts received for feeding prisoners in the county jail would be an emolument or perquisite of office as such amounts would be received by the individual holding office by virtue of same and that in determining his total amount of salary under the Constitution, account had to be taken of all fees and perquisites directly received by the Sheriff as the incumbent in the office. In rejecting Sheriff Williams' contention that there was a distinction between the expense of feeding federal prisoners and county prisoners since the former was a matter solely between the United States Government and the Sheriff personally, this Court, speaking through Justice Butler, stated on Page 118 of 187 Ark., on page 25 of 59 S.W. 2d:

> "This is not true, however, for the sums received by him from the government were received because he was a county officer and by virtue of his office. These sums, therefore, stood on no different footing from the fees received from any other source because appellee is required to account for all fees and perquisites received either directly or indirectly."

The foregoing language by Mr. Justice Butler makes it abundantly clear that a Sheriff is required to account for all fees and perquisites received from *any* source, either directly or indirectly, and this requirement is not limited to those fees and perquisites which might be characterized as "public funds" because of the identity of the giver. The precise issue now under consideration appears to be one of first impression

before this Court and no case has been found directly controlling it.

As was said in *Berry* v. *Gordon*, 237 Ark. 547, 376 S.W. 2d 279 (1964), it is a rule of universal application that the Constitution must be considered as a whole, and that, to get at the meaning of any part of it, we must read it in light of other provisions relating to the same subject. Further, the Constitution is to be construed according to the sense of the terms used and the intention of its authors. With these principles in mind, it is instructive to consider the provisions of Article XVI, Section 4 of the Arkansas Constitution in our effort to determine if the authors of Article XIX, Section 23 intended the limitations therein expressed to apply only to "public funds". Article XVI, Section 4 reads:

> "Section 4. THE SALARIES AND FEES OF STATE OFFICERS — The General Assembly shall fix the salaries and fees of all officers in the state, and no greater salary or fee than that fixed by law shall be paid to any officer, employee or other person, or at any rate other than par value; and the number and salaries of the clerks and employees of the different departments of the state shall be fixed by law."

I think it obvious that the salaries and fees which the General Assembly is authorized to fix under Article XVI, Section 4, are to be paid by the State, or its subdivisions, in "public funds" since these public entities have no other kind of funds. It is further obvious that the General Assembly, in fixing such salaries and fees pursuant to Article XVI, Section 4, must observe the limitations set forth in Article XIX, Section 23 as to the maximum compensation an officer of the state may receive per year.

It should be noted that Article XIX, Section 23 places a limit on "perquisites" which a state officer may receive, but Article XVI, Section 4 doesn't authorize the General Assembly to fix or limit "perquisites". The omission of the term "perquisite" from Article XVI, Section 4 would not seem to have been inadvertent, but rather seems to have been conscious and deliberate in view of the meaning of the term

"perquisite". *Webster's Seventh New Collegiate Dictionary* (1965) defines "perquisite" as "a privilege, gain, or profit incidental to regular salary or wages" and as a "gratuity, tip". *Doubleday Dictionary* (1975) defines "perquisite" as "any incidental profit from service beyond salary or wages".

These definitions make it clear that a "perquisite" is no part of salary, but rather is a privilege, gain, profit, gratuity or tip *incidental to* and *beyond* regular salary or wages. Since Article XVI, Section 4 only authorizes the General Assembly to fix salaries and fees to be paid state officers by the public out of public funds and prohibits such officers from receiving greater salary or fees than that fixed by law, from whence can come the "perquisites" mentioned in Article XIX, Section 23 and in what manner can they be paid if not in "public funds"? It would seem obvious from the foregoing discussion that the authors of the Constitution did not intend that "perquisites" should be considered to be a part of a state officer's compensation coming from the public generally and paid by or received out of public funds. Further, when Article XVI, Section 4 and Article XIX, Section 23 are considered together, one is impelled to the inescapable conclusions that Article XVI, Section 4 relates to the compensation paid to a state officer in public funds from the state or its subdivisions and that Article XIX, Section 23 both limits the amount of public funds which may be used to compensate a state officer under Article XVI, Section 4 as well as the "perquisites" which may be received by a state officer from *any source,* public or private.

In a previous consideration of these constitutional provisions limiting the compensation which may be received by state officers, this Court has pointedly stated its opinion of what the authors of the present constitution intended by Article XVI, Section 4, and Article XIX, Section 23. Speaking through Justice Wood, this Court said in *Nixon* v. *Allen,* 150 Ark. 244, 234 S.W. 45 (1921), at Page 258 of 150 Ark.:

> ". . . Article XVI, Section 4, together with Article XIX, Section 23, were intended by the framers of our organic law to forestall, if possible, any extortion, extravagance, or corruption on the part of those entrusted with the ad-

ministration of public office . . . "

I am not persuaded that the efforts of the authors of the Constitution to forestall, if possible, any extortion, extravagance, or corruption on the part of those entrusted with the administration of public office, were prompted solely by a concern that those in public office might perpetrate those evils by paying out public funds to, or permitting public funds to be retained by, others in public office over and above the expressed constitutional limits. If one in public office should engage in extortion, extravagance, or corruption, would his victims be others who hold public office or would his victims be the public he serves? If these constitutional provisions do not protect the public from one in public office who would extort private funds from them to augment his salary or who would be corrupted by the receipt of secret private contributions in augmentation of the salary paid him by the public, where then, in the Constitution, is the public's protection from these evils to be found?

In my opinion, the authors of the Constitution intended Article XIX, Section 23, in addition to its more obvious purposes, to prohibit precisely the kind of secret private contributions to state officers such as are involved in this case even where, as here, there is no actual evidence of extortion or corruption. Even in the absence of such evidence, when secret private contributions are made to a Sheriff in a suspicious and surreptitious manner without the knowledge and consent of the county and the people therein the Sheriff serves, the result is the opportunity for and the appearance of the very evils warned of in *Nixon* v. *Allen*, supra.

In a search for some authority supporting the majority's view on the second issue now under discussion (other than cases cited in the majority opinion which are, in my mind, not inconsistent with, if not supportive of, the writer's viewpoint), the case of *Gipson* v. *Ingram*, 215 Ark. 812, 233 S.W. 2d 595 (1949) was found. In that case there is included some dicta which might provide some comfort for one holding the majority's view. In the *Gipson* case, this Court held that when the legislature fixes a maximum annual salary of an employee, then no state agency or institution may use any

part of its cash funds to supplement or enlarge the salary so fixed by the legislature. The Court went on to state, at Page 821 of 215 Ark.:

> "In this connection, we point out that some employees, for example, see Section 17-517, Ark. Stat. of 1947, receive additional compensation derived from federal as well as county sources, and some also from endowments or gifts. The legislative determination in the appropriation act of a maximum annual salary does not prohibit such supplementation from funds from such other sources, as these are not "cash funds" within the purview of this topic. No injunction should prohibit the supplementation of salaries by the use of funds given for salary purposes by sources not controlled by the legislature, such as private donations and federal grants. Of course, the agencies and institutions may accept donations earmarked for salaries, even though they may not use general cash funds to increase the salaries fixed by the legislature."

There are at least two reasons why the above language in the *Gipson* decision cannot be regarded as supporting the view that a Sheriff, who is a state constitutional officer, may have his salary supplemented by funds given for salary purposes by sources not controlled by the legislature, such as endowments, gifts, or donations. First, this dicta related to *employees* and not to *state officers*. In *Bean* v. *Humphrey,* 223 Ark. 118, 264 S.W. 2d 607 (1954), this Court held that, with respect to the salary limitations of Article XIX, Section 23 of the Constitution, there are key distinctions between those who are *employees* and those who are *officers* and that the said limitations do not apply to employees, but only to state officers.

Second, the said language indicates that the supplementation of an employee's salary, there said to be permissible and not in violation of an act fixing the maximum of set salary, could be accomplished by the *employer* of the employee, using endowments, gifts and donations which were given *to the employer* and earmarked for salaries. In the case at bar, the Southland funds were not given to Crittenden County and earmarked as additional salary for Sheriff Thomas. To

the contrary, the funds were secretly and surreptitiously given to Sheriff Thomas without the knowledge and consent of Crittenden County. Accordingly, I find the *Gipson* dicta not to be supportive of the majority view and regard it as very little comfort for the same.

In my view, there is a further reason why the Southland funds should have been accounted for and paid over to Crittenden County by Sheriff Marion Thomas. This Court has previously held that the office of Sheriff is a public trust. *Brewer* v. *Hawkins*, supra. It is clear beyond the need for citation of authority that the holder of a public trust owes to the public complete and total disclosure of any fact or circumstance which might have a bearing on his ability and intention to faithfully and impartially discharge his duty. The receipt by an incumbent Sheriff of funds given to him by a private corporation in a suspicious and surreptitious manner as is disclosed by the facts in this case, is a fact which the citizens of Crittenden County are entitled to know as the beneficiaries of the public trust reposed in the office of Sheriff.

I further dissent to this Court's failure to address itself to appellee's contention that the decree of the Chancellor should be affirmed by reason of the failure of appellant to comply with Rule 9 of this Supreme Court in the preparation of the briefs submitted herein. I think the contention is well-taken and that this appeal could have been disposed of on that ground had not the important issue concerning the meaning and effect of Article XIX, Section 23 of the Arkansas Constitution been involved. Since I would affirm the decree of the Chancellor on the merits, I deem it unnecessary to extend this dissenting opinion further by discussing the deficiencies in the briefs submitted by appellants. However, I would award additional attorneys' fees to Appellee by reason of this appeal in view of the unnecessary extra time and effort required by reason of the said deficiencies.

I would affirm the decree of the Chancellor, rejecting all points urged for reversal by appellants, and would supplement the decree by directing that the Southland funds in the amount of $8,800.10 should be paid into the registry of the Crittenden County Chancery Court, as in the case of a bill of

interpleader, until Southland Racing Corporation and Farrior's, Inc., the source and conduit of the funds, respectively, have each had a reasonable notice and opportunity to assert any claim they may have to the same. The Clerk of the Chancery Court of Crittenden County should be directed to give the said notice to Southland Racing Corporation and Farrior's, Inc. by certified mail. If no claim or claims are asserted to the funds within a reasonable time after receipt of the said notice by the parties to whom the same is directed, the said funds should then be paid over to Crittenden County.

I am authorized to state that Justice Roy joins in this dissent.

L. J. (Leaster) MERRITT,
County Clerk *v.* Guy H. JONES Sr.

75-70 533 S.W. 2d 497

Opinion delivered February 23, 1976
[Rehearing denied March 29, 1976.]

James Guy Tucker, Atty. Gen., and *Alex Streett*, Prosecuting Atty., Fifth Judicial Circuit, by: *Robert M. Moore, Jr.*, Asst. Atty. Gen., for appellant.

William M. Clark, Guy Jones Jr., and *Phil Stratton*, for appellee.

RANDALL W. ISHMAEL, Special Justice. In April, 1973 Appellee was tried in the United States District Court for the Eastern District of Arkansas, Western Division, and by jury verdict found guilty on four counts of filing fraudulent income tax returns in an attempt to evade taxes for the years 1965 and 1966; and making and subscribing false tax returns (26 U.S.C. 7201 and 26 U.S.C. 7206(1).)

The sentence of the U.S. District Court was a fine of $5,000.00. The imposition of sentence as to imprisonment only was suspended and Appellee was placed on probation for a period of three years.

Appellant in his capacity as County Clerk and Permanent Registrar of the voter registration list for Faulkner County obtained an authenticated copy of the U.S. District Court Judgment and Order of Probation, cancelled Appellee's name from the voter registration list and immediately gave notice of such cancellation to Appellee. This action by Appellant was under the apparent authority of Amendment 51 to the Arkansas Constitution, specifically:

> Section 11. Cancellation of Registration.
>
> (a) It shall be the duty of the Permanent Registrar to cancel the registration of voters:
>
> * * *
>
> (4) Who have been convicted of felonies and have not been pardoned;
>
> * * *

It isn't necessary that we review each of the pleadings and procedural steps in the Circuit Court of Faulkner County. It is sufficient to say that upon petition of Appellee the Faulkner County Board of Registration (Board of Election Commissioners) ordered Appellant to reinstate Appellee's name to the voter registration list. Appellant appealed from that order by filing a complaint in the Circuit Court. Appellee demurred to the complaint and upon order of the Circuit Court the demurrer was sustained and Appellant's complaint dismissed.

This appeal is before us on three principal points:

(1) Was the Judgment and Order of Probation in the U.S. District Court a final conviction?

(2) Was the crime for which Appellee was convicted a felony within the meaning and purpose of Amendment 51 to the Arkansas Constitution, Section 11(a)(4)?

(3) Was Appellant as Registrar authorized to cancel Appellee's registration upon receiving notice of the conviction in the U.S. District Court?

At this point we find it helpful to set out the relevant portion of the Judgment and Order of Probation of the U.S. District Court:

> IT IS ADJUDGED that the defendant is guilty as charged and convicted.
>
> IT IS ADJUDGED that on Count I of the indictment, the defendant pay a fine to the United States in the sum of $5,000.00 and the imposition of sentence as to imprisonment only is suspended and defendant placed on probation for a period of three (3) years. Imposition of sentence suspended on Counts II, III and IV of the indictment and defendant placed on probation for a period of three (3) years, to run concurrently with probationary period imposed on Count I.

Appellee takes the position that because there was no imposition of a penitentiary sentence, there was no final conviction. We disagree. By the plain language of the judgment it is clear that there was a final conviction in the U.S. District Court.

As Appellee points out in his brief, there was not a sentence of imprisonment the execution of which was suspended, but rather the imposition of sentence as to imprisonment was suspended. Had there been no fine imposed, then we would agree that the judgment was not final as there was something remaining to be done. In fact, however, a fine was imposed and in that regard the judgment was final and left nothing to be done but enforce execution or collection of the fine. In federal criminal prosecutions final judgment in the case means sentence. *Berman* v. *United States,* 58 S. Ct. 164, 302 U.S. 211, 82 L. Ed. 204 (1937). It is clear in this case that

Appellee was finally sentenced to a fine and such was unconditional and subject only to appeal by Appellee. We do not find this inconsistent with the opinion in *Tucker* v. *State,* 248 Ark. 979, 455 S.W. 2d 888 (1970). The obvious distinction here is that nothing further was to be done. There was an immediate and final sentence of a fine of $5,000.00 and neither the imposition nor execution of that sentence was suspended. Also, if there be any doubt remaining, we adopt the principle that there can be no fine unless there is a conviction. *Almond* v. *Countryside Casualty Company,* 329 F. Supp. 137 (W.D. Ark. 1971).

In considering whether the offense for which Appellee was convicted is a felony, we must examine the provisions of the federal law (Internal Revenue Code) under which he was prosecuted.

26 U.S.C.

Section 7201. ATTEMPT TO EVADE OR DEFEAT TAX.

Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $10,000.00 or imprisoned not more than five years, or both together with the cost of prosecution.

Section 7206. FRAUD AND FALSE STATEMENTS.

Any person who—

(1) * * *
Willfully makes and subscribes any return, statement, or other document, which contains or is verified by a written declaration that it is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter;

* * *

> shall be guilty of a felony and, upon conviction thereof, shall be fined not more than $5,000.00, or imprisoned not more than three years, or both, together with the cost of prosecution.

In the purview of federal law the offenses are felonies and are specifically so stated to be. Also, while an attempt to evade taxes due to the State of Arkansas is characterized as a misdemeanor by our statutes (Ark. Stat. Ann. 84-2036) that is a totally different offense and Arkansas does not have a criminal sanction or provision of any kind for a violation of United States income tax laws or in particular any attempt to evade United States taxes. The question is: Was the offense for which Appellee was convicted a felony within the meaning and purpose of Amendment 51 to the Arkansas Constitution and specifically as the word "felonies" is used in Section 11(a)(4).

It has long been, if not always, the law in this State that an offense for which a person may be imprisoned in the state penitentiary is a felony. By the plain wording of the federal statutes, Appellee could have been imprisoned for up to five years in a penitentiary. It is not material that Appellee was not in fact sentenced to a term in the penitentiary and did not in fact serve any time. The relevant Arkansas Statute provides:

> A felony is an offense of which the punishment is death or confinement in the penitentiary. (Ark. Stat. Ann. 41-103.)

We consider that to mean that if the maximum sentence for an offense is death or confinement in the penitentiary, then even though a lesser sentence is imposed, the offense is deemed a felony. This has been considered and decided by this Court in *Burrell* v. *State*, 203 Ark. 1124, 160 S.W. 2d 218 (1942):

> "The fact that the amendment provided imprisonment in the Arkansas penitentiary would have been sufficient to make it a felony, under Section 2922 of Pope's Digest [now Ark. Stat. Ann. 41-103].

* * *

> Although under this amendment it is optional with the jury to fix a punishment at imprisonment in the Arkansas penitentiary, or at a fine, or at both fine and imprisonment, the offense is not reduced from a felony to a misdemeanor in the event a fine only is assessed."

Also, in *Shoop* v. *State*, 209 Ark. 642, 192 S.W. 2d 122 (1946):

> The maximum penalty that may be imposed or the things authorized to be done are the controlling characteristics in determining whether an offense is a felony or a misdemeanor.

As Appellee could have been imprisoned in the penitentiary under the quoted statutes, we conclude that within the meaning of the term "felony" in the State of Arkansas the offenses were felonies.

In his brief Appellee has, starting with the Arkansas Constitution of 1868, traced the development of the provisions relating to qualifications of voters up to the point immediately before Amendment 51. Based upon the presence of the terms "felony at common law" and "felony . . . by law passed by the General Assembly" in other provisions of the Arkansas Constitutions and amendments prior to Amendment 51 and coupled with the argument that Amendment 51 did not amend any prior provisions regarding voter qualification but merely set forth a method of registration, Appellee contends that his registration may not be cancelled except upon conviction of a felony at common law or a felony by laws passed by the General Assembly. First we address the proposition that Amendment 51 does not set qualifications for voters and thus does not amend previously existing provisions as to qualifications. Certainly a reading of Amendment 51 will show that some qualifications for voters are set forth clearly and at the very least Amendment 51 states specific disqualifications. To that extent previous provisions were amended by Amendment 51. Particularly with regard to

felonies Section 11(a)(4) uses the word "felonies" without limitation, qualification or condition. It is plain and unambiguous and in the absence of any other meaning being stated or at least implied we must interpret it to have superseded any former more restricted or defined term. With regard to the construction of constitutional provisions we stated in *State ex rel. Attorney General* v. *Irby,* 190 Ark. 786, 81 S.W. 2d 419 (1935):

> . . . we are irrevocably committed to the rule that the Constitution of this State should be construed as a frame of laws and not as an ordinary statute and that where the language employed in the Constitution is plain and unambiguous, the Courts cannot and should not seek other aids of interpretation and that every word used should be expounded in its plain, obvious and common acceptation. . . (Citations omitted.)

In examining the restrictive meanings urged by Appellee, we find that "felony at common law" is far too restrictive and could not realistically be read into the word "felonies" as used in Amendment 51. As the common law developed the meaning of the word "felony" changed. At one point it was restricted to the crimes of treason, murder, manslaughter, mayhem and larceny and at other times it was generally stated to be any offense which would occasion the forfeiture of either land or goods and to which capital or other punishment might be superadded. Other meanings from time to time in different jurisdictions were numerous.

As to the term "felony by law enacted by the General Assembly", that would ignore the laws of sister states and of the United States and would be equally unrealistic.

On the case before us we consider it of principal importance that the offense for which Appellee was convicted was one which we consider to be a felony within the purpose of Amendment 51. The laws violated were enacted by the Congress of the United States and were considered to be of such serious nature as to be characterized and punishable as felonies. And this Court in *Supreme Court Committee on Professional Conduct* v. *Jones,* 256 Ark. Appendix (1974), rejected all contentions that such violations did not involve

moral turpitude. In *State ex rel. Attorney General* v. *Irby,* we quoted the Supreme Court of North Dakota in *State, etc.* v. *Langer,* 65 N.D. 68, 256 N.W. 377, considering the rules stated to be sound and based upon reason and logic:

> A state has an undoubted right to provide in its constitution that persons may be . . . deprived of the right of sufferage by reason of having been convicted of crime. The manifest purpose of such restrictions upon this right is to preserve the purity of elections. The presumption is that one rendered infamous by conviction of felony, or other base offense indicative of moral turpitude, is unfit to exercise the privilege of sufferage. . . .

Appellee urges that even if there was a final conviction of a felony within the meaning of Amendment 51, then the action of Appellant as Registrar in cancelling the registration was not authorized. This argument is based upon Section 11(d) as follows:

> It shall be the duty of the Circuit Clerk of each county upon the conviction of any person of a felony to notify promptly the Permanent Registrar of the county of residence of such convicted felon.

Appellee asserts that such notice from an Arkansas Circuit Court Clerk is an absolute prerequisite to cancellation of a registration by the Registrar. That obviously is not the case. Subparagraph 11(d) simply states an additional duty of the circuit clerk and it is one method by which the Registrar may obtain information concerning disqualification of a voter. It could not be seriously contended that if a person was convicted of murder in a sister state or of bank robbery in United States District Court that he would still be a qualified voter in the State of Arkansas. Moreover, subparagraph 11(g) specifically provides that the registrar may by house to house canvass or *any other reasonable means* determine whether the active registration files contain the names of any person not qualified to vote. That subsection also provides for the Prosecuting Attorney upon affidavits to apply for an order of the Circuit Court to determine or cancel a registration. That procedure likewise is only one method and it is not exclusive.

In this case appellant obtained an authenticated copy of the Judgment and Order of Probation of the U.S. District Court and we approve that procedure as one method of determining the action of the U.S. District Court upon a criminal prosecution.

Finally, Appellee cites an Act of Congress of June 22, 1868, 15 Stat. 72, Ch. 69, (Vol. 1, Ark. Stat. Ann. p. 313). We note that this point was not presented in circuit court, but we consider it so that the point may be laid to rest. The relevant portion of the cited statute provides:

> The Constitution of Arkansas shall never be so amended or changed as to deprive any citizen or class of citizens of the United States to the right to vote who are entitled to vote by the Constitution herein recognized, except as a punishment for such crimes as are now felonies at common law, whereof they shall have been duly convicted under laws equally applicable to all of the inhabitants of said state. . . .

First, we must consider that this Act was in 1868, soon after the Civil War, and it was designed and intended to prevent unconstitutional criminal laws as a means of depriving former slaves of the right to vote. That is no longer a consideration. The Act purports to state the conditions upon which the State of Arkansas would be readmitted to the Union and be entitled to representation in Congress, but the Supreme Court has ruled that the Confederate States were never out of the Union and, hence, there was no necessity for readmission. *State of Texas* v. *White*, 7 Wall 700, 74 U.S. 700, 19 L. Ed. 227. Even if we assume that the Act has some force and effect, its enforcement is in the exclusive domain of Congress. Such was the determination when identical language was considered in an act concerning the State of Virginia's constitutional poll tax requirement. *Butler* v. *Thompson*, 97 F. Supp. 17, affd., 341 U.S. 937, 95 L. Ed. 1365, 71 S. Ct. 1002.

In conclusion we are of the opinion that Appellee was finally convicted of a felony within the meaning and purpose of Amendment 51 to the Arkansas Constitution and the

procedure and action of Appellant as registrar in cancelling Appellee's name from the voter registration list of Faulkner County was lawful and proper. The judgment of the circuit court is reversed with direction to overrule the demurrer, reinstate Appellant's complain as amended and proceed further as appropriate and consistent with this opinion.

ROY, J., not participating.

INSURANCE COMPANY of NORTH AMERICA et al
v. Billy B. NICHOLAS, Administrator

75-238 533 S.W. 2d 204

Opinion delivered March 1, 1976

Wright, Lindsey & Jennings, and *Plegge, Lowe & Whitmore,* for appellants.

Kay L. Matthews, for appellee.

GEORGE ROSE SMITH, Justice. This multi-party lawsuit arose as a result of there having been two concurrent fire insurance policies upon a house in Little Rock that was partially damaged by fire on December 2, 1972. The record owner, Hallie B. Nicholas, died some months later. The appellee, as the administrator of Mrs. Nicholas's estate, brought this suit against the two insurance companies (joining as defendants the other beneficiaries of the policies). The chancellor's decree held each insurer liable in the amount sued for, with penalty and attorney's fees. For reversal each insurer contends that it is not liable to the extent found by the chancellor.

The facts are not in dispute. Mrs. Nicholas originally owned the house, subject to a mortgage not in controversy. She sold the property, by an installment contract, to Edward D. Briscoe, Jr. At that time one of the insurers, Fireman's Fund, insured the property for $10,000, naming Mrs. Nicholas and Briscoe as the insureds. That policy contained a "pro rata" other insurance clause (a term explained in *Ark. Grain Corp.* v. *Lloyd's,* 240 Ark. 750, 402 S.W. 2d 118 [1966]). Briscoe later contracted to sell the property to Cleaster Coates. The other insurer, INA, then insured the property for $11,000, naming Briscoe and Coates as the insureds. That policy contained an "escape" other insurance clause (also explained in *Lloyd's*).

The fire damage amounted to $13,153.47. The two insurers took different courses. INA, without invoking its escape clause, simply paid the full amount of its policy, $11,000, to its insureds, Briscoe and Coates, who presumably divided the money as they saw fit. Briscoe, before this suit was filed, fell behind in his payments to Mrs. Nicholas and reconveyed his interest to her. While the suit was pending Briscoe was adjudicated a bankrupt and was dismissed from the case.

The other insurer, Fireman's Fund, invoked the benefit of its pro rata clause by tendering to its insureds, Nicholas and Briscoe, its proportionate part (10/21st) of the loss. Nicholas rejected the tender and brought this suit, successfully contending in the trial court that Fireman's Fund is liable to him for its full $10,000 and that INA is liable to him for the remaining $3,153.47 of the loss.

We first consider INA's appeal. Here the issue is comparatively simple. An insurance policy is ordinarily a personal contract, upon which the insured alone is entitled to recover. *Langford* v. *Searcy College,* 73 Ark. 211, 83 S.W. 944 (1904). INA was therefore justified in admitting liability, waiving its escape clause, and paying the full amount of its coverage to its named insureds, Briscoe and Coates. It makes no difference that INA knew of Mrs. Nicholas's interest in the property when it paid the loss. Whatever claim Mrs. Nicholas might have asserted against INA was necessarily derived from Briscoe and was extinguished when INA paid Briscoe in full. Mrs. Nicholas could not claim the benefits of Briscoe's INA policy without also being subject to its burdens. Nicholas also asserts an equitable lien against the proceeds of the INA policy, but that also was a matter between Mrs. Nicholas and Briscoe. It is argued that this lien theory is supported by the presence of a standard mortgage clause in the INA policy. That clause, however, was never activated, because no mortgagee was named in the policy (as the clause required). We conclude that the chancellor erred in holding INA liable to Nicholas.

As to Fireman's Fund, the pivotal question is whether the INA policy constituted other insurance within the meaning of Fireman's Fund's pro rata clause. Such double insurance exists when the two policies cover the same interests in the same property, against the same risks, and for the benefit of the same person. Couch on Insurance 2d, § 37:1394 (1962). Here the questions are whether the two policies covered the same interests for the benefit of the same person.

Briscoe's insured interest under the two policies was evidently the same. What he purchased from Mrs. Nicholas is what he sold to Coates — nothing more, nothing less. That he was paying Mrs. Nicholas and being paid by Coates did

not divide his estate into two ownerships. It must be remembered that the purpose of the pro rata clause is to protect the insurer against the hazards of overinsurance. Such a hazard would have existed if Briscoe had insured the full value of his estate with two different insurers.

By the same reasoning the two policies were for the benefit of the same person — Briscoe. This particular point seems to have arisen very infrequently, but the cases are uniform in holding that there is double insurance where the same person is an insured in each policy. *Horridge* v. *Dwelling-House, Ins. Co.*, 75 Iowa 375, 39 N.W. 648 (1888); *Pitney* v. *Glen's Falls Ins. Co.*, 65 N.Y. 6 (1875); *Mussey* v. *Atlas Mut. Ins. Co.*, 14 N.Y. 79 (1856). Again the hazard of overinsurance would exist if Briscoe could recover in full under each policy. As a matter of fact, owing to INA's waiver of its escape clause, the two insurers will pay $11,000 plus $6,263.56, a total that exceeds the physical damage of $13,153.47. If the Nicholas estate sustains a loss it will be attributable .o Mrs. Nicholas's not having taken out a policy by herself, instead of with Briscoe, and to the latter's insolvency after he was paid by INA. Needless to say, principles of law that reach a sound result with respect to solvent litigants cannot be abrogated simply because the fortuitous intervention of insolvency may cause a hardship.

Reversed and remanded for the entry of a decree in harmony with this opinion.

BYRD, J., dissents.

FOGLEMAN, J., not participating.

CONLEY BYRD, Justice, dissenting. I disagree with so much of the majority opinion as holds that the INA policy constituted other insurance to Mrs. Nicholas. The Fireman's Fund policy lists the insured's name and address as follows:

"Mrs. Hallie Nicholas, Vendor and
Ed Briscoe, Vendee
Arkansas Abstract Company
212 Center Street
Little Rock, Arkansas"

In 44 Am. Jr. 2d INSURANCE § 1808 it is stated:

> "It is generally held that in order for a proportionate recovery clause to operate in the insurer's favor, there must, under the policies, be both an identity of the insured interest and an identity of risk; and the requirement with respect to an identity of risk is not obviated by the fact that the apportionment clause refers to other insurance 'whether concurrent or not.' "

In 6 Appleman, INSURANCE LAW AND PRACTICE § 3905 (1972), the author states:

> "The apportionment of loss between concurrent insurers is proper, where the policy so provides. Proration provisions are inserted in insurance policies to relieve the insurer from the burden of litigating with the insured as to the validity of other policies, and to eliminate any inducement to the insured to commit fraud. But *every rule of construction in apportioning losses must yield to the right of the insured to be fully indemnified, and it must always be remembered that the contribution clause in an insurance policy should not be so applied as to diminish the protection of the insured.*" [Emphasis mine]

In COUCH ON INSURANCE 2d § 37:1394 (1962), the author states:

> "By definition, other or double insurance exists where two or more policies of insurance are effected upon or cover the same interests in the same property, against the same risks, and in favor of, or for the benefit of, the same person. As all of these conditions must concur, it follows that if different persons have different interests in the same subject of insurance, each may insure his interest without effecting other or double insurance. Likewise a policy of insurance containing a stipulation against 'other insurance' is not invalidated by the fact that at the time of its issuance a prior policy covering the same property is in existence, unless the insured has an interest in such prior policy, or will derive a benefit under it, in the event of the destruction of the property."

Also, in 5 Appleman, INSURANCE LAW AND PRACTICE § 3057 (1970), the author states:

> "The better rule is to the effect that the interests of vendor and vendee are distinct and different, and that an insurance by such vendee upon his own interest will not nullify insurance previously taken out by the vendor. . . . ."

Furthermore, the trial court found: (Decree of Oct. 10, 1974)

> "16. That the plaintiff was never at any time informed by any of the parties of the existence of the policy coverage issued by the defendant, Insurance Company of North America, and had no actual knowledge of that fact until after payment had been made by Insurance Company of North America to Coates and Briscoe."

Thus, while I would prefer that the pro-ration be denied on the theory that it should yield to the right of Mrs. Nicholas to be fully indemnified, there is another basis upon which it should be denied — *i.e.* another policy obtained without the knowledge of the insured does not constitute other insurance. See *Hall* v. *Concordia Fire Ins. Co.,* 90 Mich. 403, 51 N.W. 524 (1892), *St. Paul Fire & Marine Insurance Co.* v. *Crutchfield,* 162 Tex. 586, 350 S.W. 2d 534 (1961) and 5 Appleman, INSURANCE LAW AND PRACTICE § 3909 (1972).

Therefore, I would enter judgment against Fireman's Fund for the full amount of the policy, the 12% statutory penalty and a $2,500 attorney's fee.

For the reasons stated, I respectfully dissent.

DEGA POULTRY COMPANY et al *v.* Lowell TANNER

75-250 533 S.W. 2d 207

Opinion delivered March 1, 1976

Alex G. Streett, for appellants.

Priddy & Hardin, for appellee.

GEORGE ROSE SMITH, Justice. Salmonella paratyphoid is an infection that may be contracted by human beings, chickens, dogs, cats, turtles, and many other animals. It totally disabled the appellee, Lowell Tanner, for about ten months. In this workmen's compensation case the Commission made an award to Tanner, finding that he contracted the infection in the course of his employment by the appellant

Dega Poultry Company. The employer and its insurance carrier argue two points for reversal.

First, it is contended that the claimant's affliction was neither an accidental injury nor one of the occupational diseases listed in the statute. Ark. Stat. Ann. § 81-1314 (Repl. 1960). Hence, it is said, the claimant is not entitled to compensation, because his disability does not fall within either of two compensable categories: Accidental injuries and occupational diseases.

This argument overlooks the possibility of a third compensable category: Occupational infections. Whether such a third category existed under our original workmen's compensation act is perhaps open to question, because that statute referred to "such occupational disease or occupational infection as arises naturally out of such employment." Act 319 of 1939, § 2. Manifestly the legislature might have been using "occupational infection" merely as a synonym for "occupational disease" rather than as a reference to a separate affliction.

The 1948 revision of the statute set the issue at rest. It refers specifically to "occupational diseases as set out in section 14 [which lists compensable occupational diseases] and occupational infections arising out of and in the course of employment." Ark. Stat. Ann. § 81-1302 (d). Here the reference to occupational infections is meaningless unless it adds something to the enumerated occupational diseases. Of course we must assume that the legislature intended for its words to have meaning.

In the case at bar the Commission's opinion shows that it understood the distinction between an occupational disease and an occupational infection and that it found the claimant's disability to be the result of the latter. Our statute does not define occupational infection — a term that seems to be extremely rare in compensation acts. Thus what is or is not an occupational infection becomes an issue of fact. As we shall see in a moment, there was ample evidence to support the Commission's finding that salmonella paratyphoid was an occupational infection as to this claimant.

The appellants argue, secondly, that there is no substantial proof that Tanner's salmonellosis arose out of his employment. We do not agree. To the contrary, the evidence supporting the Commission's award is so one-sided as to suggest the view that we took in *Hall* v. *Pittman Constr. Co.*, 235 Ark. 104, 357 S.W. 2d 263 (1962): "If the claimant's disability arises soon after the accident and is logically attributable to it, with nothing to suggest any other explanation for the employee's condition, we may say without hesitation that there is no substantial evidence to sustain the Commission's refusal to make an award."

The claimant, Tanner, might be termed a practical veterinarian, for he had worked with licensed veterinarians for some 22 years, had studied the subject in magazines, and had worked for the appellant, Dega Poultry Company, for four years. His duties included inspecting the various Dega flocks of chickens for disease and recommending treatment. He believed that he contracted salmonella paratyphoid from the Akin flock (one of the Dega flocks), because those chickens were sick and had the same symptoms that he developed. The Akin flock was unquestionably afflicted with some disease and had to be sold before maturity.

Dr. Teeter, who treated Tanner, testified that salmonella paratyphoid is a rare disease and so difficult to diagnose that it took his clinic several months to identify Tanner's malady. The infection is found in the digestive tract of human beings, chickens, and other creatures. The claimant, as part of his work for Dega, stripped out the intestines of chickens in the course of performing post mortem examinations for disease. Dr. Teeter testified positively that Tanner had the disease, "and again I think it likely that he contracted it by working with some chickens that were infected." That testimony cannot be laid aside as insubstantial.

Dr. Davis, a veterinarian, testified that poultry products are a common source of salmonellosis. (We may note that one form of that infection is called "fowl typhoid." Webster's Second New International Dictionary [1934].) This witness said that the germ of salmonella paratyphoid can be isolated without any particular difficulty if the culture is made from the chickens' fecal matter.

The appellants rely principally upon the testimony of Dr. Fields, another veterinarian. Dr. Fields examined chickens from the afflicted Akin flock on three occasions. He did not find any salmonella organisms. On direct examination he said that such an organism would ordinarily have shown up in his culture type examination, but on cross examination he admitted that he was not looking specifically for salmonella paratyphoid and could have overlooked it. He described it as an enteric organism, which means that it is found within the intestines. The witness testified that he did not perform fecal examinations. The Commission could reasonably have concluded that Dr. Fields' testimony did not exclude the Akin flock as the source of Tanner's infection.

According to all the testimony there is a strong probability that Tanner was infected by the Akin flock. But even if he contracted the disease from other chickens, it would still have been in the course of his employment, for he seems to have handled only Dega birds. Even the flock that Tanner was raising on his own farm belonged to Dega. Unless a claimant must prove the source of an infection with absolute certainty — a manifest impossibility — Tanner's proof amply supports the Commission's award.

Affirmed.

Marial Oxford KNIGHTON *v.* J. T. KNIGHTON

75-286 533 S.W. 2d 215

Opinion delivered March 1, 1976

Tackett, Moore, Dowd & Harrelson, for appellant.

Robinson & Robinson, for appellee.

GEORGE ROSE SMITH, Justice. The parties to this suit, formerly husband and wife, are residents of Louisiana, where their divorce was granted. The basic question in the case is whether the wife can, after the termination of the Louisiana divorce proceeding, obtain in a separate suit in Arkansas a statutory interest in land owned by the husband in this state. Ark. Stat. Ann. § 34-1214 (Repl. 1962). The chancellor correctly held that the Louisiana divorce decree is a bar to such a suit in Arkansas.

Only a few facts are really pertinent. The couple were married in 1945. In July of 1973 the husband brought suit in

Louisiana for separation from bed and board. In August the husband obtained such a decree, and the parties agreed upon a settlement of their Louisiana property, with no mention of the husband's land in Arkansas. In June of 1974, while the couple were legally separated, the wife brought this suit in Arkansas to enjoin her husband from disposing of his Arkansas land until her marital interest in it should be determined. In November the Louisiana court granted the wife an absolute divorce, a step that appears to be merely formal and perfunctory after the separation from bed and board has continued for more than 12 months. Finally in April of 1975, the trial court entered its decree in the case at bar, denying the wife's claim to an interest in her former husband's Arkansas land.

If the parties had been residents of Arkansas and the divorce decree had been rendered here, it cannot be doubted that the wife's present claim would not have been maintainable. It was held in *Gwynn* v. *Rush,* 143 Ark. 4, 219 S.W. 339 (1920), that the statute relied upon by the appellant is a rule of practice to be applied in divorce proceedings. After the divorce the wife cannot invoke it. In *Taylor* v. *Taylor,* 153 Ark. 206, 240 S.W. 6 (1922), we noted that great confusion and uncertainty would result if the wife could assert such a property right after the divorce had been granted. If she had that right, as we observed, upon the husband's remarriage both wives would be in a position to claim dower. Hence we declared in *Dawson* v. *Mays,* 159 Ark. 331, 252 S.W. 33, 30 A.L.R. 1463 (1923), that "an allowance in lieu of dower must be made in the divorce proceeding, and cannot be made in a subsequent proceeding."

The appellant argues two grounds for distinguishing this case from our earlier decisions. First, it is suggested that the rule adopted in *Gwynn* v. *Rush, supra,* was changed in 1953, when the legislature amended Ark. Stat. Ann. § 34-1214. As we read the amendment, however, it simply expanded the property rights of certain nonresident wives in Arkansas divorce cases. The statute is still, as it was in *Gwynn,* a rule to be applied in Arkansas divorce proceedings.

Second, the appellant argues that she could not have

asserted in the Louisiana case her claim to an interest in her husband's Arkansas property. That argument is without merit, because even though the Louisiana court could not by its decree directly affect the title to land in Arkansas, it could achieve the same result by requiring the husband to execute a deed to that land. *Phillips* v. *Phillips,* 224 Ark. 225, 272 S.W. 2d 433 (1954). As a matter of public policy, in a divorce case the entire dispute about the division of the couple's property ought to be determined in one proceeding. Not only is comparative fault a proper matter for consideration, but also the division of, for example, the property in Arkansas may be affected by the division of property in other states. (The appellant is mistaken in assuming that she has an absolute right to a life estate in a third of her husband's property under the Arkansas statute, because that allowance may be reduced even when the wife is the injured party. *Alexander* v. *Alexander,* 227 Ark. 938, 302 S.W. 2d 781 [1957].) It is apparent that in order for the Arkansas property to be divided fairly in the present proceeding, it would probably be necessary for the original divorce case to be retried in its entirety. Similar useless retrials would be necessary in other states where the couple owned land. Hence strong reasons of policy support the conclusion that all questions at issue in a divorce case should be decided in one proceeding, in one court. That opp rtunity was available to the appellant in the Louisiana case, ut she elected not to take advantage of it.

Affirmed.

George DAVIS *v.* STATE of Arkansas

CR 75-173 533 S.W. 2d 202

Opinion delivered March 1, 1976

Jones & Tiller, by: *Delector Tiller,* for appellant.

Jim Guy Tucker, Atty. Gen., by: *B. J. Walker,* Asst. Atty. Gen., for appellee.

CONLEY BYRD, Justice. Appellant George Davis was found guilty of murder in the second degree and sentenced to 15 years in the Department of Correction. For reversal he contends:

> "I. Under the circumstances that developed at the time of trial, it was impossible for defendant to get a fair trial.
>
> II. The Court erred in sustaining the State's objection to the defendant's effort to inform the jury as to the conversation between himself and Charlie Bailey and as to a conversation defendant had with his Aunt Gloria Dean Dodson.

III. The Court erred in overruling the defense objection to the line of argument pursued by the prosecution in its closing argument.

IV. The verdict is contrary to the law and the evidence.

V. The Court erred in refusing to give the jury defendant's instruction labeled No. 2 over defendant's objections.

VI. The Court erred in overruling defendant's motions for a directed verdict."

The record shows that appellant shot one Charlie Bailey at a party in a neighbor's house. The bullet entered the decedent's body just under the right shoulder blade. Appellant relied upon self defense and sought to show that in the afternoon before the shooting his Aunt Gloria told him that the decedent had threatened him. The trial court sustained an objection on the basis that such testimony was hearsay. There is testimony from other witnesses that the decedent had threatened to kill appellant one or two times shortly before the shooting. It is fairly well conceded by all witnesses that the decedent had been removed from the party at least once before the shooting.

We find no merit in appellant's contentions I, III, IV, V and VI. The testimony was certainly sufficient to go to the jury on second degree murder. However, we find that prejudicial error was committed when the trial court ruled that appellant could not testify about the threat communicated to him by Aunt Gloria. In *Decker* v. *State,* 234 Ark. 518, 353 S.W. 2d 168 (1962), we stated:

". . . Of course, it is well settled that a communicated threat by the victim against the accused is admissible to explain the conduct, or show motive of the accused, when self defense is relied upon, or an overt demonstration of violence on the part of the victim is present. *Lee* v. *State,* 72 Ark. 436, 8 S.W. 385."

In *McCormick on Evidence* § 295 (2d ed. 1972) the author states:

> "Homicide and assault cases present another special problem. If the accused claims self defense, and threats of the victim were known to the accused, these threats are admissible to prove the accused's apprehension of danger and its reasonableness. . . ."

In 1 *Wharton's Criminal Evidence* § 225 (13th ed. 1972) the author states:

> "It is relevant for the accused himself to testify directly as to his apprehension of imminent danger and his reasons therefor, and he may state what he believed the deceased intended to do in the encounter. In support of the accused's claim of apprehension, it may be shown that the deceased had previously threatened the accused."

The author in 2 *Wigmore on Evidence* § 247 (3rd ed. 1940) states:

> "On the same principle as that of the preceding section, *threats of violence* against the defendant, uttered by the deceased, and brought to the knowledge of the defendant, are relevant to show his belief of impending danger from the deceased. The state of the law in the several jurisdictions varies only in the phrasing of the generally accepted conditions of admissibility.
>
> (a) As in the preceding topic, considerations of policy call for some *restrictions* calculated to secure the 'bona fide' use of such evidence. These may be, and frequently are, the same as those applied (in the preceding topic) to the use of the deceased's character. But they are less frequently laid down for the present class of evidence, apparently for two reasons, — first, because there is less danger of improperly using the deceased's threats in justification for the killing (less danger, that is, than where he can be shown to be an abandoned ruffian, a curse to the community), and,

secondly, because specific threats of violence have a more decided bearing on the probability of aggression than mere dangerousness of character. It is therefore to be noted that the rulings on the two subjects in a given jurisdiction are not necessarily mutually applicable.

(b) Wherever the *overt-act* limitation is adopted, the rule should prevail (as in the preceeding topic) that the trial Court's discretion determines the sufficiency of the evidence of an overt act.

(c) The threats are required to have been *communicated* to the defendant, *i.e.* brought to his notice in some way; otherwise they have no bearing for the present purpose.

(d) The use of *uncommunicated threats,* as showing the probability of the deceased having been the aggressor, involves a different principle (dealt with *ante,* § 110); but the respective precedents are not always duly discriminated.

(e) The *actual making* of the threats is immaterial, if there was a communication made to the defendant of supposed threats. This illustrates the contrast of principle with the doctrine of uncommunicated threats (*ante,* § 110)."

From the foregoing authorities, we find that the accused is entitled to testify as to his apprehensions and that for that purpose his testimony, as to threats of the decedent communicated to him by third persons, does not constitute hearsay. It matters not whether the communications were truthful or untruthful but only that the third person made the communication to the accused and that he had a right to rely upon the communications to make him apprehensive of the decedent's subsequent conduct.

Reversed and remanded.

Glenn JORDAN and Marge WOMACK *v.*
Sara ADAMS and J. W. ADAMS

75-266 533 S.W. 2d 210

Opinion delivered March 1, 1976

George K. Reeves and *Max B. Harrison,* for appellants.

Gardner & Steinsiek, for appellees.

ELSIJANE T. ROY, Justice. On May 29, 1973, appellees Sara Adams and J. W. Adams were guests at the Imperial Diners Club, Inc., a private club with a bar located in the Ramada Inn, Blytheville, Arkansas. The bar is operated immediately off the main dining room of the inn and is separated by a semi-private partition.

Prior to the arrival of appellees at the club, appellants Glenn Jordan and Marge Womack were seated at a table in the dining area near the partition dividing it from the bar area. Appellants had been dating for about a year and a half, and Mrs. Womack drove from Caruthersville, Missouri, to the Ramada Inn in Blytheville about once a week to meet Jordan.

According to testimony of others seated nearby agitated and vulgar conversation was heard from appellants' table. Mrs. Womack left the table and went to talk to a man seated at the bar. Jordan followed her and, using profanity, spoke to the man to whom Mrs. Womack was talking.

When Jordan returned to his table he picked up Mrs. Womack's purse and threw it approximately 26 feet toward the bar where Mrs. Womack was standing. The purse landed on a table between appellants, knocking off a glass candle holder, which broke upon impact. The purse then slid off the table and hit the floor. A .25 caliber pistol in the purse discharged, and the bullet struck Sara Adams below the calf of her left leg.

Appellees brought this action for damages, and the jury returned a verdict in favor of Sara Adams in the sum of $20,000 and for J.W. Adams in the amount of $600. From such verdict appellants lodged this appeal. Appellants first argue that the court erred in overruling their motion for a directed verdict since there was no negligence which would entitle

appellees to recover. We do not agree with this contention. We find that there was substantial evidence of negligence to make a question of fact for the jury as to each appellant.

J. W. Adams testified that he and his wife were guests of John Olson the night of the accident and that after they were seated Tom Miller came over to visit with them. He noticed that Jordan came to the bar and had an agitated conversation with a man talking to Mrs. Womack and then Jordan returned to his table. Then came the crash, after which he noticed Mrs. Womack stoop down, pick up her purse and go out the door. Within seconds he saw blood coming from his wife's leg and initially he thought it was a cut from the glass candle stick, but in reality it was a gunshot wound. Mrs. Adams was admitted to the Chickasawba Hospital and remained there five days; while there she was attended by Dr. Sims and Dr. Jones; the medical expense for the hospitalization, x-rays, doctors' fees, etc. at that time amounted to approximately $446; she continued to go to see Dr. Sims when necessary thereafter. In order to ascertain how far the purse had been thrown after the accident he stepped off the distance from Jordan's table to the bar and found it to be about 26 feet.

Mrs. Adams testified that during the five days she was in the hospital she was given medication for pain; the first night at home was an extremely bad one; and for two weeks after she got home she stayed in bed. The following week when she tried to walk, pursuant to the doctor's instruction, she suffered extreme pain. She lost 21 pounds the first three weeks after the accident.

Prior to the accident she had performed her household duties, did gardening and yard work, rode a bicycle and maintained a walking schedule of three miles almost every day. These activities were curtailed all summer and to the date of trial (about two years after the incident) she still had not been able to resume some of them. Mr. Adams' sister helped take care of her, and she paid a maid to come in twice a week. Even though she has resumed her exercise activity as much as possible she still gets cramps in the calf of her leg and has to get off the leg and take something for pain.

She also testified that just recently one night she felt the length of the bullet under the skin in her leg, and this was confirmed by her husband.

Mrs. Tom Miller testified she and her husband were in the dining area of the Ramada Inn and that coming from a table to their right there was loud conversation with vulgar language, making her feel uncomfortable. The people at the table were later identified as appellants.

Both John M. Olson and Mrs. Miller confirmed other testimony about the purse flying through the air and hitting the bar area. Olson also testified that Jordan was slurring his words and seemed to act like a person who had been drinking.

Dr. Hunter C. Sims testified that he saw Mrs. Adams on May 29, and she had a gunshot wound in the left calf in the bottom part of her leg. X-rays were taken and indicated a missile present from a .25 caliber gun.

He stated an injury of this nature does damage to every tissue it traverses, including blood vessels, nerves, fat, muscle, skin and subcutaneous tissue. The velocity of the bullet and the heat of the bullet both caused damage. He described her hospital treatments for five days and stated she was seen after her discharge because she continued to have some discomfort, swelling and redness in her left calf, all of which was diagnosed as superficial thrombophlebitis or an intervascular clot in her left leg. She was placed on cortisone, but she developed an allergic reaction to this drug. The bullet was not removed from her leg because the size of the object was such that it probably would not move around in the body. However, Dr. Sims also testified that if Mrs. Adams continued to have pain from the projectile in her leg, then the bullet would have to be removed and if she continued to experience difficulty and pain in walking it probably would be related to the gunshot wound.

On appeal we consider only that evidence which is most favorable to appellees in determining if substantial evidence exists.

Nevertheless we note that Jordan himself testified he "tossed" the purse to Mrs. Womack, though her back was to him and he did not know why he did it. He admitted he had been drinking but said he was not staggering; he was not mad but he had a bad habit of cursing. He denied he knew Mrs. Womack had a pistol in her purse, but he did not deny that he had been target shooting with her nor that he had been seeing her once or twice a week for about two years.

Mrs. Marge Womack testified concerning her association with Jordan and arrival at the Ramada Inn on May 29, 1973.

She admitted the purse and pistol belonged to her and that she carried the pistol whenever she went out of town at night, but that she did not have a permit.

She further testified there were two safety devices on the gun but she did not check the gun before she left that night; the last time she had the gun out for the purpose of shooting it was when she was out in the country with Jordan and Mr. DePriest.

Mrs. Womack testified she left the scene that night because she was scared.

Appellants argue Marge Womack could not have foreseen that someone would throw her purse causing the pistol to fire and Jordan, not knowing the pistol was in the purse, could not foresee injury from the act of throwing it.

We do not agree. It is well established that if the act is one which the party in the exercise of ordinary care ought to have anticipated was likely to result in injury to others, then such person is liable for the injury proximately resulting therefrom although he might not have foreseen the particular injury which did happen. *Missouri Pacific Railroad Company* v. *Johnson,* 198 Ark. 1134, 133 S.W. 2d 33 (1939). In *Johnson* the foreseeability rule enunciated in the case of *Helen Palsgraf* v. *Long Island R.R. Co.,* 248 N.Y. 339, 162 N.E. 99 (1928), was discussed by the court as follows:

> * * * If we should hold in following the rule that one to be held liable for an alleged negligent act, such act must be the proximate cause of the injury and also be of such a nature that the consequent injury must be one a person of ordinary foresight and prudence would have anticipated, and unless the particular injury suffered could have been so anticipated, there is no liability. Such an application of a sound rule destroys liability for negligence. It would be a rare case, indeed in which any ordinary mortal might possess such foresight or power of anticipation that he could in the exercise or such power know or foresee the exact injury, or effect that would come from any form of negligence. No such foresight has ever been possessed by modern man, nor is any such required in the matter of negligence to anticipate the exact injury or nature of it to establish or fix liability as a result thereof.

In the case at bar the evidence as above detailed is certainly sufficient for the jury to infer that Jordan knew Womack carried a pistol in her purse since, according to her testimony, she always carried it when she went out of town at night. They had been meeting regularly at night for well over a year, and on at least one occasion she had her pistol with her and they went out to target shoot together. However, even if we assume that Jordan was unaware that Womack had a pistol in her purse, it was a culpably negligent act for him to throw a purse (large enough to hold a pistol and other things a woman carries therein) 26 feet across an area where people were dining and drinking. It certainly could have been or reasonably should have been foreseen that the purse might hit someone in the head and/or land on a table breaking glasses or other fragile articles causing serious injury. The throwing of the purse did result in the crash of the glass candle holder which initially was thought to be the cause of Mrs. Adams' injury. Mrs. Adams was certainly within the foreseeable group of persons who might be injured by Jordan's negligence, and it was not necessary that he foresee the exact manner in which the injury would be caused. The *Palsgraf* case, supra, dealt with the "unforseeable plaintiff". Here we do not have such a situation.

Mrs. Womack's bringing, without checking the safety, a loaded pistol in her purse into an establishment where people were drinking intoxicating beverages constituted sufficient evidence of negligence to make a fact question for the jury. Furthermore, a party under such circumstances could reasonably foresee a risk of harm to others.

The case of *Cobb* v. *Indian Springs, Inc.*, 258 Ark. 9, 522 S.W. 2d 383 (1975), also presents a bizarre set of circumstances. In *Cobb* we held that a directed verdict as to a security guard was improper where there was evidence from which a jury could conclude that the automobile driver was encouraged and incited by the security guard on the premises to demonstrate the speed of the driver's car. The jury could have found the driver engaged in the tortious conduct complained of, and that the security guard also was guilty of negligence, but in his conduct, both becoming tortfeasors who by concurrent acts of negligence, though disconnected, were guilty of acts which were the proximate cause of the injury. The court stated:

> As to foreseeability, it was only necessary that Babbitt [the security guard], at the time the suggestion was made, foresee an appreciable risk of harm to others.

In the case at bar we have the negligent act of Mrs. Womack's carrying the pistol into the establishment in her purse and the negligent act of Jordan's throwing the purse; these acts concurred to proximately cause Sara Adams' injuries.

As to the excessiveness of the verdict, the fact a jury's award is possibly larger than the court would have given is not sufficient to disturb the verdict. The ultimate question is whether the amount shocks the conscience of the court or demonstrates that the jurors were motivated by passion, prejudice or undue influence. *Clark County Lumber Company* v. *Collins*, 249 Ark. 465, 459 S.W. 2d 800 (1970), and *McChristian* v. *Hooten*, 245 Ark. 1045, 436 S.W. 2d 844 (1969).

Furthermore, in *Clark County Lumber Company* the court said:

> Every case involving the issue of an excessive verdict

> must be examined on its own facts; and before this court can constitutionally reduce a verdict we must give the evidence in favor of the verdict its highest probative force and then determine whether there is any substantial evidence to sustain the verdict. *Breitenberg* v. *Parker,* 237 Ark. 261, 372 S.W. 2d 828.

Applying the principles enunciated in the above cited cases to the evidence herein we do not find the verdict as to either of the appellees excessive.

Affirmed.

HARRIS, C.J., and GEORGE ROSE SMITH and FOGLEMAN, JJ., dissent.

JOHN A. FOGLEMAN, Justice, concurring in part, dissenting in part. I concur in the affirmance of the judgment as to Marge Womack. The pistol she carried in her purse was a dangerous instrumentality. See dissenting opinion in *Purtle* v. *Shelton,* 251 Ark. 519, 474 S.W. 2d 123 (per Fogleman, J.) and cases cited therein. See also, *Williams* v. *Davidson,* 241 Ark. 699, 409 S.W. 2d 311. One handling such instrumentalities must take every precaution to reasonably assure the safety of any persons lawfully coming into proximity with it. *Hobbs Western Tie Company* v. *Orahood,* 229 Ark. 241, 315 S.W. 2d 930. See also, *Manning* v. *Jones,* 95 Ark. 359, 129 S.W. 791.

Mrs. Womack's conduct in failing to check the safety on the weapon and in leaving her purse on the floor near the table did not meet that standard, particularly if those at the table were, as might be inferred from some of the testimony, intoxicated and boisterous.

Jordan's liability is quite a different matter. As to him, I join in the dissent of Mr. Justice George Rose Smith.

I am authorized to state that the Chief Justice joins in this opinion.

GEORGE ROSE SMITH, Justice, dissenting. I would reverse as to Jordan, because as I interpret the testimony Jordan had

no reason to foresee the possibility that Mrs. Womack's purse contained a pistol that might go off upon the purse's being thrown across the room. Yet the majority opinion, after saying that "even if we assume that Jordan was unaware that Womack had a pistol in her purse," still imposes liability, simply because the thrown purse might have hit someone in the head or have caused injury by breaking glasses on a table.

Such reasoning is properly criticized by Harper and James in their Law of Torts, § 20.5 (1956): "Courts and writers have from time to time taken the position that if defendants should anticipate that certain conduct is fraught with unreasonable probability of *some* harms to *somebody,* then the duty to refrain from that conduct is owed to anyone who may in fact be hurt by it. As we have seen, this was the view taken in the dissenting opinion of Judge Andrews in *Palsgraf* v. *Long Island Railroad Co.*"

What the present majority opinion really says is that if Jordan could foresee some danger, then he is liable for any injury that might actually occur, no matter how unforeseeable. It would make no difference if the purse contained a pistol, a vial of poison gas, or an angry rattlesnake. Prosser points out why that view is wrong: "It is here at least that the line must of necessity be drawn to terminate the defendant's responsibility. The courts have exhibited a more or less instinctive feeling that it would be unfair to hold him liable. The virtually unanimous agreement that the liability must be limited to cover only those intervening causes which lie within the scope of the foreseeable risk, or have at least some reasonable connection with it, is based upon a recognition of the fact that the independent causes which may intervene to change the situation created by the defendant are infinite, and that as a practical matter responsibility simply cannot be carried to such lengths." Prosser on Torts, § 44 (4th ed., 1971). I would hold that the discharge of the pistol was an intervening cause for which Jordan is not liable.

Almer MARTINDALE Jr. *v.* Charles L. HONEY

75-102 533 S.W. 2d 198

Opinion delivered March 1, 1976

James E. Davis, for appellant.

Norman M. Smith, for appellee.

ROBERT S. LINDSEY, Special Chief Justice. To the question "May a member of the General Assembly, during his term of office, constitutionally be appointed a deputy prosecuting attorney?", we answer "No."

On August 1, 1973, the prosecuting attorney appointed appellee Charles L. Honey, a member of the House of Representatives, to the position of deputy prosecuting attorney for Nevada County. In chancery court appellant Almer Martindale, Jr., as a citizen and taxpayer, challenged the legality of the appointment.

The chancellor transferred the action to circuit court - "insofar as the question of the defendant's legal qualifications to be appointed and to serve . . . is concerned," but retained jurisdiction to afford the plaintiff the remedy of an accounting, should the plaintiff's contentions concerning Honey's qualifications to serve as deputy prosecuting attorney be upheld. There was no motion to transfer back to chancery court and it is not necessary to discuss or decide the propriety of the transfer to circuit court. *Quinn* v. *Murphy,* 181 Ark. 260, 25 S.W. 2d 429 (1930).

Section 10 of Article 5 of the Arkansas Constitution provides:

> "No Senator or Representative shall, during the term for which he shall have been elected, be appointed or elected to any civil office under this State."

By Section 1 of Article 4 the powers of government of the

State are "divided into three distinct departments," legislative, executive and judicial.

Section 2 of Article 4 reads:

> "No person, or collection of persons, being one of these departments, shall exercise any power belonging to either of the others, except in the instances hereinafter expressly directed or permitted."

The Constitution provides for the office of prosecuting attorney and places it in the judicial department. Art. 7, § 24. It is a State office and the prosecuting attorney is an officer of the State. *Griffin* v. *Rhoton,* 85 Ark. 89, 107 S.W. 380 (1907); *Smith* v. *Page,* 192 Ark. 342, 91 S.W. 2d 281 (1936).

The office of deputy prosecuting attorney has been created and provided for by the legislature, a deputy being appointed by the prosecuting attorney, with the appointment not to take effect until approved in writing by the circuit court. Ark. Stats. Ann. § 24-119 (Repl. 1962).

In previous discussions concerning whether a particular position was an office or a mere employment, we have said that the distinction often becomes indistinct and we have refrained from framing an inflexible definition or drawing a precise line. *Lucas* v. *Futrall,* 84 Ark. 540, 106 S.W. 667 (1907); *Rhoden* v. *Johnston,* 121 Ark. 317, 181 S.W. 128 (1915); *Middleton* v. *Miller County,* 134 Ark. 514, 204 S.W. 421 (1918); *Maddox and Coffman* v. *State,* 220 Ark. 762, 249 S.W. 2d 972 (1952); *Bean* v. *Humphrey, State Auditor,* 223 Ark. 118, 264 S.W. 2d 607 (1954); *Haynes* v. *Riales,* 226 Ark. 370, 290 S.W. 2d 7 (1956).

Somewhat by definition, there is a distinction between deputies and assistants. Ordinarily, a deputy acts officially for another, as a substitute, and by his appointment exercises the office in his principal's right or name, his acts being of equal force with those of the officer himself. 63 Am. Jur. 2d *Public Officers and Employees,* §§483 through 487, 67 C.J.S. *Officers,* §148.

This court has said

"It is true that it is generally said that a deputy prosecuting attorney, legally appointed, is generally clothed with all the powers and privileges of the prosecuting attorney, but he must file the information in the name of the prosecuting attorney." *Johnson* v. *State,* 199 Ark. 196, 203, 133 S.W. 2d 15, 18 (1939); *Bingley* v. *State,* 235 Ark. 982, 363 S.W. 2d 530 (1963).

In the latter case we upheld the validity, under Amendment 21 to the Constitution, of an information where the name of the prosecuting attorney and the word "by" were typewritten and followed by the signature of the deputy prosecuting attorney.

As noted, the office of deputy prosecuting attorney is created by law; deputy prosecuting attorneys regularly exercise some of the State's soverign power in the judicial department; their duties are statutory rather than contractual; they hold their positions by official appointments, not by contract of hire; and their compensation is fixed or regulated by law. These characteristics of the office, considered collectively, indicate a public office as contrasted with a mere public employment, even though every public office may be an employment.

The circuit judge, after holding that a deputy prosecuting attorney "is not a civil officer within the meaning of the constitutional prohibition," dismissed the plaintiff's complaint. Having concluded that a member of the General Assembly is prohibited by our Constitution from being appointed or serving as a deputy prosecuting attorney, we reverse and remand with directions that judgment be entered declaring that the appellee, during his term of office as a member of the General Assembly, is ineligible to be appointed or to serve as a deputy prosecuting attorney.

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

HOLT, J., disqualified and not participating,

Special Justice H. DAVID BLAIR sitting in his stead.

FOGLEMAN and JONES, JJ., dissent.

JOHN A. FOGLEMAN, Justice, dissenting. It may well be that the majority has reached a desirable result. But even if the answer given should be correct, it has been given to the wrong question. The principal basis of my disagreement is the question as stated by the majority. I humbly submit that the only question presented to the trial court or in the briefs was somewhat different. It was whether the appointment of a representative to the position of deputy prosecuting attorney violates Art. 5 § 10 of the Arkansas Constitution. The judgment was entered upon motions for summary judgment made by each of the parties. Appellant's motion was based upon the sole contention that the position of deputy prosecuting attorney was a civil office. Appellee's motion was based upon the contention that the deputy prosecuting attorney was a public employee and not a civil officer. Art. 4 § 2 was never mentioned by anyone except the members of this court. More simply stated, the question at issue in the trial court and submitted to us was: "Is the position of deputy prosecuting attorney a civil office?" I cannot agree with the majority in this respect. As I see it, a deputy prosecuting attorney is an employee, not a civil officer.

Although this court has appropriately avoided any rigid rule in the matter, the importance of certain factors cannot be overlooked. In *Maddox* v. *State,* 220 Ark. 762, 249 S.W. 2d 972, cited in the majority opinion, we said:

Since the distinction between a public officer and a public employee tends to become indistinct when the position in dispute has some of the characteristics of each, we have never attempted to frame an inflexible definition of either. Yet the governing principles are well established. A public officer ordinarily exercises some part of the State's soverign power. His tenure of office, his compensation, and his duties are usually fixed by law. The taking of an oath of office, the receipt of a for-

> mal commission, and the giving of a bond all indicate that a public office is involved, although no single factor is ever conclusive. *** On the other hand, mere public employment differs from a public office in that some or all of these characteristics are lacking.
>
> It is clear that a school teacher, whose tenure, compensation, and duties are all fixed by his contract with the school board, is an employee rather than an officer. ***

As in *Maddox,* some of the *important* characteristics of a public office (which I take to be included within the definition of a civil office) are missing.

In the first place the deputy prosecuting attorney has no authority to exercise any of the sovereign power in his own name. Whatever power he exercises is in the name of his principal, the prosecuting attorney. It is clear that this power can be limited by the prosecuting attorney. In considering Ark. Stat. Ann. § 24-120 (Repl. 1962) giving the deputy prosecuting attorney the authority to file informations charging persons with criminal offenses, we made it quite clear that there was only a prima facie presumption that a deputy prosecuting attorney has been authorized to file an information. *State* v. *Eason,* 200 Ark. 1112, 143 S.W. 2d 22. There we said:

> *** Pope's Digest, § 10885, authorizes deputy prosecuting attorneys to file information in their own names. There is, prima facie, a presumption that a deputy prosecuting attorney acts under direction of his superior. Until the authority is questioned and there is failure of the prosecuting attorney to affirm, the information, being voidable only, is sufficient to bring the defendant before the court, and in consequence such court acquires jurisdiction.

The deputy prosecuting attorney is only required to attend and prosecute charges on behalf of the state when a warrant has been issued by a judicial officer, or when a judicial officer or the prosecuting attorney requests him to do so. See Ark.

Stat. Ann. §§ 24-121, 123 (Repl. 1962). Thus it may be clearly seen that the deputy prosecuting attorney's exercise of the sovereign powers of government is in the name of another.

The acts of a deputy in the name of his principal are those of the principal and not of the deputy, and it is the principal not the deputy who is exercising the sovereign power. *State* v. *Christmas,* 126 Miss. 358, 88 S. 881 (1921). See also, *Jamesville & Washington R. Co.* v. *Fisher,* 109 N.C. 1, 13 S.E. 698, 13 LRA 721 (1891); *Oklahoma City* v. *Century Indemnity Co.,* 178 Okla. 212, 62 P. 2d 94 (1936). Where the statute confers a power to be exercised only in the name of the principal the deputy is not an officer. 67 CJS 450, Officers § 148. *State* v. *Christmas,* supra; *State* v. *Houck,* 31 Ohio Cir. Ct. Rep. 15 (1908). See also, *Nelson* v. *Troy,* 11 Wash. 435, 39 P. 974 (1895).

The investment of sovereign powers in the incumbent is one of the more important, if not the most important, criteria of public office. 63 Am. Jur. 2d 627, Public Officers & Employees, § 2; 67 CJS 110, Officers, § 5b (2). We have said that sovereign powers are a necessary requisite to any office. *Bean* v. *Humphrey,* 223 Ark. 118, 264 S.W. 2d 607.

Tenure is also an important, even if not controlling, characteristic of a public office. A deputy prosecuting attorney has no tenure and cannot be assured any by agreement of the prosecuting attorney. He may be removed by the prosecuting attorney at any time. Ark. Stat. Ann. § 24-120. *Sheffield* v. *Heslep,* 206 Ark. 605, 177 S.W. 2d 412. Certainly, it would be hard for one subject to dismissal on a moment's notice to feel that he had the security of a civil office.

Some duties of the deputy prosecuting attorney are stated by law. As pointed out, those stated are not duties until someone else has acted to make them so. But I am sure that no one would say that his duties are fixed by law, so that other duties could not be assigned by the prosecuting attorney. It is common knowledge that deputy prosecuting attorneys do many things other than those named in the statutes.

There is no requirement that the deputy prosecuting at-

torney take an oath, were it not for the holding that he holds a civil office bringing him within the purview of Art. 19 § 20. I find no requirement that any formal commission be issued to a deputy prosecuting attorney or that his appointment be formal in any sense. It is only required that the appointment be approved, in writing, by the circuit court. Ark. Stat. Ann. § 24-119. No bond whatever is required.

Upon review of the *Maddox* requirements, I find only one of the criteria for determining whether one is the holder of a public office which is met in this case. That is the fixing of compensation by law. I do not see how such an important determination can rest upon such a slim reed.

To illustrate the importance of the distinction between the question at issue and the question posed and answered by the majority, I point out that if Art. 5, § 10 is applicable, a senator or representative could not even resign before the expiration of his term and accept appointment as a deputy prosecuting attorney. *People* v. *Lennon,* 86 Mich. 468, 49 N.W. 308 (1891); *Richardson* v. *Hare,* 381 Mich. 304, 160 N.W. 2d 883 (1968); *State* v. *Sutton,* 63 Minn. 147, 65 N.W. 262, 30 LRA 630, 56 Am. St. Rep. 459 (1895); *Chenowith* v. *Chambers,* 33 Cal. App. 104, 164 P. 428 (1917); *Baskin* v. *State,* 107 Okla. 272, 232 Pac. 388, 40 ALR 941 (1925); Annot 5 ALR 117, 120 (1920), S 40 ALR 945 (1926). Cf. *Jones* v. *Duckett,* 234 Ark. 990, 356 S.W. 2d 5; *Johnson* v. *Darrell,* 220 Ark. 675, 249 S.W. 2d 5. If the majority's result should be reached by applying Art. 4 § 2, he could.

I would affirm the judgment.

I am authorized to state that Mr. Justice Jones joins in this opinion.

Carl W. LEE *v.* B. J. VAUGHN

75-268 534 S.W. 2d 221

Opinion delivered March 8, 1976
[As amended on denial of rehearing, April 12, 1976.]

Walker, Campbell, McCorkindale & Young, for appellant.

Adams & Covington, for appellee.

CARLETON HARRIS, Chief Justice. Appellant, Carl W. Lee, guaranteed the payment of "the first $3,000.00" of a $4,000.00 note from Norvile and Rofena Akin, which Lee assigned to appellee, B. J. Vaughn, a resident of Lamesa, Texas; the guaranty agreement was also executed in Texas. The agreement provided that "If any monthly installment is past due more than 15 days, B. J. Vaughn shall promptly mail notice of that fact to the said Lee, P. O. Box 266, Bentonville, Arkansas, 72712." The Akins defaulted on the note, and appellant refused to perform his agreement, contending that appellee failed to give the requisite notice. Appellee instituted suit on the guaranty and the trial court, sitting as a jury,

rendered judgment for Vaughn in the amount of $2,921.13.[1] From the judgment so entered, appellant brings this appeal, contending that the lack of notice by appellee constituted failure of consideration with a resultant release of appellant from liability under the guaranty.

At the outset it should be mentioned that since the guaranty agreement was executed in Texas, and was to be performed there, Texas law should have governed the case; however, neither party gave notice of this fact to the trial court, and neither argues the point on appeal. Accordingly, the case must be decided under Arkansas law. *American Aviation, Inc.* v. *Aviation Insurance Managers, Inc.*, 244 Ark. 829, 427 S.W. 2d 544. In that case, we stated:

> "Appellant did not plead the application of the Texas statutes [as required by Ark. Stat. Ann. § 27-2504 (Supp. 1975)], and the law of this state applies."

Returning to the main issue, the record reveals that Lee and Smith executed the assignment and guaranty on August 15, 1968. The note called for monthly payments of $100.00 by the Akins and they made seven monthly payments. In April, 1969, no payment at all was made, and only $41.32 was paid in May. Four more payments were made before the Akins missed the payment for October, 1969; likewise, a payment was missed in February, 1970, and no payments were made after March 18, 1970.

Sometime during 1968 or 1969 Vaughn moved to Nashville, Tennessee, apparently leaving the management of his Lamesa interests in the hands of his office manager, and his Lamesa attorney, Robert Snell. The evidence does not reveal that any type of notice was given to either Lee or Smith until "right at the end of 1969 or the early part of 1970 ***."

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[1]C.E. Smith was Lee's co-guarantor on the note, for the same amount, but he died while this litigation was pending, and appellee did not revive the action against Smith's estate. Though Smith may be referred to *infra* as Lee's codefendant at the trial level, his estate is not a party to this appeal.

In answer to interrogatories, Snell stated that he had some earlier calls from Smith, and an office notation reflected a call from Smith in January, 1969; of course, this was before any default at all occurred. Snell was not able to state that he had received any calls from Lee, the witness only stating "perhaps" from Lee, but he said that most of his conversation was with Smith. According to Snell, on April 3, 1970, he directed a letter to Smith and Lee wherein he requested each to sign a statement, which he had enclosed, that "it will not be necessary from month to month for Mr. Vaughn to notify you about the default in payments in order to keep the $3,-000.00 guarantee in force." The statement to that effect was not executed and returned to Snell, and Lee denied that he ever received this letter. On August 12, 1970, another letter was directed to Smith and to Lee wherein Snell stated that he thought he had the executed statement, heretofore referred to, in his files, but found that he did not, and he again requested the execution of the waiver of notice. Lee stated that he received this notice.

In answer to Interrogatory No. 3, Snell stated that he talked with Smith near the end of 1969 or early part of 1970 and advised that the Akins were having difficulties making the payments, and he stated that Smith and Lee, together with Akin, on March 24, 1970, came to his office to discuss the matter. Thereafter, he wrote the letter requesting the waiver. In answer to Interrogatory No. 4, Snell stated that Smith had indicated that he would sign the statement, but he (Snell) never did receive it.

Vaughn testified that he called Smith on March 18, 1970, informing the latter that the Akins were delinquent on their note payment, and stated, "I presumed he would call Mr. Lee."

Lee testified that he was never notified in writing by either Vaughn or his attorney that the Akins were in default; that had he been so notified as the monthly payments became delinquent, he could have, and would have, honored the guaranty agreement.

We are of the opinion that the trial court erred in render-

ing judgment against Lee. Admittedly, the failure to make payment in April, 1969, the partial payment in May, and the failure to make payment in October were never communicated to Lee, and it appears from the record that Lee's first notice of any default came when he was told of that fact in March, 1970; as earlier pointed out, the first attempt to give either Smith or Lee written notice was the letter of April 3, 1970.

We have held that a guarantor is entitled to have his undertaking strictly construed and that he cannot be held liable beyond the strict terms of his contract. *Gulf Refining Company* v. *Williams Roofing Company,* 208 Ark. 362, 186 S.W. 2d 790; *National Bank of Eastern Arkansas* v. *Collins,* 236 Ark. 822, 370 S.W. 2d 91. In the last mentioned case, we quoted 24 Am. Jur. *Guaranty* § 71, p. 158, as follows:

> "A guarantor, like a surety, is a favorite of the law, and his liability is not to be extended by implication beyond the express limits or terms of the instrument, or its plain intent."

However, the instant appeal presents a question of first impression for this court; *i.e.,* apparently no Arkansas case has construed a guaranty contract that contained an express requirement of notice of the principal's default. It seems clear, however, that the great majority of states (all but one, Michigan) that have considered a like situation have reached a conclusion in conformity with the Restatement of Security, § 136, where it is stated:

> "Subject to the rules pertaining to negotiable instruments, the surety's obligation to the creditor is not affected by the creditor's failure to notify him of the principal's default *unless such notification is required by the terms of the surety's contract.*" [Our emphasis].

The leading state decision on the point appears to be *Yama* v. *Sigman,* 114 Col. 323, 165 P. 2d 191, in which the debtor was obligated to make biweekly payments, and the guaranty was conditioned upon immediate notice of default. The Colorado Supreme Court held that under such an agree-

ment the guarantor could not be held liable after the debtor's default, when the creditor failed to prove that he had given the necessary notice — "their failure in this respect relieves the defendant of all liability under his guaranty." In a New York decision, *Pergament* v. *Herrick Credit Corp.*, 200 N.Y.S. 2d 535, the rule is summarized as follows:

> "Where a contract of guarantee specifically provides for notice of default, the failure to give such notice discharges the guarantor's obligations [citations omitted]. The guarantor may limit his liability as such by whatever conditions he may see fit to impose, and non-compliance with them will preclude recourse to him. As stated above, his undertaking is strictissimi juris and cannot be extended beyond the fair import of its language."

Ohio courts adhered to the same principle in *Lakemore Plaza, Inc.* v. *Shoenterprise Corp.*, 188 N.E. 2d 203 (Ct. Cmn. Pleas):

> "Where a guarantor attaches a certain condition or conditions to his agreement, such condition or conditions must be construed in favor of the guarantor, and the failure of a creditor to strictly comply with any condition or conditions invalidates the guaranty."

Other courts that have adopted this analysis are the Wisconsin Supreme Court, *Electric Storage Battery Co.* v. *Black*, 27 Wis. 2d 366, 134 N.E. 2d 481; the District of Columbia Court of Appeals, *United States Plywood Corp.* v. *Continental Casualty Corp.*, 157 A. 2d 286; and the Pennsylvania Superior Court, *Barati* v. *M.S.I. Corp.*, 243 A. 2d 170. In the *United States Plywood* decision, the court stated:

> "Since the foundation of any rights of the donee or creditor is the promisor's contract, it follows that his rights are restricted by the terms of the promise and any conditions, express or implied, affecting them. A stipulation for notice of default is a condition of liability which may always be imposed. The weight of authority holds that where the notice provision is reasonable and is stated as a condition precedent to the right of instituting legal action, failure to observe it will discharge the surety."

Lee was entitled to the protection that he had insisted upon in guaranteeing the note; after all, the note contains an acceleration clause under which the entire indebtedness could have become immediately due and payable following the April, 1969 default. While Vaughn alleged in a second amendment to his complaint that Smith and Lee "were partners in the transaction herein sued upon," the record contains no evidence to that effect, nor is such a contention argued by appellee. Actually, the guaranty agreement itself indicates the contrary, since the notification clause called for both Smith and Lee to be notified by mail at two separate addresses.

Reversed.

Leon ODOM *v.* STATE of Arkansas

CR 75-200 533 S.W. 2d 514

Opinion delivered March 8, 1976

William B. Blevins and *Robert L. Pierce,* for appellant.

Jim Guy Tucker, Atty. Gen., by: *B.J. McCoy,* Asst. Atty. Gen., for appellee.

GEORGE ROSE SMITH, Justice. The appellant, a resident of Brinkley, was charged as an accessory before the fact in the robbery of the Mad Butcher grocery store at Brinkley. It was the State's theory that Odom assisted three other men, Embrey, Bruton, and Zappas, in planning the robbery. The other three actually committed the crime, with Odom receiving $400 as his share. The jury returned a verdict of guilty and imposed sentences of ten years for the robbery and eight years for the use of a firearm.

Inasmuch as there is one clear-cut reversible error, we confine our discussion to that point and such others as may recur upon a retrial. Embrey, one of the robbers, admitted his guilt and testified for the State. He said that when he return-

ed to Brinkley several weeks after the robbery to pay Odom, he left at Odom's house a suitcase containing clothing and some stolen blank Oklahoma car titles. Embrey testified that after his arrest he gave a federal special agent, Paul Darby, permission to pick up the suitcase. Darby testified that he did so, telling Mrs. Odom that he was Embrey's stepbrother.

Mrs. Odom testified for her husband, asserting his innocence. On cross-examination she denied having made any statement to Darby about the Oklahoma car titles. The court permitted the State to attack Mrs. Odom's credibility by means of Darby's rebuttal testimony that Mrs. Odom said to him that she thought Embrey had the car titles with him when he was arrested.

The court's ruling was erroneous. Embrey's possession of the titles at the time of his arrest was a collateral matter, in that the State could not have proved it as part of its case in chief. *Peters* v. *State,* 103 Ark. 119, 146 S.W. 491 (1912). It is firmly settled that a party cannot cross examine a witness about a collateral matter and then impeach him by proof of a contradictory statement. *Peters* v. *State, supra; Tullis* v. *State,* 162 Ark. 116, 257 S.W. 380 (1924). We certainly cannot say that the error was harmless. To the contrary, the prosecutor argued to the jury that Mrs. Odom had lied to Darby and that the rest of her testimony was therefore open to question.

Odom insists that the trial judge should have told the jury as a matter of law that Odom's 19-year-old stepson, Steve Nash, was an accomplice. Steve was living in the Odom home and testified that he heard Odom and the other men planning the robbery, which was to be brought off by tying up the store manager at his home and compelling him to reveal the combination to the safe. Steve knew the details of the plan. He had previously worked at the store and told the men where the safe was and how much money it might contain. He showed Embrey the store manager's house and went with Embrey to buy cord for tying up the manager. Steve had no part in the actual robbery, received none of its proceeds, and testified that he was afraid to report the crime to the police.

In our various definitions of an accomplice we have said

that he is one who participates in any manner in the criminality of the act (*Rhea* v. *State,* 226 Ark. 68, 288 S.W. 2d 34 [1956]) and that he is one who could have been indicted for the offense (*McClure* v. *State,* 214 Ark. 159, 215 S.W. 2d 524 [1948]) or convicted of it (*Havens* v. *State,* 217 Ark. 153, 228 S.W. 2d 1003 [1950]). That one knows that a crime is about to be committed does not necessarily make him an accomplice. *Simon* v. *State,* 149 Ark. 609, 233 S.W. 917 (1921). Nor does concealment of a crime for fear of one's own safety. *Melton* v. *State,* 43 Ark. 367 (1884).

In harmony with the general rule, the court should not instruct the jury that a certain witness is an accomplice if there is any dispute in the testimony upon that point. *Simms* v. *State,* 105 Ark. 16, 150 S.W. 113 (1912). Whether a witness is an accomplice is ordinarily a mixed question of law and fact, to be submitted to the jury. *Norris and Hamlett* v. *State,* 168 Ark. 151, 269 S.W. 46 (1925); *Rogers* v. *State,* 136 Ark. 161, 206 S.W. 152 (1918). Here a jury could readily find that Steve Nash was not an accomplice, in that he did not take part in any criminal act, that he supplied information that was readily available to anyone, and that fear kept him from reporting the crime. The court correctly refused to instruct the jury that Steve was an accomplice as a matter of law.

Odom argues that Embrey's suitcase and the Oklahoma titles were not admissible. Although we see no reason for the titles to play any part in a new trial, there was actually no error as the issues arose. The prosecutor took the position that he had to prove, on the one hand, Odom's activity in planning the crime and, on the other, the execution of the plan by others. The suitcase and titles were offered solely to corroborate Embrey's testimony about the crime. The court twice instructed the jury that the evidence was admitted only for that corroborative purpose. In both instances defense counsel were apparently satisfied with the instruction and made no other objection.

It is also argued now that the suitcase was inadmissible, because Darby obtained it by telling Mrs. Odom that he was Embrey's stepbrother. When a plain-clothes or undercover officer misrepresents his identity as a reasonable means of ap-

prehending a criminal, we do not think that the guilty person is in a position to complain unless the conduct should be prohibited, such as an entrapment. See *Peters* v. *State,* 248 Ark. 134, 450 S.W. 2d 276 (1970). Moreover, since Embrey authorized Darby to get the suitcase and it was used only to corroborate Embrey, we do not see that Odom's rights were violated. Similarly, he does not have standing to complain that a car belonging to one of the other three participants in the crime may have been searched in Missouri without a valid search warrant.

Reversed.

Carter A. WORLEY Jr. a/k/a Jack WORLEY *v.* STATE of Arkansas

CR 75-177 533 S.W. 2d 502

Opinion delivered March 8, 1976

Jon R. Sanford and *James R. Pate,* for appellant.

Jim Guy Tucker, Atty. Gen., by: *Jackson Jones,* Asst. Atty. Gen., for appellee.

JOHN A. FOGLEMAN, Justice. Carter A. Worley, Jr., was tried on a two-count indictment charging him with obtaining money under false pretenses. The first count charged that he had falsely represented to Mr. and Mrs. Albert Ford, for whom he was building a house, that certain material bills had been paid for the purpose of inducing them to authorize additional construction. In the second count, he was charged with having, on August 23, 1973, fraudulently altered a promissory note executed by the Fords with the intent to defraud the Fords and the Bank of Dover of $10,000. He was acquitted of the first count, but found guilty of the second, in a jury trial held on October 29, 1974. We find no reversible error and affirm.

The first contention made by appellant is that there was prejudicial error in the denial of his motion for continuance. Worley was charged by information filed on October 25, 1973. His motion was made on October 18, 1974 and heard at a pretrial conference on October 28, 1974. The motion was written, but not verified by affidavit. In the motion, Worley alleged that, after the information was filed, he was informed by "the State" that he would not be prosecuted, and was not told that the case would be tried until about October 1, 1974 and was not arraigned until October 10, 1974. He also alleged that he did not make any arrangements to be represented by counsel until October 18, 1974, and that his attorney did not have sufficient time to properly prepare for trial on October 29. He further alleged that certain documents important to his defense were in the possession of parties residing in Kansas and the time for obtaining those documents before trial was insufficient. Worley asked a continuance for at least 60 days, saying that he could prepare his defense and obtain the documents within that time.

The granting or denial of a motion for a continuance lies within the sound judicial discretion of the trial judge. *Cox* v. *State,* 257 Ark. 35, 513 S.W. 2d 798; *Thacker* v. *State,* 253 Ark. 864, 489 S.W. 2d 500. There is no abuse of discretion in the denial of this motion which failed to meet the statutory requirements, which include verification under oath. Ark. Stat. Ann. §§ 27-1403 (Repl. 1962), 43-1706 (Repl. 1964). See, *Carter* v. *State,* 196 Ark. 746, 119 S.W. 2d 913; *Thacker* v. *State,*

supra. The allegations of the motion are deficient in that no reason for his delay in employment of counsel from October 1 to October 18 is stated and the conclusional allegations about the evidentiary documents he desires were extremely vague, not only as to the description of the documents and a statement of their relevance, but as to the identity of their custodian. The motion, on its face, did not state facts which would constitute grounds for a continuance. *Conway* v. *State,* 256 Ark. 131, 505 S.W. 2d 758; *Brown* v. *State,* 252 Ark. 846, 481 S.W. 2d 366; *Parker* v. *State,* 179 Ark. 1064, 20 S.W. 2d 113. But, even worse, although appellant was given the opportunity to substantiate any ground alleged for continuance when the motion came on for hearing, he failed to do so. When the state controverted the allegation that Worley had been told by the state that he would not be prosecuted on the charges, his attorney offered to show by testimony of Worley that the impression had been left with him that he would not be, and that he had no information to the contrary until he was advised in early October of his impending arraignment on October 10. This proffer was rejected by the judge, who held that it was immaterial, noting that the charge had remained pending since its filing. It is notable that the proffer does not include any indication of the manner in which Worley was left with his impression or any justification for such a belief.

If defense counsel was tardily employed, Worley failed to show that anyone except him was to blame. There is no indication that Worley is or was indigent. According to Worley's testimony, the attorney who did represent him at the trial and on the motion was the same lawyer who had assisted him in posting bail on the charge and this attorney had stated then that he would not further represent appellant until appellant had arranged to employ him for defense of the charge. In the intervening period he had consulted the same attorney about civil litigation and there were probably some conversations about the charges during the time the attorney was representing him in these matters. Worley said that he received a letter about October 7 advising him that the case was to be tried and that he actually learned that he was to come to the courthouse for arraignment by a call from this attorney's office. Even then "financial arrangements" for the employment were not made until October. If counsel was

handicapped in preparing for trial, it was because of Worley's dilatory action and he was entitled to no relief on that account. See *Gathright* v. *State,* 245 Ark. 840, 435 S.W. 2d 433; *Nash* v. *State,* 248 Ark. 323, 451 S.W. 2d 869; *Shinsky* v. *State,* 250 Ark. 620, 466 S.W. 2d 911.

Worley's testimony about the documentary evidence was little better than his allegation. He revealed that, at the time of his alleged criminal conduct, he was employed by, but not a stockholder of, Worley Construction Company, a corporation, of which his son, daughter and wife were the major stockholders, that the company had subsequently gone out of business and its records packed up for safekeeping. Except to say that the corporation actually was the builder of the house for the Fords and that the records were important to his defense, he failed to inform the court of the relevance and materiality of the records he sought or to further identify them or their contents. He was very indefinite about where or in whose custody they were, except that his mother-in-law and father-in-law had possession of them in Kansas. He did say that he had notified the parties concerned and had been promised, when he was able to reach these people by telephone during the preceding week, that these records would be mailed but that he had not received them. When the judge asked what assurance there was that this evidence would be available if additional time was granted, appellant's attorney said the documents were principally cancelled checks. Worley only verbally assured the court they would be forthcoming. Without more definite information or better assurance of the availability of these documents, the trial court was justified in denying a continuance on this ground. *Brown* v. *State,* supra; *Thacker* v. *State,* supra; *Conway* v. *State,* supra; *Shinsky* v. *State,* supra. It would appear, at least superficially, that the records sought would more likely relate to the charge on which appellant was acquitted than that on which he was convicted. There is no error in denial of a motion for continuance to obtain evidence that is not material and relevant. *Morphew* v. *State,* 84 Ark. 487, 106 S.W. 480; *Padgett* v. *State,* 171 Ark. 556, 286 S.W. 819.

Even though the denial of his motion for continuance was included as an allegation of error in motion for new trial

filed by appellant, he gave no additional information about the documentary evidence he sought or about prejudice. He only said that it unjustly deprived him of the right to accumulate evidence, obtain witnesses (not identified) or confer with counsel in order to adequately defend himself. The motion for new trial was not denied until nearly eight months had elapsed after the trial. The burden of showing abuse of discretion in denial of a continuance was on appellant. *Cox* v. *State,* 257 Ark. 35, 513 S.W. 2d 798. He failed to meet it.

Appellant attacked the jury panel by motion to quash because jurors whose names were on a panel that had been quashed previously were not put back into the jury wheel when the panel from which the jury in his case was drawn was drawn from the jury wheel. It was shown that 100 names were drawn from an 850-name jury wheel on March 18, 1974 and 40 more on June 26, 1974, but that this combined panel was quashed on October 11, 1974, and a new panel drawn for the remainder of the April, 1974 term and for the November, 1974 term. Somehow it was calculated that when this last panel was drawn there were only 660 names in the wheel and that many of the 140 persons whose names had been originally drawn either did not serve or had not fully served the time they could have been required to do so. The circuit judge had specifically directed that these names not be returned to the jury wheel. It is appellant's contention that the statute required that there be at least 800 names in the jury wheel when a panel was drawn. The record does not disclose how many days any of these 140 persons might have been required to report for jury duty. It is clear that the 100 drawn in March had been subject to call for six months. No juror may be required to report for more than a six-month period or to report for more than 24 days. Ark. Stat. Ann. § 39-104 (Supp. 1974). There was probably good reason for the court to direct that these names not be returned to the jury wheel. Ark. Stat. Ann. § 39-212.1 (Supp. 1975) contains a provision that the circuit judge may, in the exercise of his discretion, direct the jury commissioners to submit additional names to be placed in the jury wheel prior to any additional drawing of jurors. There is no requirement that the minimum number of 800 names be constantly maintained after the original panel has been drawn from it. This is not the same situation we had in

Horne v. *State,* 253 Ark. 1096, 490 S.W. 2d 806. There the trial court deviated from the statutory requirement that there be a new jury wheel for each calendar year by simply adding 74 names to the 1970 jury wheel in order to constitute the 1971 jury wheel. The flaw that occasioned our disapproval of the procedure by which the chancery court used 96 names drawn from a jury wheel which were not placed in the jury book nor returned to the jury wheel in *Shelton* v. *State,* 254 Ark. 815, 496 S.W. 2d 419 was that these 96 people were rendered unavailable for use in criminal cases. We said the better procedure would have been for the chancery court to take its jurors from the list on the jury book and to return them for future use in other trials. This is an entirely different situation.

Another objection to the jury panel was that there were two or three persons on the list of 850 who were not registered voters. The clerk of the court explained that this meant that when these people were called to serve they were not qualified electors but that the circuit judge always directed such people to register to vote. It is not indicated that any of these people served on appellant's jury or even that they were on the panel drawn from the wheel. There is no indication that their names were not on the voter registration list when selected by the jury commissioners. It is, as the state suggests, quite possible that their names were subsequently removed. At any rate, we cannot say that the inclusion of three names of persons not qualified out of a list of 850 would invalidate the entire list, or a panel drawn from it.

Appellant also contends that the manner in which the list was made up invalidated it. He says that the typing of the list selected by the commissioners by a secretary of one of them invalidated the jury wheel. His argument is based upon the absence of any written oath filed by the typist and of any docket entry to the effect that any oath had been administered. He also contends that the typist was given the list by her employer and never met any of the other jury commissioners who did not verify the authenticity of the list given her either in person or by signatures or initials. There was also testimony that the marked voter registration list identifying those selected from it remained unsafeguarded in her

desk during the entire two-week period required for her typing of the list. The office was open to the public during working hours and several persons had access to it both day and night. The typist testified that she was brought to the court where an oath was administered by the circuit judge. The manner in which she described the oath indicated that it was in conformity with the statute. We find no error in the court's accepting her testimony about this matter and we certainly could not say that her employment was unauthorized if the judge actually administered the oath to her. The trial judge made a specific finding that there had been substantial compliance with the statute. Even though we think that better precautions probably should have been taken and better records kept, we cannot say that the trial court's finding was erroneous.

Appellant asserts error in the denial of the admission into evidence of what he describes as "business records." Appellant testified that James Morrow, office manager, did all of the paper work in the construction company office and that, to the best of his knowledge, the note on which the charge was based was prepared by Mr. Morrow. On this note the figures indicating the amount actually read "$16,000." The complaining witness testified that the note had been altered from $6,000. The note itself showed that the figure "1" did not appear on the same level as the remainder of the figures in the principal amount, being a little lower. All of the figures were typed. Appellant proffered as exhibits a purported copy of a letter from Morrow to appellant, carbon copies of seven checks and two contracts. On some of these there were irregularities in the typing so that letters in the same word did not all appear on the same line. In making the proffer appellant's attorney stated that this was a *random sampling of papers* from the construction company's business and that all of them were prepared by Morrow, who was dead at the time of trial and that these papers were prepared in the regular course of business and had been in the sole exclusive possession of appellant since their preparation and that they reveal irregularities of the location of numbers with reference to lines on the page showing that the typewriter could be responsible for the mislocation of the "1" in the principal sum appearing on the face of the note. The proffer was refused on the basis of hearsay.

Appellant argues here that these exhibits were admissible under the Business Records Act Ark. Stat. Ann. § 28-928 (Repl. 1962). Whatever might be otherwise said about their admissibility, they are certainly not admissible under the Business Records Act. The section to which appellant refers makes writings made as a memorandum or record of any act, transaction, occurrence *or event,* if made in the regular course of business and if it was the regular course of such business to make such memo or record at the time of the act, transaction, occurrence or event or within a reasonable time thereafter. The records simply were not proffered as evidence of any *act, transaction, occurrence,* or *event* of which they could be considered as a memorandum or record. There was no attempt to make a business record of the manner of operation of a typewriter and the transactions recorded were wholly irrelevant to the case on trial.

The only purpose of the act was to eliminate the necessity of calling as witnesses everyone who had knowledge of the transaction in order to remove the hearsay objection to the record and declarations therein as evidence of the particular matter recorded, which would otherwise be inadmissible, and nothing else. See *Shehtanian* v. *Kenny,* 156 Cal. App. 2d 576, 319 P. 2d 699 (1957); *Fagan* v. *Newark,* 78 N.J. Super. 294, 188 A. 2d 427 (1963); 30 Am. Jur. 2d 52, Evidence § 933; McCormick on Evidence (2d Ed.) 729, § 312; 2 Jones on Evidence (6th Ed.) 355, § 12.11; V Wigmore (Chadbourne Rev.) 489, § 1561 a. The fact stated in the entry made must be material, relevant and evidentiary as to the issue. *D'Amato* v. *Johnston,* 140 Conn. 54, 97 A. 2d 893, 38 ALR 2d 772 (1953).

Appellant also attempted to testify that Morrow had stated in the presence of the complaining witnesses, their attorney and appellant that he (Morrow) prepared the note in question in his office on his own typewriter with the amount shown as $16,000 and that it had not changed form from the time he made it and gave it to appellant for signature by the complaining witness up to the time of the conference at which he made the statement. The circuit judge held that this was hearsay and obviously introduced as truth of the matter asserted. We agree with the trial judge. This certainly was not offered to show whether the statements or declarations

were made and we do not understand the hearsay rule to be relaxed just because of the difficulty of obtaining other proof, as appellant contends. The exception relied upon by him, even if otherwise applicable, requires that the declarant be disinterested, that his statement must have been before the dispute or litigation, and that it be made without bias on account of existence of a dispute which the declarant might be disposed to favor. *St. Louis, I.M. & S. Ry. Co.* v. *Gibson,* 113 Ark. 417, 168 S.W. 1129. The declaration was made in connection with the dispute so the statement of Morrow could not come within this exception.

The judgment is affirmed.

The Chief Justice, Mr. Justice Byrd and Mr. Justice Holt dissent.

CONLEY BYRD, Justice, dissenting. The only count upon which the jury found appellant Worley guilty was that he altered a $6,000 note signed by Mr. and Mrs. Ford to read $16,000. The main evidence upon which the State relied to show the alteration was the fact that the "1" in the figure $16,000 was not in line with the remainder of the figures. To counter this proof Worley sought to introduce, under the "Business Records as Evidence Act," Ark. Stat. Ann. § 28-928 (Repl. 1962), other prior business transactions that had been prepared by his office manager, James Morrow, to show that the mis-location of the "1" was due to Morrow's typing and not to a subsequent alteration. Among the records proffered was a draft to Gosnell Buick-Chev. Co. (attached hereto as an appendix) which shows that, on the typewriter used, the lower case "l" was also used as the numeral "1" and that in the figure $90.11 the 11¢ was not in line with the remainder of the figures. Neither was the "11" in Gosnell in line with the remainder of the name Gosnell. At the time of trial Morrow was dead; thus, it became necessary to show that both the proffered records and the Ford note in question were prepared by the same man. To lay the foundation for that proof, Worley sought to prove the Gosnell Buick-Chev. Co. transaction to establish that the draft was made while Morrow worked for him. The trial court, without objection from the State, ruled such evidence hearsay and collateral

and would not permit its introduction. Somehow, the majority says it is not relevant.

The hearsay ruling by the trial court was clearly erroneous. As pointed out in *Frampton* v. *Hartzell,* 179 Cal. App. 2d 771, 4 Cal. Rptr. 427 (1960), it is true that business records are hearsay, but "nevertheless they are admissible as being an exception to the hearsay rule, hence an objection only that they are hearsay is not a valid objection."

Neither can it be said that the proof offered is collateral or not relevant. The conduct of the jury leaves no doubt about the relevancy or materiality of the evidence — *i.e.* their desire to compare the typing on the note with other typing of Morrow is demonstrated by the following excerpt from the record:

> "THEREUPON, after a period of deliberation by the Jury, the Jury returned into open court and with the defendant present the following proceedings were had:
>
> THE COURT: Members of the Jury, I am advised by the bailiff that you have a question.
>
> FOREMAN: Yes, Your Honor. The question came up to us, several members of the jury would like to see them other two notes, the first two six thousand dollar notes.
>
> THE COURT: Only the evidence which has been introduced in this case is . . .
>
> FOREMAN: They're not, they're not available?
>
> THE COURT: They're not introduced in this case, no, sir. Only the evidence which was introduced in this case may be submitted to the jury for your consideration.
>
> . . .
>
> JURY AGAIN RETIRES."

The majority's assertion that the records "simply were

not proffered as evidence of any *act, transaction, occurrence,* or *event* of which they could be considered as a memorandum or record" is neither supported by the record nor the authorities upon which it relies. In *McCormick on Evidence* § 312 (2d ed. 1972), cited by the majority, it is stated:

> "Implementing the common law exception, courts have traditionally required that one offering proof under the regularly kept records exception either call as witnesses all links in the organizational chain by which the entry was made, *i.e.,* all entrants, informants, and intermediaries, or establish their unavailability. This was not part of the requirement of unavailability. To the contrary, it assumed that availability did not render the proof inadmissible, apparently on the reasonable anticipation that the participants would not remember the particular transaction at issue. The requirement was one as to the manner of proving that the offered record met the other requirements of the exception.
>
> In light of present business practices, the common law requirement is clearly unreasonable. The complex nature of modern business organizations is such that all participants in the preparation of a record can most often not be identified or, if they can be pinpointed, could not reasonably be expected to have any helpful recollection concerning the specific transactions at issue. Moreover, production of the large numbers of participants that would be required would be a substantial burden on the offering party, a burden not likely to be justified by the benefits to be derived from requiring production of all participants. The revisions of the exception have dealt with this problem in various manners. The Commonwealth Fund Act did not deal with the matter expressly, although it seems clear that it was proposed principally to alleviate the burdensome method of proof required by some courts under the common law rule. The same is true of the Model Code of Evidence and the Uniform Rules of Evidence. On the other hand, the Uniform Act, the Texas statute, and the Proposed Federal Rules specifically provide that the foundation may be laid by 'the custodian or other

qualified witness' thus expressly rejecting the requirement that all participants be called."

In 5 *Wigmore on Evidence* § 1561a (Chadbourn rev. 1974), cited by the majority, we find the following comment:

> "This proposed rule was after a long interval adopted by legislation in a few states; in Rhode Island, the attempt to improve upon it produced an inferior pedantic formulation. The liberal interpretation of it by courts should serve to give the exception a rational relation to the search for truth. But much depends on whether the preverse stolidity of the juristic mind can be compelled by a few statutory words to leave its accustomed ruts."

Now, obviously, if Morrow had been alive, he could have been called to show that the records proffered were made on the dates in question in connection with the business transaction that they represented. Likewise, if the parties to the transactions, such as those at Gosnell Buick-Chev. Co., had been called, their testimony would have been relevant to show that the event represented by the record actually took place on that specific date. If the proof of those parties would have been permissible to show the events and the time of their occurrence; then, obviously, the records were admissible under the "Business Records as Evidence Act" as construed by the authorities cited in the majority opinion.

For the reason stated, I respectfully dissent.

HARRIS, C.J. and HOLT, J., join in this dissent.

[redacted]

APPENDIX #CR-75-117

WORLEY CONSTRUCTION CO., INC.
107 SOUTH BOULDER
RUSSELLVILLE, ARKANSAS 72801

544

81-329
821

PRE-DATED CHECK
11-26-72

12-20-71

$90.11

NINETY DOLLARS 11 CTS

Gosnell Buick -Chev. Co
Russellville, Ark.

WORLEY CONSTRUCTION, INC.

NOT NEGOTIABLE -

BANK OF DOVER
DOVER, ARKANSAS 72837

⑆0821⑈0329⑆

WORLEY CONSTRUCTION CO., INC.
RUSSELLVILLE, ARK.

DATE	DESCRIPTION	AMOUNT	DISTRIBUTIONS ACCT. NO.	DISTRIBUTIONS AMOUNT
12-20-71	Repairs INVOICE # 2062			$90.11

EMPLOYEE _____

PERIOD ENDING	EARNINGS HOURS	EARNINGS RATE	EARNINGS AMOUNT EARNED AT REGULAR RATE	EARNINGS OVERTIME AND OTHER	TOTAL EARNINGS	DEDUCTIONS SOCIAL SECURITY TAX	DEDUCTIONS WITHHOLDING U. S. INC. TAX	DEDUCTIONS STATE INCOME TAX	DEDUCTIONS	DEDUCTIONS	TOTAL DEDUCTIONS	NET PAY

Carl WALTERS *v.* STATE of Arkansas

CR 75-214 533 S.W. 2d 517

Opinion delivered March 8, 1976

Harold L. Hall, Public Defender, by: *Robert L. Lowery,* Dep. Public Defender, for appellant.

Jim Guy Tucker, Atty. Gen., by: *Terry Kirkpatrick,* Asst. Atty. Gen., for appellee.

JOHN A. FOGLEMAN, Justice. Appellant challenges his sentence to five years' imprisonment with credit thereon for six months pretrial incarceration on a charge of assault with intent to kill by firing a pistol and wounding Levonia Gray. He contends that the court abused its discretion by requiring appellant to accept a greater term of imprisonment as a condition for receiving credit for pretrial incarceration, saying

that he was thereby effectively denied "jail time credit" solely on the basis of indigency.

The circuit judge first indicated that since he had given another man a three-year sentence, he would sentence appellant for three years. The deputy public defender representing appellant then called the court's attention to the fact that appellant had been in custody for six months, whereupon the judge said, "I'll give him five and give him credit for his jail time." Appellant's question whether he could get some kind of probation received a negative response. The judge then asked: "Which do you want? Three or five? You can get five with credit for your jail time or three without it. Which do you prefer?" Appellant answered, "Five" and was accordingly sentenced, with the requirement that he serve one-third of the sentence before being eligible for parole.

We agree that the manner in which the court's sentencing discretion was exercised was erroneous. A sentence must be definite, certain and not dependent upon any condition or contingency, unless there is specific statutory authorization. *State* v. *Sturgis,* 110 Me. 96, 85 A. 474 (1912). In the absence of statute, a court has no power to impose a sentence which gives, or imposes upon, the defendant a choice of alternatives. *State* v. *Johnson,* 30 N.J.S. 235, 104 A. 2d 87 (1954); *State* v. *Sturgis,* supra. If such a sentence is not void, it is at least irregular. *State* v. *Sturgis,* supra; *State* v. *Johnson,* supra; *Keene* v. *State,* 37 Ala. App. 713, 76 S. 2d 180 (1954).

Of course, we recognize that where there is an inconsistency, the sentence controls, not the judge's preliminary statements. *People* v. *Champtal,* 201 N.Y.S. 2d 125 (1960). See also, *United States* v. *Hark,* 320 U.S. 531, 64 S. Ct. 359, 88 L. Ed. 290 (1944), reh. den., 321 U.S. 802, 64 S. Ct. 517, 88 L. Ed. 1089 (1944). But the imposition of a greater sentence because of a good faith request for pretrial incarceration is in itself an abuse of the sentencing court's discretion. See *Lange* v. *State,* 54 Wis. 2d 569, 196 N.W. 2d 680 (1972).

It appears that the irregularity in sentencing was prejudicial to appellant and the state does not suggest that it was

not. This is the sort of error that may be corrected by reduction of the sentence as excessive under the provisions of Ark. Stat. Ann. § 43-2725.2 (Supp. 1975); *Abbott* v. *State,* 256 Ark. 558, 508 S.W. 2d 733. It is obvious that the three-year sentence originally proposed by the judge was arrived at without consideration of appellant's indigency or the time he had spent in jail awaiting trial, so appellant's sentence is reduced to three years with credit for six months' pretrial incarceration.

The judgment is accordingly modified and affirmed.

Calvin BROWN and Cecil BETTIS Jr. *v.*
STATE of Arkansas

CR 75-27 534 S.W. 2d 213

Opinion delivered March 8, 1976

[Rehearing denied April 5, 1976.]

Pickens, Boyce, McLarty & Watson and *McArthur, Lofton, & Wilson, P.A.*, for appellants.

Jim Guy Tucker, Atty. Gen., by: *Gary Isbell*, Asst. Atty. Gen., and *Leroy Blankenship*, 3rd Judicial Circuit Prosecuting Attorney, for appellee.

J. FRED JONES, Justice. Calvin Brown and Cecil Bettis, Jr. were jointly tried before a jury and convicted of the crime of burglary. They were sentenced to five years each in the Department of Correction and a 15 year sentence, with five years suspended, was added to Brown's sentence for the use of a firearm in connection with the crime. Both Brown and Bettis have appealed to this court and are represented by separate attorneys who have filed separate briefs.

Brown and Bettis were also jointly tried and convicted at a subsequent trial on charges of robbery arising out of the same transactions or incidents as did the burglary charges. They both appealed from the judgments on the robbery convictions but their appeals in the robbery case are treated in a separate opinion.

The facts, as gathered from the evidence in the record, appear as follows: On a Sunday evening Mr. and Mrs. Harper returned to their home in Newport from playing bridge with friends. They unlocked the back door of their home and when they entered their living room, they were confronted by two men with stocking masks over their heads and faces. One of the intruders carried a pistol with which he forced the Harpers to lie on the floor while their hands and feet were tied with nylon cord or rope, and tape was wrapped around their heads and drawn over their eyes and mouths. Some valuable rings were taken from Mrs. Harper's fingers; Mr. Harper's wallet containing cards and money was taken from his pocket and he was rendered temporarily unconscious by blows on the head and shoulder with a pistol or some other instrument. The Harpers were then dragged across the floor out of the living room. Mrs. Harper heard one of the intruders in her dining room calling out what appeared to be signals on a walkie-talkie "K-1 to K-2" or something like that. The intruders then left.

Mrs. Harper soon freed herself from her bonds and called the police. The police officers arrived in a matter of minutes and an ambulance was called to the scene and took the Harpers to the hospital. The glass in a side window of the Harper residence had been broken over the latch and pry marks, as if made by a screwdriver, appeared on the outside windowsill.

Mr. Eugene Tidwell, who lived about one and one-half blocks down the street from the Harper residence, had been sitting on his front steps and had observed Brown and Bettis pass his house in Bettis's automobile with Bettis driving. He observed the Bettis automobile stop for a few minutes on three different occasions within a short period of time between his house and the Harper residence, the last stop being closer to the Harper home than to his own. Soon after he last saw the Bettis automobile stop, and then move on, he heard the sirens from the ambulance and police vehicles and observed the commotion as the vehicles converged at the Harper residence. He walked up to the Harper residence and upon inquiry by the investigating officers, he advised them of what he had seen in relation to Brown and Bettis, and described the Bettis automobile to the officers.

Through radio communication between the police officers, a roadblock was immediately set up between Newport and Batesville. Bettis's name and his automobile description were radioed to officers manning the roadblock and within a short period of time Brown and Bettis appeared and stopped at the roadblock in Bettis's white over yellow Chrysler automobile with Bettis driving.

The officers searched Brown and Bettis at the roadblock and brass knuckles were removed from Brown's hip pocket. As Brown got out of Bettis's automobile, the officers observed and removed from the floorboard of the automobile, on the passenger side where Brown had been sitting, a loaded .45 caliber semi-automatic pistol.

Brown and Bettis were placed under arrest and taken in a police patrol car to the police station in Newport. Bettis's automobile was also driven to the police station where it was searched that same evening. A walkie-talkie radio transmitter-receiver was found under the front seat on the passenger side of the automobile. A loaded .25 caliber semi-automatic pistol was found under the armrest between the driver and passenger side of the front seat. A briefcase containing a .45 caliber size pistol holster, a flashlight, and some .38 and .45 ammunition were found in the trunk. Three screwdrivers were found in the back seat and one of the diamond rings taken from Mrs. Harper's fingers was found between the backrest and seat cushion in the rear seat of the automobile. The officers returned to the scene of the roadblock and in searching the ditches and shoulders of the highway in the direction from which the Bettis automobile had approached, they found a brown paperbag containing Mr. Harper's wallet. The wallet was found in the ditch on what would have been Bettis's righthand side of the highway, about 75 or 80 yards from where the roadblock had been maintained, and within plain view of the roadblock. The wallet contained Harper's driver's license, his ID and credit cards but no money.

As already stated, the appellants are represented by separate counsel and have filed separate briefs on this appeal. In some instances they have designated the same points on

which they rely for reversal and in other instances they have designated separate points not common to both, so we shall discuss the designated points accordingly.

The appellant Brown contends that his arrest was illegal. Both Brown and Bettis contend that the search of the Bettis automobile was illegal, and that the trial court erred in overruling their motions to suppress evidence obtained in the search. We find no merit in these contentions.

Brown argues that his arrest at the roadblock was illegal because it was without probable cause. State policeman Noel Baldridge, who made the arrest, had received information by police radio that a robbery had just occurred in Newport; that Bettis was a prime suspect and that his automobile should be stopped. State Police Lieutenant Wilson broadcast the information to Baldridge and, aside from information that Bettis and Brown had just left the scene of the crime, Wilson had independent information of other similar crimes in which Bettis and Brown had been involved or suspected.

The arresting officer is entitled to credit for the collective knowledge of the entire police team in such cases. *Johnson* v. *State,* 249 Ark. 208, 458 S.W. 2d 409. In *United States* v. *Stratton,* 453 F. 2d 36 (8th Cir. 1972), *cert. denied* 405 U.S. 1069, the court said:

> "We think the knowledge of one officer is the knowledge of all and that in the operation of an investigative or police agency the collective knowledge and the available facts are the criteria to be used in assessing probable cause."

Furthermore, all automobiles were being stopped at the roadblock and a loaded .45 caliber pistol was found on the floorboard where Brown was sitting and brass knuckles were found in his hip pocket.

Both appellants argue that the affidavit upon which the search warrant was issued was insufficient because it contained hearsay, which was constitutionally impermissible under *Aguilar* v. *Texas,* 378 U.S. 108 (1964) and *Spinelli* v. *United States,* 393 U.S. 410 (1969), since the reliability of the hearsay

source was not established and the statements were insufficient to show probable cause anyway. The *Aguilar* and *Spinelli* decisions require that the affidavit for a search warrant contain sufficient information to enable the issuing magistrate to determine that the hearsay informant is reliable, and that sufficient underlying circumstances be related to establish probable cause for the warrant. Overstrict interpretation of the rule laid down in *Aguilar* and *Spinelli* has been tempered and clarified by a number of decisions since *Aguilar* and *Spinelli*. In *United States* v. *Bell,* 457 F. 2d 1231 (5th Cir. 1972), the court said:

> ". . . [A] specter has arisen in this case that deserves to be laid to rest. It is now a well-settled and familiar concept, as enunciated by *Aguilar* and *Spinelli,* that supporting affidavits in an application for a search warrant must attest to the credibility of an informant and the reliability of his information. * * * We have discovered no case that extends this requirement to the identified bystander or victim-eyewitness to a crime, and we now hold that no such requirement need be met. . . Such observers are seldom involved with the miscreants or the crime. Eyewitnesses by definition are not passing along idle rumor, for they either have been the victims of the crime or have otherwise seen some portion of it. A 'neutral and detached magistrate' could adequately assess the probative value of an eyewitness's information because, if it is reasonable and accepted as true, the magistrate must believe that it is based upon first-hand knowledge. Thus we conclude that *Aguilar* and *Spinelli* are limited to the informant situation only."

See also *United States* v. *Burke,* 517 F. 2d 377 (2nd Cir. 1975); *United States* v. *Unger,* 469 F. 2d 1283 (7th Cir. 1972), *cert. denied* 411 U.S. 920 (1973); *United States* v. *Mahler,* 442 F. 2d 1172 (9th Cir. 1971), *cert. denied* 404 U.S. 993 (1971); *United States* v. *McCoy,* 478 F. 2d 176 (10th Cir. 1973), *cert. denied* 414 U.S. 828 (1973); *United States* v. *Rajewich,* 470 F. 2d 666 (8th Cir. 1972); *People* v. *Glaubman,* 175 Colo. 41, 485 P. 2d 711 (1971); *Galloway* v. *United States,* 326 A. 2d 803 (D.C. App. 1974); *Wolf* v. *State,* 281 So. 2d 445 (Miss. 1973); *State* v. *Paszek,* 50 Wis. 2d 619, 184 N.W. 2d 836 (1971); *Erickson* v.

State, 507 P. 2d 508 (Alaska 1973); *Mobley* v. *State,* 270 Md. 76, 310 A. 2d 803 (1973).

The affidavit for search warrant contained information appearing in the record as follows:

> "At 6:15 the Police Dept. received a call from Harpers Home at 806 Third, that there had been a robbery, Officers arrived and found Mr. & Mrs. Harper tied up. They advised there were two subjects who were waiting for them when they arrived, they were armed. Cecil Bettis, Jr. was seen parked beside the Harpers home just prior to the robbery, with another subject with him. A.P.B. was placed on Bettis and the subject was arrested at Salado, and had in his possession a .45 Auto. Subject Calvin Brown who had been arrested in the past for Arson, was with him. (over)
> and a pair of Brass Knuckles, Subject Calvin Brown was also implicated in a Burglary involving Robert Holden's House. The subjects had just enough time to get to Salado, from the time the Harpers were robbed."

We are of the opinion that the affidavit met our own requirements as stated in *Walton & Fuller* v. *State,* 245 Ark. 84, 431 S.W. 2d 462 (1968). In *French* v. *State,* 256 Ark. 298, 506 S.W. 2d 820 (1974), we said: "We do not deem it necessary for an affiant applying for a search warrant to state reasons why a public official is a credible or reliable informant." Under the evidence in the case at bar a search warrant would not have been necessary under our decisions in *Easley* v. *State,* 255 Ark. 25, 498 S.W. 2d 664 (1973). *Cox* v. *State,* 254 Ark. 1, 491 S.W. 2d 802 (1973); *Wickliffe & Scott* v. *State,* 258 Ark. 544, 527 S.W. 2d 640 (1975).

We are of the opinion that the affidavit contained sufficient information to justify the magistrate in issuing the search warrant and that the search warrant was valid. Furthermore, the automobile belonged to Bettis and according to the testimony of Lieutenants Wilson and Pankey, Bettis authorized the search before the warrant was issued and further advised that no search warrant was necessary after the warrant was issued. The voluntariness of consent to search is a question of fact to be determined from all the cir-

cumstances. *Schneckloth* v. *Bustamonte,* 412 U.S. 218 (1973); *United States* v. *Gavic,* 520 F. 2d 1346 (8th Cir. 1975). We are of the opinion and so hold that the trial court did not err in overruling the appellants' motions to suppress the evidence obtained in the search of the automobile.

Brown contends that the trial court erred in denying his motion for a preliminary hearing prior to trial. We find no merit in this contention. In *Gerstein* v. *Pugh,* 420 U.S. 103, 95 S. Ct. 854 (1975), the Supreme Court said:

> ". . . [W]e adhere to the Court's prior holding that a judicial hearing is not prerequisite to prosecution by information. * * * Nor do we retreat from the established rule that illegal arrest or detention does not void a subsequent conviction. * * * Thus, as the Court of Appeals noted below, although a suspect who is presently detained may challenge the probable cause for that confinement, a conviction will not be vacated on the ground that the defendant was detained pending trial without a determination of probable cause."

We have several times held that the provision of Ark. Stat. Ann. § 43-601 (Repl. 1964), relied on by the appellant, is directory and not mandatory. There can be no reversible error solely because of a failure to take one lawfully arrested before a magistrate for preliminary examination. *Jones* v. *State,* 246 Ark. 1057, 441 S.W. 2d 458 (1969), and other cases therein cited.

Brown contends that the trial court erred in denying his motion for severance. The granting or denial of a motion for severance in noncapital cases lies within the sound discretion of the trial judge. *Lewis* v. *State,* 220 Ark. 914, 251 S.W. 2d 490 (1952); *Johnson & Loyd* v. *State,* 247 Ark. 1086, 449 S.W. 2d 954 (1970). See also *Ballew* v. *State,* 246 Ark. 1191, 441 S.W. 2d 453 (1969), and *Cox* v. *State,* 257 Ark. 35, 513 S.W. 2d 798 (1974).

Bettis contends that the trial court erred in allowing his former wife to testify as a witness for the state in violation of Ark. Stat. Ann. § 43-2019 (Repl. 1964). This contention is without merit for the reason there was no objection made

when his former wife was called to testify and this witness was not the appellant Bettis's wife at the time of the occurrence or at the time she testified.

Bettis also contends that inflammatory and prejudicial remarks made by the prosecuting attorney prejudiced his case. This contention relates to cross-examination of appellant Bettis, who testified in his own defense. He was asked on cross-examination if he then had a gun on his person and whether or not he had made certain threats of bodily harm if he was not acquitted. He denied having a gun or making such threats. Upon the examination of Mr. Bullard, a witness called by the appellant Bettis, the prosecuting attorney suggested to the court that Mr. Bullard be advised of his constitutional rights against self-incrimination prior to his testimony. Bettis's attorney objected to the comment and the objection was sustained. On cross-examination then the prosecuting attorney apologized for his remark if it was considered unfair and stated: "There has been some testimony here that made me think that the questions asked of you might have been different." At this point the appellant's attorney moved for a mistrial and the motion was denied. The appellant's attorney then requested the court to instruct the jury to disregard the statement and the court did so admonish the jury. An attorney has considerable latitude in cross-examining a witness in a criminal case as rather thoroughly set out in *Butler* v. *State,* 255 Ark. 1028, 504 S.W. 2d 747 (1974). We are of the opinion that the trial court did not err in overruling Bettis's motion for a mistrial.

Appellant Brown has designated additional points on which he relies for reversal as follows:

4

"The trial court erred in refusing appellant's motion for continuance and severance due to co-defendant's counsel introducing evidence prejudicial and inadmissable as to appellant.

5

The trial court erred in requiring appellant to proceed with the defense prior to co-defendant presenting his testimony.

6

The trial court erred in requiring appellant to take the stand when called as a witness by the co-defendant.

7

The trial court erred in quashing a subpoena duces tecum for the tax records of the prosecuting witness.

8

The trial court erred in refusing appellant's motion for mistrial based upon prosecuting attorney's repeated references to other charges pending against appellant.

9

The trial court erred in not requiring the prosecuting attorney to produce witnesses as previously ordered that would have provided testimony beneficial to appellant.

10

The trial court erred in placing unreasonable and prejudicial limitations on appellant's cross examination of the co-defendant.

11

The trial court erred in denying appellant's motion for a directed verdict of acquittal.

12

The trial court erred in instructing the jury on the firearm enhancement statute, and further erred in attempting to clarify said instruction orally for the jury."

The appellant Brown recognizes the close relation between his third, fourth, fifth and sixth points and has argued them together. We agree that the trial court erred in requiring Brown to take the witness stand when called as a witness by his co-defendant Bettis. We, therefore, see no reason to discuss appellant's fourth and fifth points as they are not likely to arise again on retrial.

Ark. Stat. Ann. § 43-2016 (Repl. 1964) provides as follows:

> "On the trial of all indictments, informations, complaints, and other proceedings against persons charged with the commission of crimes, offenses and misdemeanors in the State of Arkansas, the person so charged shall, at his own request, but not otherwise, be a competent witness, and his failure to make such request shall not create any presumption against him."

This court has not had occasion to pass on the question of whether a defendant may call his co-defendant as a witness and force him to either testify or assert his privilege against self-incrimination before the jury that is trying both together. We find few decisions from other jurisdictions on this particular point, but in *People* v. *Owens,* 291 N.Y.S. 2d 313, the court said:

> "[T]he privilege against self-incrimination is violated whenever a criminal defendant is compelled to take the stand and claim his privilege, whether at the behest of the prosecution or a codefendant."

Brown contends as his seventh point that the trial court erred in quashing a subpoena duces tecum for the tax records of the prosecuting witness Mr. Harper. Prior to trial appellant Brown filed a motion for subpoena duces tecum for the tax records of the prosecuting witness Harper and the motion was granted. Harper filed a motion to quash the subpoena duces tecum and after hearing on the motion it was granted and the subpoena duces tecum was quashed. The appellant Bettis had indicated in his testimony that he and Harper had been long-time friends and had participated in "fixing" horse races; that Harper while county judge had overpaid him for work he did for the county, and that Harper had discussed with him fictitious burglaries and robberies in order to collect money from insurance companies. These activities were emphatically denied by both Mr. and Mrs. Harper on cross-examination, and in support of his seventh point Brown argues as follows:

> ". . . Harper's activities and misappropriating funds from the County, fixing horse races and fraudulent insurance schemes makes it clear that such tax records

> would have been relevant and would have gone to the credibility of prosecuting witness. It is maintained by Appellant that the quashing of said subpoena does not meet the statutory requirements and to do so deprived Appellant of evidence that could have been used at his trial. For the foregoing reasons, Appellant respectfully moves this Court to reverse his conviction hereunder."

The trial court ruled the tax records collateral and inadmissible for the purpose they were sought and we think the trial court was right.

In *Spence* v. *State,* 184 Ark. 139, 40 S.W. 2d 986 (1931), we said:

> "It is well settled, however, in this State that a party who cross-examines a witness on collateral matters for the purpose of testing his credibility as a witness is bound by his answers and cannot contradict his testimony on a collateral issue. The reason for the rule is to avoid a multiplicity of issues which would tend to confuse and divert the minds of the jury from the main issue."

In *Fulwider* v. *Woods,* 249 Ark. 776, 461 S.W. 2d 581 (1971), we said:

> "A witness cross-examined as to matter collateral to the issues cannot be impeached by the cross-examining party by evidence contradicting his testimony. *Taylor* v. *McClintock,* 87 Ark. 243, 112 S.W. 405. The test of whether a fact is collateral is whether the cross-examining party would be entitled to prove it as a part of his evidence in chief. *Randall* v. *State,* 239 Ark. 312, 389 S.W. 2d 229."

We deem it unncessary to discuss the appellant Brown's eighth, ninth, tenth and eleventh assignments as they are not likely to arise again on retrial.

As to appellant Brown's twelfth point, we agree that the trial court erred in determining the penalty for employing a firearm in connection with the crime under Ark. Stat. Ann. §

43-2336 (Supp. 1975) rather than permitting the jury to fix the additional penalty under proper instructions.

Ark. Stat. Ann. § 43-2336 (Supp. 1975) reads as follows:

> "On and after July 1, 1969, any person convicted of any offense which is now, or may hereafter be, classified by the laws of this State as a felony, and the person so convicted employed any firearm of any character as a means of committing or escaping from said felony, may, in the discretion of the sentencing court, be subjected to an additional period of confinement in the State penitentiary for a period not to exceed fifteen (15) years."

We held this statute constitutional in *Redding* v. *State,* 254 Ark. 317, 493 S.W. 2d 116, and also in *Redding* we said:

> "We are of the view that the legislature's use of the words 'sentencing court' was intended by the legislature to refer either to the judge or the jury and that the factual issue as to the use of a firearm is to be determined by the trial court if a jury is waived and otherwise by the jury as in the case at bar."

Since our opinion in *Redding* v. *State, supra,* we have noted the difficulty encounterd where a jury fixes the primary penalty upon conviction and finds that a firearm was employed and the trial judge rather than the jury fixes the enhanced penalty under the statute. See *Johnson* v. *State,* 249 Ark. 208, 458 S.W. 2d 409. We have concluded, therefore, that in assessing the penalty under § 43-2336, *supra,* the fact finder, whether it be a jury or a trial judge sitting as a jury, should not only determine whether a firearm was employed under the provisions of § 43-2336, *supra,* but should also assess the enhanced penalty when the employment of a firearm is so found. *Cotton* v. *State,* 256 Ark. 527, 508 S.W. 2d 738.

The judgment is affirmed as to Bettis and reversed and remanded for a new trial as to Brown.

FOGLEMAN, J., concurs.

JOHN A. FOGLEMAN, Justice, concurring. I cannot agree that the affidavit for the search warrant contained sufficient showing of probable cause. The statement that "Cecil Bettis,, Jr. was seen parked beside the Harper's home just prior to the robbery, with another subject with him" was obviously necessary to a finding of probable cause. It is just as obviously hearsay. The deficiency is not in failure to support the credibility and reliability of an identified informant and his information or of a victim. The informant is totally unidentified. I take this to be a fatal defect.

I would still agree that there was no error in the trial court's refusal to suppress the evidence seized as a result of the search. There was evidence sufficient to sustain the circuit judge's holding that the search was valid as a "consent" search. There was no evidence of coercion or promises to obtain the consent of Bettis to the search. He had been given Miranda warnings. The only factors militating against the validity of the consent were the fact that Bettis was in custody in the city hall and the absence of any affirmative evidence that Bettis knew that he could withhold consent. There would simply be no basis for our overturning the finding of fact made by the circuit judge in this respect. See *United States* v. *Watson,* — U.S. —, 96 S. Ct. 820, 46 L. Ed. 2d 598 (1976).

Although the trial judge did not sustain the search as a valid automobile search, the undisputed evidence shows that it was, in my opinion. There was probable cause for the arrest of Bettis and Brown. The automobile driven by Bettis was stopped at a roadblock on Highway 4, late in the afternoon. The traffic was fairly heavy, as the arresting officer estimated that he stopped about 100 cars in a 30 minute period before the arrest and another 100 between that time and the time when other officers arrived. The officer manning the roadblock was alone when the arrest was made. He took a weapon out of the car and another from one of its occupants. All this officer could do was to see that the vehicle was not molested by anyone and that Bettis and Brown did not escape. One of the officers who came in response to the arresting officer's report drove the vehicle back to Newport. Darkness was then approaching. One of the searching officers

explained that a search there was not feasible under the existing conditions and that it would have been dangerous to have left the automobile on the highway.

One of the victims of the crime had been struck with a weapon that could have been brass knuckles. The pistol found in the automobile fit the description of a weapon given by one of the victims as having been used by the burglars. At the time of the automobile search, there is no doubt that the searching officer had, as he testified, knowledge of sufficient facts to cause him to believe that it contained stolen articles, weapons or other evidentiary material.

In this respect, I suppose that I am only agreeing with the majority's unarticulated position, when it said that a search warrant would not have been necessary. I do want to make it clear, however, that I do not consider the search at the police station to have been a valid search incident to an arrest or as a "plain view" search. My position on this point is similar to that I took in concurring in *Byars* v. *State,* 259 Ark. 158, 533 S.W. 2d 175 (1976).

Calvin BROWN and Cecil BETTIS Jr.
v. STATE of Arkansas

CR 75-52 534 S.W. 2d 207

Opinion delivered March 8, 1976
[Rehearing denied April 12, 1976.]

Pickens, Boyce, McLarty & Watson and *McArthur, Lofton & Wilson, P.A.*, for appellants.

Jim Guy Tucker, Atty. Gen., by: *Gary Isbell,* Asst. Atty. Gen. and *Leroy Blankenship,* 3rd Judicial Circuit Prosecuting Attorney, for appellee.

J. FRED JONES, Justice. Calvin Brown and Cecil Bettis Jr. were jointly tried and convicted of robbery at a jury trial in the Jackson County Circuit Court and they were each sentenced to the Department of Correction for a period of 21 years.

Both Brown and Bettis were convicted of burglary in connection with the same incident. Appellant Brown's burglary conviction was reversed and appellant Bettis's conviction was affirmed by separate opinions being handed down

today in case No. CR75-27. The pertinent background facts are set out in our opinion on the burglary convictions and will not be reiterated in this opinion. As in the burglary cases, Brown and Bettis were represented by separate counsel and have filed separate briefs in this appeal from their convictions of robbery; and, as in their appeal from the burglary convictions, they have designated separate points on which they rely for reversal, some of which were designated in the burglary appeal and disposed of in our opinion in that case.

On his appeal in the case at bar Bettis has designated the point he relies on as follows:

"The search warrant should have been suppressed."

We have thoroughly examined and treated this point in our opinion in the burglary case and found no merit in this contention.

Brown has designated the following points on which he relies for reversal in the case at bar as follows:

I

"The trial court erred in denying appellant's motion to suppress the evidence obtained due to an illegal arrest and illegal search.

II

The trial court erred in denying appellant's motion for a preliminary hearing prior to trial.

III

The trial court erred in denying appellant's motions for severance and/or continuance.

IV

The trial court erred in quashing a subpoena duces tecum for the tax records of the prosecuting witness.

V

The trial court erred in allowing a witness to testify about a previous common non-related conversation with appellant.

VI

The trial court erred in unreasonably restricting appellant's cross-examination of the co-defendant and other witnesses.

VII

The trial court erred in not allowing appellant to put on testimony of subpoenaed witnesses.

VIII

The trial court erred in denying appellant's motion for mistrial.

IX

The trial court erred in denying appellant's motion for directed verdict of acquittal."

Appellant Brown's first two points relied on in the case at bar were also relied on by him in the appeal from the burglary conviction, and we deem it unnecessary to reiterate what we said in our opinion in that case.

Appellant's third point that the trial court erred in denying his motion for severance or continuance is without merit. He argues that in the burglary trial, some 40 days prior to his trial in the present case, antagonism between him and Bettis was apparent; that considerable publicity had been given to the previous trial and that he was prejudiced by being jointly tried in the case at bar with Bettis. He argues that his co-defendant used prejudicial tactics which prejudiced his case. We find no merit to this contention.

In *Finley* v. *State,* 233 Ark. 232, 343 S.W. 2d 787 (1961), this court said:

> "Counsel for appellant does not specify wherein the court abused its discretion in refusing to grant a severance, and we find no evidence in the record to indicate that appellant was prejudiced by the refusal of the trial court to grant the motion."

We come to the same conclusion in the case at bar. The appellant argues that his motion for continuance should have been granted because the jury had been prejudiced by extensive media coverage of the burglary trial involving the same parties and circumstances, which trial had occurred only 40 days before his trial in the case at bar. The record before us does not contain the voir dire of the jury and if any members of the jury had been prejudiced by the prior trial, such prejudice should have been revealed on voir dire. In *Keith* v. *State,* 218 Ark. 174, 235 S.W. 2d 539 (1951), this court said:

> "Assignments Nos. 7, 8, 9 and 11 of the motion for new trial allege improper influence upon and misconduct of the jury which resulted in defendant's not receiving a fair trial. In the absence of anything in the record to support this assignment of error, they will not be considered. *Conley* v. *State,* 180 Ark. 278, 21 S.W. 2d 176."

We find nothing in the record that would indicate that the trial court abused its discretion in failing to grant the appellant Brown's motion for severance or continuance.

Under his fourth point Brown contends that the trial court erred in quashing a subpoena duces tecum for the tax records of the prosecuting witness Mr. Harper. The tax records were sought for the purpose of questioning the credibility of the testimony of Mr. and Mrs. Harper, and the situation arose in the following manner: The appellant Bettis testified as to his long acquaintance and friendship with Mr. and Mrs. Harper, the prosecuting witnesses and victims of the robbery. His testimony indicated that he and Harper had engaged, or been associated together, in prior illegal activities.

On direct examination Mr. and Mrs. Harper testified as to the treatment they received and the property taken in the

course of the robbery and in answers to questions on *cross-examination,* they denied participating in any illegal activities with appellant Bettis.

Subpoena duces tecum for Harper's tax records was issued on the appellant's motion but was then quashed on Harper's motion. The appellant Brown argues that Ark. Stat. Ann. § 28-803 (Repl. 1962) provides the method for vacating an order requiring production of records, and that Harper did not state in his motion or prove either of the two grounds stated therein. The appellant then argues that from testimony brought out during the trial, there was indication that Mr. Harper had misappropriated funds from the county; that he had engaged in fraudulent insurance schemes and in activity of "fixing horse races." The appellant then argues that the tax records would have been relevant in going to the *credibility of the prosecuting witness's testimony,* and that the quashing of the subpoena deprived the appellant of evidence that could have been used at his trial. This same argument was advanced by Brown and rejected in our opinion on appeal from the burglary convictions.

Ark. Stat. Ann. § 28-803 (Repl. 1962) was expressly repealed by Act 17 of the 1973 General Assembly which became effective on July 1, 1973. Ark. Stat. Ann. § 28-537 et seq. (Supp. 1975). Be that as it may, the evidence sought through the subpoena duces tecum was for the purpose of impeaching the credibility of Mr. and Mrs. Harper's testimony *brought out on cross-examination* and the trial court was correct in holding that the evidence thus sought was collateral to the issues before the court and would be inadmissible for the purpose for which it was sought and intended.

In addition to *Fulwider* v. *Woods,* 249 Ark. 776, 461 S.W. 2d 581, and *Spence* v. *State,* 184 Ark. 139, 40 S.W. 2d 986, cited in our opinion in the burglary case, see also *McArthur* v. *State,* 59 Ark. 431, 27 S.W. 628, and *McAlister* v. *State,* 99 Ark. 604, 139 S.W. 684. In *McAlister* we quoted with approval as follows:

> " 'In order to avoid an interminable multiplicity of issues, it is a settled rule of practice that when a witness

is cross examined on a matter collateral to the issues he can not, as to his answer, be subsequently contradicted by the party putting the question. The test of whether a fact inquired of in cross examination is collateral is this: Would the cross examining party be entitled to prove it as part of his case, tending to establish his plea?'

* * *

'A cross examining party is concluded by the answer which the witness gives to a question concerning a collateral matter, and no contradiction will be allowed, even for the purpose of impeaching the witness.' "

Under his fifth assignment appellant Brown contends that the trial court committed reversible error by allowing witness Tidwell to testify concerning a conversation between Tidwell and Brown which occurred approximately two weeks before the robbery. Tidwell's testimony appears as follows:

"Q. What did Mr. Brown say to you, Eugene?

A. He just walked up there where I was standing there and he asked me how I was doing, was I playing it cool or keeping it cool or something.

Q. What did that mean to you?

A. Sir, I don't know.

* * *

A. He asked me, he said 'have you been keeping it cool' or you know keeping out of trouble, and I said 'yes, I have.' and he asked me how I like to make a little money and I said 'well, I'm not interested myself.' "

The appellant made timely objection to this testimony as irrelevant, this testimony of Tidwell did not contain a fact that could have possibly aided in the conviction of the appellant. Under such circumstances the testimony was not prejudicial. *Weber* v. *State,* 250 Ark. 566, 466 S.W. 2d 257 (1971). In *Weber* this court said:

> "Actually, the witness knew no facts that connected Weber with the offense of stealing the boat. . . . It is true that the testimony was of no value to the state, but, that being true, we certainly can not find any prejudice. No fact was testified to that could have possibly aided in the conviction, and if the testimony was inadmissible, it certainly has not been demonstrated that it was prejudicial. See *Stout* v. *State,* 244 Ark. 676, 426 S.W. 2d 800."

Under his sixth and seventh points appellant Brown assigns as error the trial court's refusal to allow him to question co-defendant Bettis and call two other witnesses concerning alleged horse race fixing done by Bettis and Harper, the prosecuting witness. Appellant's purpose in asking these questions and attempting to call these witnesses was to impeach the credibility of the prosecuting witnesses Mr. and Mrs. Harper. This effort to impeach the Harpers' testimony was in violation of Ark. Stat. Ann. § 28-707 (Repl. 1962), and is also covered in what we have said in relation to the appellant's fourth assignment, *supra.*

The appellant Brown contends under his eighth assignment that the trial court erred in denying his motion for mistrial. This contention is without merit. In *Perez* v. *State,* 249 Ark. 1111, 463 S.W. 2d 394 (1971), this court set out the rule for overturning a trial court's ruling on a motion for mistrial as follows:

> "We have uniformly held that, because of the wide latitude of discretion vested in the trial judge in granting or denying a motion for a mistrial, we will not reverse a judgment because of his action on such a motion in the absence of an abuse of that discretion or manifest prejudice to the complaining party. *Shroeder* v. *Johnson,* 234 Ark. 443, 352 S.W. 2d 570."

The allegedly prejudicial testimony occurred upon cross-examination of appellant Bettis and appears in the record as follows:

> "Q. Since you have been awaiting trial on this charge did you and Calvin Brown go down to Betty Johnston's

at Possum Grape and sit there around the table and handle and discuss and sort out jewelry that had been stolen in other robberies besides this one?

A. No, sir. To my knowledge Calvin Brown hasn't been to Betty Johnston's since before this robbery and for a good deal before, I don't know.

Q. Do you know that Betty Johnston has turned over to the State Police the jewelry that was stolen in this other job?

BY MR. HARKEY: I object to that question and ask that the jury be admonished to disregard it. The question was asked and answered whether an act was committed, Your Honor, and I know he knows better, I know he is a better lawyer; this is improper.

BY THE COURT: Sustained. Ladies and Gentlemen of the jury, you are instructed to disregard the last question asked of this witness by the Prosecuting Attorney.

Q. During one of these times you had moved out from Possum Grape and somebody else had moved in, since you have been out on bail awaiting trial did you threaten to kill Betty if she didn't tell you what she had done with the jewelry you and Calvin left there?

A. No.

BY MR. McARTHUR: Your Honor, may I approach the bench, please?

BY THE COURT: Yes, sir.

BY MR. McARTHUR: I ignored the first question by the Prosecuting Attorney concerning my client but I don't feel I can ignore the second accusation of crime which is totally and utterly unrelated. The Prosecuting Attorney keeps bringing up other crimes in his questioning committed by my client that have no bearing on this trial and on behalf of Calvin Brown I move for a mistrial.

BY THE COURT: Overruled, but if you want to move in limine that he not attempt to do through this witness what I refused to permit, I will grant that.

BY MR. McARTHUR: I do ask the Court to admonish him.

BY MR. BLANKENSHIP: I consider myself admonished."

The trial judge admonished the jury to disregard the questions which accused the appellant Brown of earlier wrongful acts, and the answers to these questions were actually favorable to the appellant. We find no abuse of discretion justifying a reversal in the case at bar.

The appellant Brown's final contention that the trial court erred in denying his motion for a directed verdict of acquittal is without merit. A directed verdict should be granted only when there is no factual issue to go to the jury. *Parker* v. *State,* 252 Ark. 1242, 482 S.W. 2d 822 (1972); *Fortner & Holcombe* v. *State,* 258 Ark. 591, 528 S.W. 2d 378 (1975). Certainly there were factual issues for jury determination in this case.

The judgments as to both Bettis and Brown are affirmed.

FOGLEMAN, J., concurs.

JOHN A. FOGLEMAN, Justice, concurring. I concur in the majority holding relating to the suppression of evidence obtained by search for the same reasons given in my concurring opinion in *Brown* v. *State,* No. CR-75-27, 259 Ark. 449, 534 S.W. 2d 213 (1976).

I concur in the court's action on Brown's motion for severance only because the ground argued here, i.e., the antagonism of the co-defendant Bettis, was not asserted in the trial court. Since this issue is raised for the first time on appeal, we could not well say that the circuit judge abused his discretion in that respect.

B. G. WEST and Betty WEST *v.*
Beryl F. ANTHONY Sr. and Oma Lee ANTHONY

75-220 533 S.W. 2d 518

Opinion delivered March 8, 1976

Brown, Compton & Prewett, for appellants.

Spencer & Spencer, for appellees.

CONLEY BYRD, Justice. The principal issue on this appeal is whether appellees, Beryl F. Anthony Sr. and Oma Lee Anthony, his wife, have a right to enforce a restrictive covenant in the title of appellants, B.G. West and Betty West, his wife. The record shows that one Mellor was a common owner and that in 1925 he created Mellor's Third Subdivision to the City of El Dorado consisting of Blocks 9, 10, 11 and 12. Blocks 9, 10 and 12 were each divided into eight lots. Block 11 was not subdivided into lots but has been sold by Mellor or his heirs in parcels. The common grantor has con-

veyed all of the property in Mellor's Third Subdivision, and except for one or two conveyances, all of the conveyances contain restrictive covenants similar to those set out in the conveyances to the parcels now owned by appellants and appellees. The restriction set forth in the titles of the parties hereto reads:

> "This conveyance is made subject to the following conditions:
>
> The first improvements placed on said property shall be a residence or dwelling house, together with such customary outhouses as the owner may elect to erect on said lot, and said building shall not cost less than Five Thousand Dollars, and no building or structures except the steps to any house to be erected shall be located less than thirty (30) feet from the front or street line. Said property shall be used as residence property."

The properties of both parties hereto front on North Madison Street. This litigation was commenced after appellees objected to the construction of a carport by appellants within the 30 ft. restriction. The trial court found the issues in favor of appellees and enjoined the construction of the carport. For reversal, appellants rely upon the points hereinafter discussed.

1. We find four ALR annotations on "Restrictive Covenant — Who May Enforce," see Annot., 21 ALR 1281 (1922), Annot., 33 ALR 676 (1924), Annot., 89 ALR 812 (1933), and Annot., 51 ALR3d 556 (1971). The rule with respect to who may enforce such covenants when there is a general scheme of development is set forth in Annot., 21 ALR 1281, 1288 (1922), which quotes from *Nottingham Patent Brick & Tile Co.* v. *Butler,* 16 Q.B.D. 788 (1886), as follows:

> ". . . There are two lines of cases to be found in the books. The first is where there has been a sale of part of a property with no then-existing intention of selling the rest, and subsequently there is a sale of another part; then, as regards the later sale, you cannot look at the conditions of the former sale; you must look only at the

> conditions relating to the later sale. The other line of cases is where the whole of a property is put up for sale (not necessarily under a building scheme), but is put up for sale in lots subject to certain restrictive covenants; then it is a question of fact whether it was or was not the intention that the restrictive covenants should be entered into for the benefit of each of the purchasers as against all the others, and it is a most material circumstance whether the vendor reserves any part of the property for himself. If he does not reserve any part, that is almost, if not quite, conclusive (unless there is something contradictory) that the covenants which he takes from the purchasers are intended for the benefit of each purchaser as against the others."

To counteract the general scheme rule, appellants make two contentions: (1) That the restrictive covenant was not placed in all of the deeds — citing *Stevenson* v. *Spivey*, 132 Va. 115, 110 S.E. 367, 21 ALR 1276 (1922) and (2) That the common grantor waived the restrictions as to appellees or their predecessors in title.

We can find no support for appellants in *Stevenson* v. *Spivey, supra,* for it was there pointed out that the common grantor sold lots in either part of its plats at will and without regard to restrictions. In so holding, the court there stated:

> "... It is true that in the portion of the property in which the appellant's lots are situated a very decided majority of deeds from the company contain the building restriction in question, that this territory is largely devoted to residential purposes, and that the building line has generally been observed in the erection of residences. But it is equally true that in all parts of the plat, including that in the near vicinity of the appellant's property, some residences and other structures have been erected within a distance of less than 25 feet of the front line of the lots, and that the company has apparently at all times omitted the restriction in accordance with its own purposes and pleasure."

Neither do we find any relief for appellants in the alleged

waiver from the common grantor which provides:

> ". . . do hereby waive and set aside for the use and benefit of MRS. HILDA ZAVELO all restrictions set out in that certain warranty deed made by ourselves . . . under date of November 26, 1937. . . .
>
> The restrictions in said deed are being waived because the grantee has complied with the restrictions in full."

First, the restriction apparently applies only to the first improvements placed on the property, and the alleged waiver is nothing more than an acknowledgment that the improvements complied with the restrictions. Second, the authorities hold that a release by the common grantor is subject to the rights of other parties, *Allen* v. *Massachusetts Bonding & Ins. Co.,* 248 Mass. 378, 143 N.E. 499, 33 ALR 669 (1924).

2. Appellants, relying upon *Linder Corp.* v. *Pyeatt,* 222 Ark. 949, 264 S.W. 2d 619 (1954), contend that deeds as to properties in other Mellor subdivisions and testimony as to construction upon other properties were inadmissible to show the grantor's intent. The case of *Linder Corp.* v. *Pyeatt, supra,* goes no further than to hold that, if the language of a restrictive covenant is plain and unambiguous, it is unnecessary and improper to inquire into the surrounding circumstances and purposes of the restriction for aid in its construction. The restrictive covenant here involved is not so plain and unambiguous as to who may enforce the provisions thereof to prevent the proof offered by appellees.

3. Another contention by appellants is that the language "front or street line" means the actual curb line rather than the platted line of the particular street. We find no merit to this contention. Street line when used in connection with platted lots and blocks ordinarily means the platted street line. See *Yoemans* v. *Herrick,* 178 Mo. App. 274, 165 S.W. 1112 (1914).

4. Finally, appellants suggest that we should remand this case to permit them to furnish proof that the general

building scheme established by the common grantor has been abandoned. We find no merit to this contention. On rare occasions we have remanded a case in chancery for further development, but in all such cases it has occurred because of some conduct or ruling of the trial court on a theory that made it unnecessary or impractical for a party to put on his proof upon a particular issue. However, here there was nothing to prevent appellants from making whatever showing of abandonment the proof would support, and consequently, we must apply the usual rule that an appeal in chancery will be decided upon the record made in the trial court.

Affirmed.

Reba Marion Diehl HAIGHT and
Rebecca Marion SUTTON *v.* STATE of Arkansas

CR 75-180 533 S.W. 2d 510

Opinion delivered March 8, 1976

Robert L. Pierce and *Paul R. Bosson,* for appellants.

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

FRANK HOLT, Justice. Appellants were convicted by a jury of possession of a controlled substance, marijuana, with intent to deliver. [Ark. Stat. Ann. § 82-2617 (a) (1) (ii) (Supp. 1975)]. Appellant Haight received a five year sentence and appellant Sutton received a three year sentence in the Arkansas Department of Correction. Appellants first contend for reversal that the trial court erred in denying their motion to dismiss on the ground of double jeopardy. Amendment 5, United States Constitution and Article 2, § 8, Constitution of Arkansas (1874). Appellants' first trial resulted in a mistrial, upon the state's motion, because appellants' counsel, in his opening statement, made reference to a plea bargain and the sentence which was recommended by the prosecuting attorney. Appellants argue that without consent by them, either express or implied, it was error to dismiss the jury absent overruling necessity. In *Wilson* v. *State,* 253 Ark. 10, 484 S.W. 2d 82 (1972), we said:

> Plea bargaining is alien to jury trials and many reasons should be obvious why offers and counteroffers in plea bargaining have no place whatever in the evidence at jury trials.

There the remarks were made by the prosecution in the closing argument and we said that the trial court's admonition to disregard the statement was not sufficient to remove whatever prejudice the statement may have caused. We hold that the remarks here, as to plea bargaining, are equally prejudicial when made by the defense counsel and the court properly granted a mistrial. Since the court correctly granted a mistrial, it follows that appellants' constitutional rights as to double jeopardy were not violated. *Walters* v. *State,* 255 Ark. 904, 503 S.W. 2d 895 (1974), and *Franklin and Reid* v. *State,* 251 Ark. 223, 471 S.W. 2d 760 (1971).

Appellants next insist that the trial court erred by not permitting appellants to question jurors as to whether comments by the trial court in another case, a month previously as reported in the press, made it impossible for the jury to render a fair and impartial verdict in the case at bar. It is true that the trial court has discretionary authority in determining the extent of voir dire of the jurors. Ark. Stat. Ann. § 39-226

(Repl. 1962). However, this statutory authority does not foreclose or unduly limit counsel for the accused to probe the jurors fully with reference "to their mental attitude" in order to determine whether a juror is subject to a challenge for cause or a peremptory challenge. *Griffin* v. *State,* 239 Ark. 431, 389 S.W. 2d 900 (1965). In the case at bar, it appears that the jurors responded to the court's and to appellants' attorney's inquiry that their decision would be based solely upon the law and the evidence adduced at the trial. Further, the jurors indicated, in response to the court's inquiry, that they would not be influenced by anything they had seen or read in the news media "or anywhere else." It does not appear that any member of this jury had served on the previous jury to which the court had directed his remarks. Consequently, we are of the view no prejudicial error was demonstrated. Furthermore, we consider that this issue is most unlikely to arise upon a retrial.

We next consider appellants' contention that the court erred in allowing the state to elicit from a witness, a police informant, a conversation he had with the appellants about other drug transactions. The informant testified he had a conversation with appellants concerning a trip to a nearby town to get some "speed." Evidence that these appellants were engaged in traffic of other controlled substances was relevant in the case at bar to the possession of marijuana with intent to deliver as it would tend to show intent or design. *Kurck* v. *State,* 242 Ark. 742, 415 S.W. 2d 61 (1967); *Derrick* v. *State,* 259 Ark. 316, 532 S.W. 2d 431 (1976).

We must agree with appellants' contention for reversal that the trial court erred in refusing to allow the defense counsel to attack the credibility of the police informant by two proffered witnesses. It was made clear that if these witnesses were allowed to testify their testimony would be that the informant had previously stated to them that one of the appellants was not guilty. Reliance upon *Swaim* v. *State,* 257 Ark. 166, 514 S.W. 2d 706 (1974), by the trial court and the state that the proffered testimony is collateral is misplaced. There the arresting officer denied on cross-examination by appellants' counsel that he carried a gun, threatened or intimidated appellant. Appellant attempted to call two

witnesses. One would testify that the officer had threatened him by using a gun. The other proffered witness would testify that the officer had offered to sell him drugs. We held that the trial court was correct in holding this constituted a collateral inquiry and not relevant to the issue. This is not so in the case at bar. Here in order to establish the guilt of the appellants, the state relied heavily upon its principal witness, the informant. Appellants' proposed witnesses would contradict this evidence of guilt by the informant. They would testify that the informant had told them that one of the appellants was not guilty of the alleged offense. The vital issue in this case is, of course, the guilt or innocence of these appellants. Therefore, any contradictory statements bearing on this issue by the state's witness were not collateral. They were most relevant to the subject. Certainly the jury should have the right to consider this testimony as bearing upon the credibility of a witness. We take this occasion to state that if the opinion in *Swaim* v. *State, supra,* is susceptible to the interpretation made by the trial court and the state, then it is here accordingly clarified.

We also agree with appellants' contention that the trial court erred in denying their motion for mistrial when the court allowed the prosecuting attorney, on redirect, to ask the police informant to answer what had been the verdicts in other drug cases in which he had testified. The witness responded that other juries had found the defendants guilty. Appellants argue that the results of other jury trials were totally irrelevant and immaterial in this case. It is true that defense counsel had asked the informant on cross-examination how many times he had testified in similar cases to which he replied three or four times. However, we cannot agree with the appellee that the limited extent of the cross-examination by appellants' counsel opened up the subject to the extent permitted or that it was an invited error and, therefore, nonprejudicial. Obviously, it could be effectively argued to the jury that other juries had accorded great credence to the testimony of this witness inasmuch as other juries had consistently believed him. Neither can we agree that a motion to strike nor a cautionary instruction would have sufficiently corrected this erroneous method of bolstering the credibility of a witness.

We do not agree with appellants' next contention that the trial court erred in refusing to strike the testimony of the officer concerning a conversation he had overheard on the telephone and a radio transmitter. It is argued that his testimony was inadmissible as secondary evidence since the tape recording, which was made of the conversation, was not available. It appears that the police had "taped over" or "reused" the tape recording because "the quality of the tape is very poor" and "it was impossible to follow the conversation of the tape." There was no objection to the officer's testimony. Appellants' counsel cross-examined the officer about the availability of the tape. Another witness testified and the trial recessed. It was not until then that appellants' motion to strike the officer's testimony was presented to the court. Suffice it to say that since there was no objection to the testimony and the motion to strike was not timely made, we cannot say the court abused its discretion. *Warren* v. *State,* 103 Ark. 165, 146 S.W. 477 (1912). Cf. *Kerr & Pinnell* v. *State,* 256 Ark. 738, 512 S.W. 2d 13 (1974); and *Flaherty & Whipple* v. *State,* 255 Ark. 187, 500 S.W. 2d 87 (1973).

We agree with appellants' contention that the trial court committed error in restricting the scope of the appellants' cross-examination of an officer witness about contacts between him and the appellants. The cross-examination would demonstrate the officer's animosity toward them. The state insists that the inquiry was collateral and, having occurred two to three years preceding the trial, is too remote, citing *Swain* v. *State, supra.* Here we are of the view the evidence sought to be elicited on cross-examination was not too remote and had some probative value. *Lang* v. *State,* 258 Ark. 504, 527 S.W. 2d 900 (1975). The right of cross-examination is so important that we have often said the cross-examiner has wide latitude and cannot be unduly restricted in eliciting facts which affect the witness' credibility. *Henry & Aclin Ford* v. *Landreth,* 254 Ark. 483, 494 S.W. 2d 114 (1973); and *Washington National Ins. Co.* v. *Meeks,* 249 Ark. 73, 458 S.W. 2d 135 (1970). Neither can we agree with the state that the asserted error was rendered harmless and nonprejudicial merely because here one of the appellants was permitted on redirect examination to testify about existing animosities that the state's witness had toward her.

We deem it unnecessary to discuss the other asserted prejudicial error inasmuch as it is not likely to occur on a retrial. The judgments are reversed and the causes remanded for the errors indicated.

Reversed and remanded.

Dwain MARTIN *v.* Charles E. HEFLEY

75-276 533 S.W. 2d 521

Opinion delivered March 8, 1976

Adams & Covington, for appellant.

Thomas A. Martin Jr., for appellee.

ELSIJANE T. ROY, Justice. In 1975 the Deer School District of Newton County, Arkansas, held a regular election to choose a school board member. Appellant Dwain Martin and appellee Charles Hefley were candidates. The Newton County Election Commissioners certified appellee Hefley as the winner with a 243 vote total for him and 242 votes for Martin. Appellant Martin filed suit challenging the validity of certain votes for Hefley and questioning Hefley's right to hold office. Appellee Hefley cross-complained contesting certain votes received by Martin.

At trial below the court ruled invalid two votes for appellee and one vote for appellant, leaving 241 legal votes for each party, and declared, pursuant to Arkansas statutes, a special election should be held to resolve the tie. From that decision comes this appeal.

Appellant contends the court erred in counting the vote of Sandra Hefley Carter. Mrs. Carter's vote was cast for

appellee, and appellant argues that Mrs. Carter was not a resident of the Deer School District at the time of the election because she had married two months before the election. Appellant bases this argument on his contention that Mrs. Carter, upon marrying, immediately assumed the domicile of her husband who was not a resident of the Deer School District area.

Mrs. Carter's testimony was that prior to marriage she had lived with her parents in the Deer School District and it was the only place she had ever registered to vote. She further testified that she and her husband had not established a home but that both lived with his parents part of the time and with her parents part of the time. Thus the rule that the wife assumes the domicile of her husband upon marriage finds no applicability in this instance. *Bruce* v. *Bruce,* 176 Ark. 442, 3 S.W. 2d 6 (1928). The action of the Carters indicates the absence of an intent to elect a permanent domicile, and intent to remain in a particular place coupled with actual residence has often been held to be the determinant of domicile. *Ellis* v. *Southeast Construction Co.,* 260 F. 2d 280 (8th Cir. 1958); *Troillet* v. *Troillet,* 227 Ark. 624, 300 S.W. 2d 273 (1957); *Phillips* v. *Sherrod Estate,* 248 Ark. 605, 453 S.W. 2d 60 (1970). Consequently we find the trial court's action correct on this issue.

Appellant Martin also submits as error the action of the court disallowing the vote of William Braden. Braden's vote was cast for appellant and was deducted by the court from his total based on its conclusion that the statutory provision regulating absentee voting had not been strictly complied with. Earl Braden, the father of William Braden, testified that he secured his son's ballot in order to forward it to him since young Braden was attending school at Arkansas Tech at the time the election was held. Earl Braden stated that he did not sign for the absentee ballot because the officials advised none were available. Two regular ballots (one for his daughter-in-law[1]) were given him, and he was told that by the clerk's marking "absentee" across the top they would be counted as legitimate ballots.

[1]The vote of the daughter-in-law was disallowed by the election commission.

Ark. Stat. Ann. §§ 3-904 and 3-905 (Supp. 1973) are quite specific in delineating the procedure which must be followed in qualifying to register an absentee vote. § 3-904 begins:

> Applications for absentee ballots may be made in one of the following three (3) ways, *in no other manner,* and then only on the form set out in this Act]§§ 3-101 — 3-1306]. (emphasis supplied)

The statute then provides that applications can be made in person, by mail or by delivery of the absentee form to the County Clerk by the elector, husband, wife, son, daughter, sister, brother, father or mother of the applicant. § 3-905 requires that applications for absentee ballots ". . . shall be made *only* on the form furnished by the County Clerk . . ." (emphasis supplied), and incorporates the format of the form to be so furnished. Amendment 51 of the Arkansas Constitution provides in § 13(d) that:

> . . . [T]he Permanent Registrar shall determine that the signature on the application for absentee ballot is identical with the signature appearing on the voter's Affidavit of Registration before mailing or passing out an absentee ballot. * * *

This court cannot view lightly specific constitutional as well as statutory requirements. Since no application form was provided no signature comparison could have been made by the permanent registrar. Thus there was no compliance with Constitutional Amendment 51, § 13(d).

In *Bingamin* v. *City of Eureka Springs,* 241 Ark. 477, 408 S.W. 2d 607 (1966), we stated:

> Suits in election contests frequently show irregularities, and Amendment 51, adopted comparatively recently by the people, contains provisions aimed at correcting this situation. It is necessary that these provisions of the amendment, and the statutes referred to, relating to the duties of voters in applying for, and casting, absentee ballots, be strictly complied with.

Therefore, we find the trial court was not in error in holding William Braden's vote invalid.

Appellant's final contention is that the court erred in ruling that it was without jurisdiction to determine whether appellee was qualified to hold public office. Appellant bases this contention on the fact that appellee was convicted of burglary and given a two year suspended sentence, a crime he argues falls within the ambit of Article 5, § 9 of the Arkansas Constitution. § 9 states:

> No person hereafter convicted of embezzlement of public money, bribery, forgery or other infamous crime shall be eligible to the General Assembly or capable of holding any office of trust or profit in this State.

The court found that the issue of whether Charles Hefley was legally competent to hold office should be determined quo warranto and could only be raised by the attorney general, prosecuting attorney *or one entitled to the office.* The court ruled that appellant was not entitled to the office and was therefore precluded from bringing an action to determine appellee's eligibility.

Ark. Stat. Ann. § 34-2203 (Repl. 1962) outlines the method by which usurpation of office or franchise may be redressed. Relevant to appellant's position is language therein requiring that proceedings instituted against a usurper be initiated by "the party entitled to the office or franchise." Appellant can lay no claim to having received more votes than appellee, for even after the revised count conducted by the court each party received an equal number of votes. Therefore, appellant does not qualify as a person authorized to bring suit under the statute.

Furthermore, appellee received a suspended sentence. This type of sentence is insufficient to obviate his right to seek and hold the office. *State Medical Board* v. *Rodgers,* 190 Ark. 266, 79 S.W. 2d 83 (1935); *May* v. *Edwards,* 258 Ark. 871, 529 S.W. 2d 647 (1975). Consequently the trial court's holding was correct on this point.

Appellee, by way of cross appeal, alleges error below in the court's declaring Ray Proctor's vote invalid because of non-residency. Proctor testifed that, at the time of the election, he was staying with his family at Mossville, Arkansas, which is in the Deer School District. He stated he was living there because he had been "laid-off" from his employment in Fayetteville, which is located in Washington County. He previously had been living in Elkins, also in Washington County, for two or three years prior to being "laid-off". He owned a mobile home and paid taxes there. At the time of trial he had resumed employment in Washington County. From the evidence we cannot say that the trial court erred in declaring his vote invalid for failure to meet residency requirements. A fact question was presented as to his residence for voting purposes, and the court could justifiably conclude that he had relinquished voter status in the Deer School District area.

The validity of the vote of Ertle Hicks was questioned also as to residency. Hicks' testimony discloses that he owns a home in Deer, receives his mail there and alternates two or three times a week staying in Jasper with his wife and in Deer on his farm. Here again is a factual determination for the court, and we find no error in its conclusion. *Charisse* v. *Eldred,* 252 Ark. 101, 477 S.W. 2d 480 (1972).

Since the record discloses substantial evidence to support the judgment of the trial court, it is affirmed.

HARRIS, C.J., and FOGLEMAN, J., dissent.

JOHN A. FOGLEMAN, Justice, dissenting. I concur in all of the majority opinion except that part relating to the vote of William Braden. My disagreement is based upon appellant's argument, which is totally disregarded by the majority. In my opinion, it is valid, and I cannot understand why it does not dictate a different result. Appellant argues that a voter cannot be disfranchised solely by the reason of irregularities or improper action of election officials.

William Braden complied with the absentee voting requirements as fully as he could, given the situation resulting

from the action or inaction of the county board of election commissioners and the county clerk. His vote was counted by the election officials. It was not shown or even alleged that he was not a registered voter. The circuit court held his ballot invalid, saying that William Braden failed to comply with provisions of the Arkansas statutes setting forth the method for making application and voting absentee. The testimony shows that Earl Braden, William Braden's father, went to the county clerk's office for the purpose of obtaining an absentee ballot for his son, a college student at "Arkansas Tech," on three different occasions. The clerk told the senior Braden that he had no absentee ballot material, but finally marked an official ballot with the word "absentee" across the top and delivered it to the father, assuring him that this ballot would be legal in every respect.

There was a presumption that this vote, since it was accepted and counted by the election officials was valid, and the burden of overcoming this presumption was upon the contestant. *Letchworth* v. *Flinn,* 108 Ark. 301, 157 S.W. 402; *Webb* v. *Bowden,* 124 Ark. 244, 187 S.W. 461.

As appellee concedes, the evidence shows that no mechanism had been established for the casting of absentee ballots in this election. William Braden did not make an application for the ballot as required by Ark. Stat. Ann. § 3-904 (Supp. 1975). But that section of the statute clearly requires that the application be made *only* on the form set out in the act. That form is set out in Ark. Stat. Ann. § 3-905 (Supp. 1973). That section contains the following language:

> Applications for absentee ballots shall be made only on the form furnished by the County Clerk and the County Clerk shall supply the following form on request beginning sixty (60) days before the election.

William Braden was prevented from making this application solely because the county clerk failed to provide the necessary application form as he was required by law to do. In casting his ballot William Braden used the ballot provided him by the clerk, because the election commissioners failed to provide absentee ballots as required by Ark. Stat. Ann. § 3-902 (Supp. 1973).

It is quite true that we said, appropriately enough, that there must be strict compliance with statutory provisions governing absentee voting in *Bingham* v. *City of Eureka Springs,* 241 Ark. 447, 408 S.W. 2d 607. But it was not a failure to perform by election officials which prevented compliance by the voter in *Bingham.* There should also be strict compliance by officers conducting the election. We did not, could not, and should not, in *Bingham,* or in this case, hold that failure of election officials to perform their mandatory duties can have the effect of disfranchising any voter.

It has long been the law that neglect, misconduct or mistakes of election officials should not disfranchise qualified electors. Appellee does not quarrel with this general rule, but says: "The rule that improper actions of election officials will not invalidate a voter's ballot has no place in the area of absentee voting." He cites no authority for this statement and the reason is understandable. As a matter of fact, the authorities in Arkansas are to the contrary. In *Orr* v. *Carpenter,* 222 Ark. 716, 262 S.W. 2d 280, we had under consideration a challenge to absentee ballots in an election contest. In holding that they should be counted, we said:

> The pertinent issue here is whether legal voters are to be denied their right of franchise because they used ballots upon which the candidates' names had been placed by the use of a typewriter instead of some other form of printing and no objection to the form of the ballot is made until after the election. Even if it be conceded, without deciding, that the typing of the candidates' names is not a substantial compliance with Ark. Stats. § 3-811 as amended by §§ 3-823 and 3-826, still the appellant may not object to the validity of the election on account of such irregularity where he did not avail himself of the opportunity to have it corrected before the election was held.
>
> This court is committed to the rule that the mistake of an officer charged with responsibilities incident to an election will not have the effect of disfranchising the voter whose evidence of the right to participate in the election was irregular. In *Henderson* v. *Gladish,* 198 Ark.

> 217, 128 S.W. 2d 257, we reaffirmed the following principles announced in *Jones* v. *State,* 153 Ind. 440, 55 N.E. 229, 232: "To hold that all prescribed duties of election officers are mandatory, in the sense that their nonperformance shall vitiate the election, is to ingraft upon the law the very powers for mischief it was intended to prevent. If the mistake or inadvertence of the officer shall be fatal to the election, then his intentional wrong may so impress the ballot as to accomplish the defeat of a particular candidate or the disfranchisement of a party. And it is no answer to say that the offending officer may be punished by the criminal laws, for his punishment will not repair the injury done to those affected by his acts. ***

As pointed out in *Henderson* v. *Gladish,* 198 Ark. 217, 128 S.W. 2d 257, a voter should not be disfranchised by making him the innocent victim of either a careless, designing or uninformed officer. In that case, reference was made to our constitutional provision that "no power, civil or military, shall ever interfere to prevent the free exercise of the right of suffrage." Art. 3 § 2, Constitution of Arkansas.

Since I would hold the William Braden ballot valid, I would reverse the judgment and enter judgment here for the appellant.

I am authorized to state that the Chief Justice joins in this opinion.

CITY OF BATESVILLE and Dr. Bob SMITH et al
v. Preston W. Grace et al

75-184 534 S.W. 2d 224

Opinion delivered March 15, 1976

Pickens, Boyce, McLarty & Watson, by: *James A. McLarty,* for appellants.

Highsmith, Tatum, Gregg & Hart, by: *Samuel C. Highsmith, W. D. Murphy Jr.,* for appellees.

CARLETON HARRIS, Chief Justice. This appeal relates to the rezoning of two tracts of land located on Highway 167 in Batesville; the tracts are contiguous, one belonging to appellee Preston Grace (hereafter referred to as the "Ball

tract"), and the other belonging to Grace and appellees Highsmith and Rogers (hereafter called the "Highsmith tract"). Appellants, the City of Batesville, and 23 homeowners living near the tracts (who intervened), contend that the chancellor erred in finding that the action of the City of Batesville in denying the C-1A classification to the subject tracts was arbitrary, capricious, and unreasonable.

The Ball tract, 381 ft. of frontage on Highway 167, was purchased by Grace in October of 1971 for the sum of $69,-000, the property being zoned residential at the time; likewise, the Highsmith tract was zoned residential.

The unusual nature of the court's decree necessitates a step-by-step review of the events that occurred.

1. *December 7, 1971:* Appellees filed their petition for rezoning from R-1 to C-1A with the Planning Commission.

2. *March 7, 1972:* The Planning Commission held hearings on two nights, at which both appellants and appellees were heard, and voted 4-3 to recommend to the City Council the rezoning of the property to C-1A.

3. *April 25, 1972:* The City Council voted 4-3 to approve the rezoning. The mayor vetoed the measure.

4. *May 29, 1972:* The City Council met again, with the mayor reading aloud the reasons for his veto. A motion to override the veto failed to pass, 3-3 (one councilman abstaining).

5. *June 21, 1972:* Appellees appealed the decision of the City Council to Circuit Court.

6. *October 20, 1972:* Appellees moved to transfer the case to chancery, simultaneously amending their complaint to allege that the mayor's veto was arbitrary and capricious. The cause was transferred to chancery on October 23, 1972, as two cases, Nos. 4975 (the Ball tract) and 4976 (the Highsmith tract). The amended

complaints alleged three specific grounds for the charge of arbitrary and capricious action:

a. The mayor had refused to decide the application on the record before him.

b. The veto disregarded the findings of the Planning Commission and the vote of the Council.

c. The veto deprived the appellees of their property without due process of law.

After an extended trial, the chancellor entered a thirty-one page opinion containing the court's findings, and at the same time an interlocutory order embracing the findings was entered and it was stated that the "summary of specific findings of the court and mandatory requirements for rezoning . . . is hereby made the court's interlocutory order regarding this case." Further, "that a final order in this cause will be entered by the court pending the resolution of the procedures as laid down in this interlocutory order." The chancellor commented that the greatest fear of the residents, whose properties lie west and southwest of the land sought to be rezoned, was an increased traffic flow resulting from commercial development, but he noted that this detriment would be nominal if traffic could only enter the tracts from the highway. During the trial, testimony was offered indicating that the Independence Savings and Loan Association's new office building would be placed on the Ball tract.[1] Plans were offered relative to the Savings and Loan office which the court termed "acceptable." The following findings were then made:

> "(2) That the Court further finds that since both tracts are located along Highway 167 where there is extremely heavy traffic, and in or near a growing and expanding commercial area that the said tracts, although they might be used for residential purposes, are not desirable for such use. That the said tracts are much

[1]Grace is a stockholder of the Savings and Loan company and Guy Mosely, Chairman of the Board of the company, likewise testified relative to the plans for the new office. There was never any specific proposal offered relative to the use that would be made of the Highsmith tract.

more desirable for commercial use or purposes, and the highest and best use of the said property would definitely be for commercial purposes, and this is more particularly true of the Highsmith tract.

"(3) That the fear of increased traffic among the intervenors in the residential area which might come about from the rezoning of the tracts in question can or may be largely alleviated by a mandatory requirement that all major traffic come in from the east off the said Highway 167, or in other words the main and only entrance for traffic in general to any established business would be from Highway 167 and not from the section on the west side of the land to be rezoned where the homes of the intervenors are principally located.

"(4) That no presently existing or dedicated streets or roads not now open shall be opened up without approval of the City Council of Batesville, and upon recommendation of the City Planning Commission, and only after an opportunity had been afforded the intervenors to be heard on the matter.

"(5) That the Court finds that the said rezoning of both the Ball and Highsmith tracts from a R-1 to C-1A as prayed for by the petitioners should be granted upon conditions hereinafter set out, and that the Mayor's veto of the action of the City Council relative to the said proposed rezoning is arbitrary, discriminatory and unreasonable based on his objections set out in his veto message, and for the further reasons heretofore mentioned.

"(6) That arrangements must be made and plans set out specifically in writing that all major traffic must come off Highway 167, and that the petitioners must either execute a bill of assurance or such other covenants or agreement to meet the requirements of the City Planning Commission and the City Council in this respect so as to guarantee adequate protection to the intervenors against any possible excess traffic, and must provide buffer zones where necessary to residents nearest the new proposed business sites."

Appellees were then directed to submit to the City Planning Commission and City Council a general outline of plans for the use and development of the property within six weeks; the Council was given two weeks to accept, reject, or modify such proposals, but the action of the Council would be subject to review by the court. The Council was ordered to report to the court within sixty days from the date of the order unless the court should extend the time. Further findings were then made:

> "(9) The cost of this action is assessed against the plaintiffs or petitioners in this suit since they are the ones who brought it and are seeking the benefits therefrom, unless, however, this cause of action is strenuously resisted by the intervenors [residential property owners] herein, in which event the Court may then upon final hearing or entry of a final decree in this cause of action adjust the costs otherwise if he should deem such action equitable. Any attendance of the intervenors or their attorneys at meetings of the City Council to procure the rights given them under this decree will not be considered strenuous objections or resistance but only to protect the rights given them under this temporary order. However, further outright resistance to the proposed rezoning on a limited basis, as defined and set out by the Court herein, will be considered strenuous resistance.
>
> "(10) In event of any unwillingness on the part of the petitioners herein to comply with the orders and findings of this Court as heretofore set out may be grounds for the denial of the plaintiff's petition in toto upon final hearing or review of this cause of action.
>
> "(11) Any requirement further made by the City of Batesville relative to the types of buildings and establishment of proposed businesses or opening or closing of streets in the affected zoning area, or other requirements needed to protect the intervenors must be reasonable, practicable, and based on sound business judgment of said city officials and not necessarily on prejudice or ill feelings."

On July 22, 1974, the appellees presented to the Planning Commission their plan in compliance with the court order, details of which, under the view we take, are unnecessary to this opinion. It is significant, however, that the report announced that Independence Savings and Loan Association could not contract to build its new office on the Ball tract because of rising construction costs and changed economic conditions,[2] and that a binding commitment from anyone to develop the tracts could not be obtained until the proposed rezoning became final. The report did offer to exclude ten specific types of businesses from the property. On September 19, the Commission voted 5 to 2 to recommend that the property remain residential, notwithstanding the chancellor's statement to the Chairman of the Commission that he had already rezoned the property in the June 10 order. However, on the basis of the fact that the property was being rezoned, the Commission offered certain suggestions as proposed by the court as to restrictions and recommendations and this report, along with the minutes of the meeting, was sent to the City Council. The Council voted 5 to 3 to adopt the recommedation that the property remain residential rather than becoming commercial, but alternatively, approved the suggestions and restrictions recommended by the Planning Commission.

Thereafter, these recommendations were filed with the court, in compliance with its order, and subsequently, the chancellor entered his "Supplementary Findings and Opinion," in which he set out that the Commission and the Council had "voted to accept the Court's plan for a rezoning of the land" and a decree was entered wherein part of the suggestions were accepted, part rejected, and additional restrictions were entered on the court's own motion. The following provisions *inter alia* are found in the decree:

> "That the Court finds that the following types of businesses ordinarily permitted under a C-1A classification should be and are by the orders of this Court specifically prohibited, namely:

[2]The proposed construction of this building appears to have carried considerable weight with the court.

(6) Dry cleaning and laundry establishments

(8) Automotive service stations

(9) Automotive repairs and sales, both new and used

(10) Warehousing — commercial

(11) Wholesaling

(15) Commercial recreation, such as bowling alleys, golf driving ranges, drive-in theaters, skating rinks, and such like

(16) Automotive laundries of any nature whatsoever

(19) Drive-in restaurants, ice cream stands and such like

(23) Hospitals and nursing homes of any nature whatsoever, and funeral homes.

(24) Mobile home parks ***

"The Court further reiterates the findings in paragraph 6, page 29 in his original findings that all major traffic must come in off Highway 167 or from the east, and that the petitioners must provide adequate protection to the intervenors or their property against excess traffic coming on to the newly zoned (Ball-Highsmith) property, particularly where necessary to protect the residents nearest any proposed business sites, and to provide necessary buffer zones where absolutely needed.

"That the petitioners should and must provide a fence approximately five (5) feet in height extending along and near the west boundary line, at least 6 inches over on the petitioners' lands and immediately east of the intervenors' land, to be built and maintained at the expense of the petitioners or their successors in title. [Here follows a description of the location of the fence.] ***

"That no buildings or constructions on the property to be rezoned shall exceed two (2) stories in height. ***

"It is the thinking of the Court that neither the petitioning landowners or their employees or agents should be prohibited from coming in on any of their own lands from any direction so long as they do not intrude, impose, or trespass on adjacent land owners or lands of the intervenors herein. But this Court thinks and finds that such private entrances should be from the south, west, or north sides of the lands rezoned and so arranged that the general public might be excluded from any ingress or egress at such private entrances. This arrangement might be affected by means of gates, or chains between posts that might be taken down at times, or other practical means of ingress and egress to the said property."

It is apparent from the portions of the decree(s) set out herein that this is a classic example of judicial rezoning, and thus cannot stand. Let it be remembered that this is not an ordinary equity case, but rather involves only the chancellor's function in determining whether the City's action in granting, or denying, rezoning was or was not arbitrary, capricious, and unreasonable. In *City of Little Rock* v. *Parker,* 241 Ark. 381, 407 S.W. 2d 921, this court said:

"The right and responsibility for classifying the various areas in the city are with the zoning authorities, and their decision will only be disturbed if it is shown that they acted arbitrarily. [Citation omitted.]

"The sole question before this court on appeal is, 'Did the preponderance of the evidence before the Chancellor show that the city acted arbitrarily in refusing to rezone the properties here at issue. . .?' While the word 'arbitrary,' has several definitions, probably the most generally accepted one is, 'arising from unrestrained exercise of the will, caprice, or personal preference; based on random or convenient selection or choice, rather than on reason or nature.' (Webster's Third New International Dictionary, 1961)."

Likewise, in *Tate* v. *City of Malvern,* 246 Ark. 318, 438 S.W. 2d 52, we stated:

> "We recently had occasion to recount some fundamental rules of law applicable generally to zoning cases. [Citation omitted.] The burden is on the landowner to preponderantly show, at the trial level, that the action of the city was arbitrary; on appeal we determine whether the trial court's finding was contrary to a preponderance of the evidence; home owners who have relied on residential zoning are entitled to consideration and the use of a particular tract may be reasonably restrained so as not to cause them injury; and rezoning cannot be justified solely on the ground that it is necessary to put a particular tract to its most remunerative use."

This court has ruled that judicial intrusion upon this legislative prerogative violates the constitutional requirement of separation of powers. *Wenderoth* v. *City of Fort Smith,* 251 Ark. 342, 472 S.W. 2d 74. In *Wenderoth,* the court held unconstitutional a statute that purported to give landowners the right of *de novo* trial in circuit court, as a mode of appeal from municipal building and zoning decisions. The court's holding in *Wenderoth* is relevant to this appeal:

> "Therefore, when a city exercises the power conferred upon it by our state legislature, the city is acting in a legislative capacity which is co-equal with the power of the legislature itself. *Little Rock Ry. & Elec. Co.* v. *Dowell,* 101 Ark. 223, 142 S.W. 165 (1911). There we said that when a municipality exercised the delegation of this legislative authority, the courts cannot take away the discretion vested in the city's legislative body. ***
>
> ". . . By this method of appellate review *de novo* there is attempted to impose upon the circuit court a function of a non-judicial character in a matter that is exclusively within the discretion and legitimate power of the city's legislative body. The result would be to substitute the judgment of the circuit court for that of a municipal law-making body. This is contrary to Article 4 of our constitution which prohibits intrusion by the judiciary upon the legislative domain. ***

> "However, zoning regulations and ordinances are not immune to appellate review. Our chancery courts have the power to grant relief in appropriate proceedings when a zoning ordinance is arbitrary, capricious, or unreasonable. [Citations omitted.] On this restricted basis our chancery courts have reviewed the validity of zoning ordinances. In other words, the enactment of zoning ordinances is a legislative function subject only to appellate review to determine whether the city's legislative body acted arbitrarily, capriciously, or unreasonably in the enactment of the ordinance."

Thus, a dissatisfied landowner is not entitled to a *de novo* review in chancery of the city zoning action. *Wenderoth* v. *Freeze, Mayor,* 248 Ark. 469, 452 S.W. 2d 328.

In the instant case the chancellor committed two errors in his review of the city zoning decision. First, his opinion on June 10 clearly shows that he focused on the question of the arbitrariness of the mayor's veto, instead of the action by the city — the refusal to override the veto.

Second, as previously stated, the trial court exceeded the permissible bounds of judicial review of a zoning decision. The decrees entered in this case amply evidence that the chancellor tried the zoning question *de novo* and substituted his decision for that of the City Council, even to the extent of specifically modifying the city zoning ordinance by placing building restrictions on the tracts in question, along with the type of fencing, etc. No decision of this court has ever sanctioned any procedure whereby the trial court originates and imposes such specific restrictions in a rezoning case, though the court has upheld rezoning in cases when the developer had committed himself to restrictions for a definite project for the use of the land. *Metropolitan Trust Co.* v. *North Little Rock,* 252 Ark. 1140, 482 S.W. 2d 613; *Little Rock* v. *Hocott,* 220 Ark. 421, 247 S.W. 2d 1012. In the instant case, however, the impetus for the restrictions came from the trial court itself — in its June 10 opinion — and several of the restrictions finally imposed in the decree of November 4, 1974, apparently originated with the court.

Of course, the very fact that the chancellor found it necessary to place numerous limitations upon the rezoning, is probably the best evidence that the Council did not act arbitrarily.

In accordance with what has been said, it appearing that the action of the Council in refusing to rezone the property to C-1A was not arbitrary, capricious or unreasonable, the decree[3] should be, and hereby is, reversed.

It is so ordered.

BYRD, J., not participating.

Robert SIMMONS et ux *v.* ARKANSAS STATE HIGHWAY COMMISSION

75-310 534 S.W. 2d 16

Opinion delivered March 15, 1976

[3]Both cases were included in the same decree.

Kenneth C. Coffelt, for appellants.

Thomas B. Keys, George O. Green, for appellee.

JOHN A. FOGLEMAN, Justice. The sole point for reversal raised by appellants in this, the third appeal in the case,[1] is the failure of the court to instruct the jury, upon appellants' timely request, that it could not return a verdict based upon speculation and conjecture. We find no merit in this point and affirm.

The case is one in eminent domain. The question of just compensation actually turned upon the jury's consideration of expert testimony. Appellants' expert witness testified that appellants' property remaining after the taking of 1.23 acres was still residential in character and that any prospect for future development was pure speculation. Appellee's expert testified that the highest and best use of appellants' residual land, after the taking, was for commercial and industrial purposes, because of its proximity to an interchange on a heavily travelled highway. He found the situation comparable to property at other interchanges around which there had been commercial development, and expressed the opinion that benefits accruing to appellant by reason of enhancement of the market value of their land due to the taking and ultimate construction of the highway according to plan far exceeded

[1]See *Arkansas State Highway Commission* v. *Simmons,* 254 Ark. 144, 492 S.W. 2d 238; *Simmons* v. *Arkansas State Highway Commission,* No. 74-153, Nov. 4, 1974.

any damages which might have otherwise have been recoverable. He admitted on cross-examination that there had been no industrial development on any tract which he found comparable to appellants' property for the purpose of arriving at his opinion as to market value. This witness denied that the change in highest and best use was speculative. He explained that sales of property adjoining appellants' property by typical buyers would be indicative of normal trends and not speculative because the owners of the corporation making the purchases were astute, knowledgeable and informed and well-financed businessmen whose judgment he accepted. He admitted that he did run into speculation every now and then where purchasers were misled and uninformed.

Of course, just compensation in an eminent domain case is not to be arrived at by speculation and conjecture. Evaluation of the opinion of appellee's expert witness was for the jury. It was properly instructed that fair market value was the highest price the land would bring in a transaction between parties with knowledge of all the uses and purposes to which the property was adapted; that the burden was upon appellee to prove enhancement of value by the greater weight of the evidence, which was that evidence which had more convincing force and was more probably true and accurate; that it was to decide whether opinion evidence was correct or erroneous and, in doing so, was to consider its reasonableness or unreasonableness; and that it should not consider the opinion of an expert if it was not reasonable.

We have held that, in a particular factual situation, it was not error to instruct a jury that it could not base its verdict upon speculation and conjecture. *Benefit Ass'n. of Ry. Employees* v. *Jacklin,* 173 Ark. 937, 294 S.W. 353. But this does not mean that it is error to refuse such an instruction. It is a cautionary instruction. The giving or refusal of instructions of this nature lies within the sound judicial discretion of the trial judge and reversible error is not committed unless the circumstances are such as to indicate an abuse of that discretion. See *St. Louis I.M. & S. Ry. Co.* v. *Lyman,* 57 Ark. 512, 22 S.W. 170; *Smith* v. *Alexander,* 245 Ark. 567, 433 S.W. 2d 157; 5A CJS 1281, Appeal & Error, § 1775, P. 1282; 88 CJS 846, Trial § 320.

Where there is substantial evidence to support a jury verdict and instructions given fully and fairly cover the law and the factual situation in the case, the refusal of the instruction requested by appellants is not an abuse of discretion. *Kantor* v. *Ash,* 215 Md. 285, 137 A. 2d 661, 69 ALR 2d 585 (1958); *Midland Valley R. Co.* v. *Bradley,* 37 F. 2d 666 (10 Cir., 1930). There was substantial evidence on behalf of appellee, if Larrison's opinion was accepted and his explanation of the sales be considered comparable was found reasonable by the jury. The instructions fully and fairly covered the issues and provided a proper test for weighing expert opinions.

We find no abuse of the trial court's discretion, so the judgment is affirmed.

Dr. R. E. BELL *v.* STAREN & COMPANY

75-309 534 S.W. 2d 238

Opinion delivered March 22, 1976

Highsmith, Tatum, Highsmith, Gregg & Hart, by: *Samuel C. Highsmith,* for appellant.

Bennett & Purtle, by: *John Purtle,* for appellee.

GEORGE ROSE SMITH, Justice. Under an Illinois statute a person who incurs an indebtedness may, in advance, authorize the creditor, upon default, to appoint an attorney to confess judgment on behalf of the debtor in any Illinois court having jurisdiction under the statute. Ill. Ann. Stats., S.H.A., ch. 110, § 50 (3) (1968); see also *Motsinger* v. *Walker,* 205 Ark. 236, 168 S.W. 2d 385 (1943). The appellee, Staren & Company, a Chicago broker dealing in commodity futures,

obtained such a judgment by confession, in Cook County, Illinois, against the appellant, Dr. Bell, a resident of Batesville, Independence County, Arkansas. Staren then brought this action in Independence County to register the Illinois judgment. The circuit court granted Staren's motion for summary judgment. For reversal Dr. Bell contends that the Illinois judgment is void, because Staren did not strictly comply with the mandatory provisions of the Illinois statute. We agree that the circuit court was in error in granting Staren's motion for summary judgment.

The Illinois procedure, although constitutionally valid, may be rigorous and even oppressive, because the debtor confesses judgment in advance, without reserving any right to present his defenses. For that reason the statute itself, *supra,* and the Illinois cases recognize that the power to confess judgment "must be clearly given and strictly pursued, and a departure from the authority conferred will render the confessed judgment void." *Grundy County Nat. Bank* v. *Westfall,* 49 Ill. 2d 498, 275 N.E. 2d 374 (1971). Thus the ultimate question in the case at bar is not whether the Illinois judgment is voidable but whether it is void, even in Illinois.

As far as this record shows, Dr. Bell signed only one instrument, a two-page finely-printed "Customer's Agreement." That document does not in itself impose upon Dr. Bell any pecuniary liability to Staren. It merely sets forth in detail the rules that will govern subsequent transactions in which Dr. Bell purchases securities or commodities through Staren, as broker. It is recognized that such securities or commodities, after having been purchased on margin by Dr. Bell, may decline on the market, requiring Dr. Bell to advance more money to Staren. If Dr. Bell fails within 24 hours after notification to make such an advance or to question the amount demanded, the account is deemed to be correct, and Dr. Bell authorizes Staren to appoint an attorney to confess judgment.

That is seemingly what happened, although no documents whatever, evidencing any purchases by Dr. Bell or any statement of his account or any demand for payment, are shown to have been filed in the Illinois proceedings. All that Staren filed in the Illinois court was a copy of the Customer's

Agreement, a bald assertion that $8,705, plus an attorney's fee, was due, and a confession of liability signed by Woodrow W. Hodge as attorney for Dr. Bell. Upon those documents the Illinois court entered the judgment now sued upon.

We find apparently fatal defects in the Illinois proceeding. In the *Westfall* case, *supra,* the Illinois Supreme Court declared: "The extent of the liability undertaken must be ascertainable from the face of the instrument in which the warrant [to confess judgment] is granted. As was said in *Weber* v. *Powers,* 213 Ill. 370 at 383, 72 N.E. 1070 at 1074: 'A judgment by confession must be for a fixed and definite sum, and not in confession of a fact that can only be established by testimony outside of the written documents, required by the statute to be filed in order to enter up a judgment by confession.' " Here Staren introduced in the Illinois case no writing signed by Dr. Bell specifying the asserted debt of $8,-705. Counsel for the appellee cite no case to support their argument that the affidavit signed by some unidentified person in behalf of the Illinois plaintiff constituted one of the "written documents" required by statute to be filed.

In the second place, under the Illinois statute, *supra,* jurisdiction over the defendant can be asserted upon only three grounds: One, that the obligation was executed in the county where the suit is brought; two, that the defendant resides in that county; or three, that he owns property in that county. Here the first ground alone is relied upon. It is undisputed, however, that the Customer's Agreement was signed by Dr. Bell in Arkansas. That agreement did not specify for its validity that it be approved in Illinois, as was true in the case relied upon by the appellee, *Nationwide Commercial Co.* v. *Knox,* 10 Ill. App. 3d 13, 293 N.E. 2d 638 (1973). Furthermore, Dr. Bell's asserted liability must really depend upon his subsequent orders for the purchase of securities or commodities, but there is no contradiction of his affidavit that all documents which he executed in doing business with Staren were executed in Independence County. Thus Staren failed in the Illinois proceeding to make the jurisdictional showing that the action was brought upon an obligation executed by Dr. Bell in Cook County. The judgment was therefore void in Illinois and not entitled to full faith and credit here. Leflar, American Conflicts Law, § 81 (rev. ed., 1968).

Finally, the Customer's Agreement empowered Staren to appoint an attorney to confess judgment for Dr. Bell. The confession of judgment was signed by attorney Woodrow W. Hodge, but we can find nothing to show that he was appointed by the creditor for that purpose. Hence the appellant may be right in his insistence that the Illinois judgment is void because it was based upon "a warrant of attorney and a cognovit not made a part of the record."

The case was decided below upon motion for summary judgment. Since that motion should not have been granted, the cause must be remanded for further proceedings.

Reversed and remanded.

John Michael CARY *v.* STATE of Arkansas

CR 75-159 534 S.W. 2d 230

Opinion delivered March 22, 1976

[redacted]

Don Langston, for appellant.

Jim Guy Tucker, Atty. Gen., by: *Terry Kirkpatrick,* Asst. Atty. Gen., for appellee.

JOHN A. FOGLEMAN, Justice. Appellant John Michael Cary was convicted of possession, with intent to deliver, heroin in violation of Ark. Stat. Ann. § 82-2617 (a) (1) (i) (Supp. 1975) Act 590 of 1971, as amended. It was alleged in the information that the offense occurred on January 10, 1974. Prior to trial, appellant filed a motion to suppress heroin seized in a search of premises at 1708 South "R" Street, Apt. 6, in Fort Smith pursuant to a warrant issued by the Judge of the Municipal Court of Fort Smith. The warrant was issued upon an affidavit made by Sgt. Bill Reather. The affidavit read substantially as follows:

> *** On the afternoon of January 5, 1974, I received information from a confidential but reliable informant

who has proved very reliable in the past. The informant told me that he had been in Apartment No. 6, 1708 South "R", in Fort Smith, Arkansas, an apartment he knew was shared by John Michael Cary and Larry Williams. The informant said while he was in the apartment the afternoon of January 5, 1974, he saw a large quantity of heroin that had been broken down into small packages called "quarter-T's." That on January 2, 1974, affiant was working with this same confidential and reliable informant. On that date informant told me that John Michael Cary had some heroin and was selling it from his apartment. On January 1, after talking with the informant I arranged for him to make a controlled buy of heroin from the above-described apartment. He went inside the apartment and then when he came back out he got into my car and gave me a small plastic bag containing a white powdery substance which was later field-tested and proved to be heroin. The informant told me that John Michael Cary and Larry Williams were both in the apartment at the time he made the buy. That on January 9, 1974, I received information from the same confidential but reliable informant that he had been in the apartment of John Michael Cary and Larry Williams that day and he personally observed a large quantity of heroin that had been broken down into small packages called "quarter-T's." That recently Captain Rivaldo of the Narcotics Unit of the Fort Smith Police Department interviewed John Michael Cary and Cary told him that he was living in Apartment No. 6 at 1708 South "R" in Fort Smith, Arkansas. Based on the above the affiant has reason to believe that heroin and other dangerous drugs are now being stored on the premises known as Apartment No. 6, 1708 South "R", Fort Smith, Arkansas, the residence of John Michael Cary.

Appellant contends that the affidavit was defective in that it contains no statement of facts from which the magistrate could conclude that the unidentified informant was reliable.

In testing an affidavit for a search warrant, the issuing magistrate must render a judgment based upon a common

sense reading of the entire affidavit and great deference should be shown his determination. *Spinelli* v. *United States,* 393 U.S. 410, 89 S. Ct. 584, 21 L. Ed. 2d 637 (1968). The sufficiency of the affidavit might indeed be subject to question, were it not for the fact that the earliest report made by the informant to the police officer was the result of the "controlled buy." The officer's relating the facts pertaining to that incident certainly gave the magistrate advice of underlying circumstances from which the officer concluded that the informer was reliable, so that the magistrate did not have to depend only upon the officer's suspicion, belief or conclusion. The magistrate's determination then, not being based simply upon the officer's conclusion, was sufficient to support the issuance of the warrant. *Jones* v. *United States,* 353 F. 2d 908 (D.C. Cir., 1965).

Appellant also argues that the circuit court erred in admitting testimony showing his participation in the sales of marijuana on November 22, 1971, May 3, 1972, and December 20, 1973. He first objects that the first two were too remote in time from the date he is alleged to have committed the crime for which he was charged. The matter of remoteness is addressed to the sound judicial discretion of the trial judge, which will be interfered with by a reviewing court only when it is clear that the questioned evidence has no connection with any issue in the case. *Caton* v. *State,* 252 Ark. 420, 479 S.W. 2d 537; *King* v. *United States,* 144 F. 2d 729 (8 Cir., 1944). We find no abuse of discretion, particularly in view of the fact that there was testimony tending to prove intervening instances during the two years between the first and the offense charged. See *Wilson* v. *State,* 184 Ark. 119, 41 S.W. 2d 764; *King* v. *United States,* supra.

Appellant next asserts that evidence of sales of marijuana should not be admitted to show intention to deliver heroin, because the sale of marijuana is a relatively minor offense, by comparison, and that marijuana is not sufficiently similar to heroin to have any relevance. His principal reliance is upon *Sweatt* v. *State,* 251 Ark. 650, 473 S.W. 2d 913. But in *Sweatt,* intent was not an issue. The defendant was there accused of the sale of LSD and based upon *Alford* v. *State,* 223 Ark. 330, 266 S.W. 2d 804, we held that the only relevancy of prior sales of marijuana would be to show that the accused,

having previously sold *drugs* was likely to do so again. But it is clearly pointed out in *Alford* that evidence of previous offenses bearing on intent is admissible. The test is not the comparative seriousness of the offenses. It is only necessary that they be similar in nature to the crime charged. *Wood* v. *State,* 248 Ark. 109, 450 S.W. 2d 537; *Wilson* v. *State,* supra. There was sufficient similarity here. See, *People* v. *Tabb,* 137 Cal. App. 167, 289 P. 2d 858 (1955).

Another alleged error is the denial of appellant's motion for a mistrial when a witness called by him mentioned on cross-examination that appellant was on parole at the time of the alleged offense. The answer was not in any way responsive to the prosecuting attorney's question. The witness did not finish the answer before he was interrupted by the objection. The circuit judge admonished the jury not to consider the statement as evidence of appellant's guilt. Appellant relies on cases from other jurisdictions as authority that an admonition is not sufficient to eliminate prejudice to a defendant arising from an injection into the trial of evidence of his prior criminal record. We have left the matter of deciding whether prejudice of improper evidence may be removed by an admonition largely to the discretion of the trial judge. The only alternative to the admonition was the declaration of a mistrial, a drastic remedy to be resorted to only when the prejudice is so great that it cannot be removed by an admonition. *Hathcock* v. *State,* 256 Ark. 707, 510 S.W. 2d 276. See also *Yarbrough* v. *State,* 257 Ark. 732, 520 S.W. 2d 227; *Hill* v. *State,* 255 Ark. 720, 502 S.W. 2d 649; *Parrott* v. *State,* 246 Ark. 672, 439 S.W. 2d 924. We find no abuse of discretion in this connection.

The question of the sufficiency of the evidence to sustain the court's denial of appellant's motion for directed verdict has required us to examine the testimony rather closely because it was so cryptically abstracted, and there are many references to testimony in the state's brief not disclosed by appellant's abstract. The manager of the apartment where the heroin was found pursuant to the search warrant previously mentioned testified that he rented the apartment in which the heroin was found to Susan Walker on December 15, 1973 for six months, for occupancy by three persons, one

of whom was represented to be her husband.[1] The "husband" was the appellant but he was known to the manager as John Walker. The manager saw him about the premises during the first week in January, 1974. He had collected rent from appellant on December 20, 1973. On December 21, 1973, appellant had told Capt. Rivaldo of the Fort Smith Police Department that he lived at this apartment. The other occupant of the apartment was Lawrence Williams. Williams, called as a witness by appellant, testified that this apartment was not his permanent residence and that he only stayed there "off and on."

When the search was conducted, only Williams and Susan Walker were present. The heroin was found in small plastic bags inside a small plastic box folded in a rug, blanket or tapestry on top of a bedroom closet shelf. Sgt. Reather, one of the searching officers, found a glove in the closet. This glove bore appellant's name. Personal papers belonging to appellant were found in other rooms in the apartment. When the officers entered the apartment, Susan Walker was in another bedroom. Williams told the officers that he had been sleeping on the couch in the living room.

Williams testified that he was the owner of the heroin and that appellant has never possessed it. He said that appellant had used heroin from the supply in his (Williams') possession and had, on one occasion, "picked up the money" paid for the marijuana Williams had sold. He also testified that Cary had left for Fayetteville in the daytime just preceding the "raid," which took place after 1:00 a.m. Williams stated that he saw appellant after the search and that appellant, knowing that the police were looking for him, asked if Williams had been caught with any heroin and if Williams had charged the officers for the heroin sample used for analysis. Williams also testified that "whenever John left he told me that he was not going to wait around to go to trial." He stated that others purchased heroin from him at the apartment.

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[1]Larry Williams, a witness called by appellant, testified that the couple were not married, but that Susan Walker was one of appellant's many girlfriends.

Of course, in determining whether the evidence of appellant's guilt was substantial, it, with all reasonable inferences to be drawn from it, is viewed in the light most favorable to the state. *Rogers* v. *State,* 257 Ark. 144, 515 S.W. 2d 79. When it is, we cannot say that the inference that appellant had joint or constructive possession of the heroin is unreasonable. Either is sufficient. *Smith* v. *United States,* 385 F. 2d 34 (5 Cir., 1967); *Hernandez* v. *United States,* 300 F. 2d 114 (5th Cir. 1962); *State* v. *Villavicencio,* 108 Ariz. 518, 502 P. 2d 1337 (1972); *State* v. *Trowbridge,* 157 Mont. 527, 487 P. 2d 530 (1971); *State* v. *Bellam,* 225 La. 445, 73 S. 2d 311 (1954); *People* v. *McDaniel,* 154 Cal. App. 2d 475, 316 P. 2d 660 (1957). See Annot, 56 ALR 3d 948 (1974). Constructive possession of a controlled substance means knowledge of its presence and control over it. *State* v. *Montoya,* 85 N. M. 126, 509 P. 2d 893 (1973). See also, *People* v. *Bock Leung Chew,* 142 Cal. App. 2d 400, 298 P. 2d 118 (1956). Neither actual physical possession at the time of arrest nor physical presence when the offending substance is found is required. *People* v. *McDaniel,* supra; *People* v. *Bock Leung Chew,* supra. As a matter of fact, neither exclusive nor physical possession is necessary to sustain a charge if the place where the offending substance is found is under the dominion and control of the accused. *State* v. *Trowbridge,* supra; *Hernandez* v. *United States,* supra; *State* v. *Hunt,* 91 Ariz. 149, 370 P. 2d 642; *People* v. *Bretado,* 178 Cal. App. 2d 465, 3 Cal. Rptr. 216 (1960); *People* v. *Yeoman,* 261 Cal. App. 2d 338, 67 Cal. Rptr. 869 (1968). It was reasonable for the jury to infer from the evidence that the premises were under appellant's dominion and control. *People* v. *McDaniel,* supra. In *People* v. *Williams,* 95 Cal. Rptr. 530, 485 P. 2d 1146 (1971), the Supreme Court of California said:

> *** Constructive possession occurs when the accused maintains control or a right to control the contraband; possession may be imputed when the contraband is found in a place which is immediately and exclusively accessible to the accused and subject to his dominion and control, or to the joint dominion and control of the accused and another. (*People* v. *Francis,* supra, 71 Cal. 2d 66, 71, 75 Cal. Rptr. 199, 450 P. 2d 591).

The elements of unlawful possession may be established by circumstantial evidence and any

reasonable inferences drawn from such evidence. ***

See also, *State* v. *Villavicenio,* supra; *Sewell* v. *United States,* 406 F. 2d 1289 (8th Cir. 1969). The evidence is sufficient if it is shown, either by direct or circumstantial evidence, that the accused had the right to exercise control over the contraband substance. *State* v. *Trowbridge,* supra; *Hernandez* v. *United States,* supra. The offense, and its elements, may be proved by circumstantial evidence. *Smith* v. *United States,* supra; *Hernandez* v. *United States,* supra; *People* v. *Haynes,* 253 Cal. App. 2d 1060, 61 Cal. Rptr. 859 (1967); *People* v. *Yeoman,* supra. See Annot, 56 ALR 3d 948, 953. The evidence of the circumstances is sufficient basis for a reasonable inference that appellant knew of the presence of the heroin and that he had the right to exercise, at least, joint dominion and control of it. See *People* v. *Bretado,* 178 Cal. App. 2d 465, 3 Cal. Rptr. 216 (1960). When the evidence of possession is purely circumstantial, there must be some factor, in addition to joint occupancy of the place where narcotics are found, linking the accused with the narcotic in order to establish joint possession. *People* v. *Davenport,* 39 Mich. App. 252, 197 N.W. 2d 521, 56 ALR 3d 942 (1972). See also, *State* v. *Hunt,* supra; Annot, 56 ALR 3d 948, 957 and cases cited. But it was not necessary to show that appellant had exclusive possession of either the apartment or the bedroom closet where the heroin was found. Annot, 56 ALR 3d 948, 956 and cases cited. The finding of appellant's glove in the closet might not have been sufficient to furnish this link, but when this factor is coupled with evidence that appellant used heroin from the stock kept on the premises and that sales were made there, and the remarks of appellant to Williams after the search, there were sufficient circumstances from which it was reasonable for a jury to draw the inference that appellant had joint possession of the substance, even though that possession might have been constructive. See *State* v. *Weiss,* 73 Wash. 2d 372, 438 P. 2d 610 (1968); *People* v. *Haynes,* supra. See Annot, 56 ALR 3d 948, 854.

Finally, appellant mounts a three-pronged attack on Ark. Stat. Ann. § 82-2624 (Supp. 1975) which he labels as the Habitual Drug Offender Statute. He first contends that it is unconstitutional because it does not provide a procedure for its administration or prescribe the type of evidence admissi-

ble to prove the convictions as does the Habitual Criminal Act [Ark. Stat. § 43-2328 et seq. (Repl. 1964 and Supp. 1975)]. For some reason, appellant complains of this omission and simultaneously argues that the court denied him due process of law by utilizing the procedures outlined for application of the Habitual Criminal Act in Ark. Stat. Ann. § 43-2330, 2330.1 (Repl. 1964 and Supp. 1975).

Appellant has not furnished us with any citation of authority in support of his contentions. We find no merit in them. There are other statutes providing for enhancement of punishment for second of subsequent convictions. See, e.g., Ark. Stat. Ann. § 75-1029.4 (Supp. 1975). We simply do not find any basis for declaring Ark. Stat. Ann. § 82-2624 unconstitutional and cannot see how appellant has been deprived of due process of law by the circuit court's patterning its procedures for fixing punishment after those provided in the Habitual Criminal Act.

Long ago, we held that statutes providing for increased penalties when an offense is committed by a prior offender are valid. *Wolf* v. *State,* 135 Ark. 574, 206 S.W. 39. See also, *Ferguson* v. *State,* 249 Ark. 138, 458 S.W. 2d 383. But if the court in this case had permitted evidence of previous convictions to be admitted during the trial and before the jury had arrived at a verdict of guilty of the offense charged, it might well have deprived appellant of a fair trial under the Fifth, Sixth and Fourteenth Amendments to the United States Constitution. See *Miller* v. *State,* 239 Ark. 836, 394 S.W. 2d 601. There we held the procedure followed in applying a habitual criminal act unconstitutional but not the act. We prescribed procedures to insure the defendant a fair trial, but which would, under certain circumstances, permit a separate hearing on prior convictions and an increase of punishment on account thereof. Subsequently procedures more nearly like those proposed in a dissenting opinion were adopted by the legislature. Ark. Stat. Ann. § 43-2330.1 (Supp. 1975). We have long upheld the procedure and see no reason why following it in this case did not adequately prevent prejudice to appellant.

One facet of appellant's argument in this connection is directed toward the court's refusal of his requested instruc-

tion No. 2. The basis of this objection was actually the court's refusal to present the penalty stated for a first offense, which was also the ground for his objection to Court's Instruction No. 5. For the reasons heretofore stated, we find no merit in this argument.

Appellant feels that there was error in the admission of testimony of a prior conviction through the testimony of the Circuit Clerk of Sebastian County. As custodian of all records of the Circuit Court of Sebastian County, he testified that among them was a penitentiary commitment of John Michael Cary for a term of five years for violation of Act 590 of 1971, as amended. He testified that the commitment contained a statement that it was a true and perfect transcript of the judgment. The only objection made in the trial court was that the judgment itself was not introduced. However, appellant argues here that even if the trial court did not err in following procedures outlined in the Habitual Criminal Act, this evidence was not admissible. But we have heretofore recognized that Ark. Stat. Ann. § 43-2330 simply provides that properly certified copies of certain documents are prima facie evidence of prior convictions but does not exclude other methods of proof of prior convictions. *Parker* v. *State,* 258 Ark. 880, 529 S.W. 2d 860 (1975). When the statutory method for proving prior convictions is not exclusive, they may be shown in accordance with common law rules or by any otherwise competent evidence. *People* v. *McIntyre,* 163 N.Y.S. 528, 35 N.Y.Cr. 413, 99 Misc. 17 (1917); *People* v. *Hill,* 67 Cal. 2d 105, 60 Cal. Rptr. 234, 429 P. 2d 586 (1967). In *Parker* we held that a penitentiary commitment which contained a transcript of the judgment of conviction was admissible in evidence. We have also held that the testimony of the circuit clerk that the accused had been convicted of the first offense of drunken driving was admissible in a prosecution for a second offense. *Atha* v. *State,* 217 Ark. 599, 232 S.W. 2d 452. Later, we held that testimony of a circuit court clerk as to the contents of official records was sufficient to support a habitual criminal conviction. *Ellingburg* v. *State,* 254 Ark. 199, 492 S.W. 2d 904. We find no error in admitting the evidence in this case.

Since we find no error, the judgment is affirmed.

Edward Lynn CLARK *v.* SHILOH TANK AND ERECTION COMPANY and HARTFORD INSURANCE COMPANY

75-338 534 S.W. 2d 240

Opinion delivered March 22, 1976

Niblock, Hipp & Odom, for appellant.

Putnam, Davis & Bassett, for appellees.

FRANK HOLT, Justice. This is a workmen's compensation case. Appellant was a welder's helper for the appellee, Shiloh Tank and Erection Company, when a sheet of steel fell across his right foot amputating the anterior portion of it. A surgical amputation of the foot at mid-ankle was required. The Workmen's Compensation Commission awarded appellant 125 weeks, the maximum benefit, for the loss of his foot as a scheduled injury under Ark. Stat. Ann. § 81-1313 (c) (11)

(Repl. 1960). An additional 22.5 weeks was awarded (or the equivalent of 5%) as a permanent partial disability to the body as a whole for a back injury which the commission found was attributable to the loss of the foot. The commission further found that the primary limitation in regard to claimant's loss of earning capacity resulted from his amputated foot and not his back. Appellant's sole contention or argument on appeal is that where a scheduled injury is coupled with or produces an unscheduled injury, the combined effect should be apportioned to the body as a whole. Consequently, it is asserted the commission erred in not doing so. We cannot agree inasmuch as appellant's contention would convert a fact question, which is presented here, into a question of law.

It is well established that in compensation cases the burden is upon a claimant to establish his claim for compensation by a preponderance of evidence before the commission. On appeal we consider only that evidence which is most favorable to the commission's finding and affirm if any substantial evidence exists. *Superior Improvement Co.* v. *Hignight,* 254 Ark. 328, 493 S.W. 2d 424 (1973). In the case at bar there is substantial evidence to sustain the commission's findings. It is undisputed that appellant's foot injury necessitated the surgical amputation at the right ankle. Admittedly, this is a scheduled injury pursuant to Ark. Stat. Ann. § 81-1313 (c) (11) (Repl. 1960). Some fourteen months after suffering the foot injury, the appellant complained to his doctor that he was suffering from pain in his lower back. According to the appellant his back started bothering him when he got off crutches and started using his leg with the prosthesis. According to his doctor, the type of amputation, the use of the prosthetic device and the unlevel limb when not using the device are continuing to aggravate his back condition. In the doctor's opinion the appellant has a 5% permanent partial disability to his back.

We have held that, absent total disability, a scheduled injury or injuries cannot be apportioned to the body as a whole. *McNeely* v. *Clem Mill & Gin,* 241 Ark. 498, 409 S.W. 2d 502 (1966); *Moyers Brothers* v. *Poe,* 249 Ark. 984, 462 S.W. 2d 862 (1971); *Anchor Const. Co.* v. *Rice,* 252 Ark. 460, 479 S.W. 2d 573 (1972); *Meadowlake Nursing Home* v. *Sullivan,* 253 Ark.

403; 486 S.W. 2d 82 (1972); and *Motor Queen Motel* v. *Sandlin,* 254 Ark. 166, 492 S.W. 2d 257 (1973). In the case at bar, as indicated, there is substantial evidence to support the commission's finding that the appellant was not totally disabled as a result of his scheduled injury or the combination of it and his back injury. It follows that the commission correctly applied the law.

Affirmed.

Peggy GRAVNING *v.* THE AMERICAN DRUGGISTS' INSURANCE COMPANY

75-291 534 S.W. 2d 754

Opinion delivered March 29, 1976

Niblock, Hipp & Odom, for appellant.

Putman, Davis & Basset, for appellee.

CARLETON HARRIS, Chief Justice. On August 10, 1971, a deed was executed from Elsie Norwood to Peggy Gravning, appellant herein, conveying a lot and house in Lincoln, Arkansas; also, on August 10, appellant and her brother, Darrell Mattox, executed a note to the Bank of Lincoln for $7,000.00, and Mrs. Gravning also executed a mortgage on the aforementioned property in that amount. At the same time, appellant executed a deed to this property to her brother, and this deed remained in the custody of the bank, unrecorded. Mattox had paid the full consideration for the house on behalf of his sister, and he received the proceeds of the $7,000.00 loan from the bank. The Norwood deed was recorded on August 11. In December, 1971, Mrs. Gravning signed another note to the Lincoln Bank for $3,117.41, an F.H.A. improvement loan. On February 19, 1973, a homeowner's insurance policy was issued to appellant by The American Druggists' Insurance Company with policy limits of $15,000.00 for the dwelling and $7,500.00 for the contents, and on October 24, 1973, the dwelling was totally destroyed by fire. In February, 1974, Mrs. Gravning and her brother filed a complaint against the insurance company for recovery[1] of the face amount the policy, $15,000.00, for the total loss of the dwelling, and $2,500.00 was sought for loss of the contents, plus interest, penalty and reasonable attorney's fees and costs. The company filed a cross-complaint and paid the sum of $7,468.85, the balance due on the two notes to the Lincoln Bank and prayed to be subrogated to the bank's rights on the indebtedness. This payment was made during

[1]Mattox took a voluntary nonsuit before the case was submitted to the jury.

the pendency of the lawsuit and thereafter, the bank notified Mattox to pick up the entire file, which included the deed given to him by his sister. This deed was recorded on June 26, 1974. On trial, at the conclusion of appellant's evidence, she moved for a directed verdict, and when it developed that appellee did not desire to put on any testimony, the motion was renewed, but again denied.

The jury returned a verdict for Mrs. Gravning in the amount of $1,500.00[2] for the dwelling and $2,000.00 for the personal property. After a motion for a new trial was denied, appellant appealed to this court setting out four points of asserted error. We will discuss three of these points, the fourth having no bearing under the conclusions reached.

The determination of this litigation does not depend upon a statement of the facts,[3] for it is conceded that Mrs. Gravning had an insurable interest in the dwelling. From appellee's brief:

> "It is, of course, undisputed that at the time of the fire, appellant remained liable on the promissory notes which she had executed, one of which had also been executed by Mattox. If, however, Mattox was the owner of the property at the time of the fire, appellant's only in-

[2]This figure was clearly a compromise and not based on any instruction from the court, the court telling the jury that if they found she was the owner of the property at the time of the fire, she would be entitled to the difference in what had been paid the bank and the $15,000.00 coverage; if they found she was not the owner at the time of the fire, she would be entitled to nothing.

[3]Mrs. Gravning and Mattox testified that she executed the deed in order that the property would "stay in the family" in case she decided to leave Lincoln or "if anything happened to her." Appellant and her children moved into the house and she obtained the $3,117.41 F.H.A. home improvement loan, lived there, paid taxes on the property in 1971, 1972, and 1973, but after receiving her college degree at the University of Arkansas in June, 1973, she moved to Tulsa seeking employment; thereafter, she went on to San Diego, California, still seeking employment, and was living there at the time of the trial. She had not made Lincoln her home since 1973, although she still received mail at Lincoln at the time the house burned. After Mrs. Gravning left Lincoln, her brother twice rented the house to other persons, checking with appellant each time, and he had rented it a third time just before the fire. The rentals were applied to the monthly payments on the note at the bank, Mattox paying the difference.

terest in the property stemmed from her potential liability on the notes and appellee respectfully submits that the extent of her insurable interest was the amount owed on the two notes at the time of the fire. It is undisputed that appellee voluntarily paid into court the amount due the Bank of Lincoln on the two promissory notes signed by appellant. This amounted to some $7,-468.85. Upon payment of this amount, which discharged appellant's liability to the Bank of Lincoln in full, appellant had no further interest in the property and anything beyond the amount she owed on the notes would be a windfall to her. In short, appellant's insurable interest was limited to her potential liability on the promissory notes."

In *Tedford* v. *Security State Fire Insurance Company,* 224 Ark. 1047, 278 S.W. 2d 89, Tedford owned a one-eleventh interest in the insured property, but obtained a policy for its full value. After fire destroyed the property, the company denied liability on the ground that Tedford had misrepresented his interest in the application for the policy. The trial court found for Tedford, but limited the recovery to one-eleventh of the face value of the property because of a provision in the policy that purported to limit any recovery to the amount of the insured's interest in the property.

On appeal, this court affirmed as to the company's liability but reversed as to the amount of recovery, awarding Tedford the face value of the policy under Ark. Stat. Ann. § 66-3901 (Repl. 1966)[4] (then codified as § 66-515). It was noted that the statute provided a "valuation fixed in advance by the parties by way of liquidated damages in the case of total loss by fire of the property insured without the fault of the insurer," and earlier decisions were cited that had held void attempts by insurance companies to limit recoveries to less than the face value in contravention of the statute. We said:

[4]"66-3901. VALUED POLICY LAW. — A fire insurance policy, in case of a total loss by fire of the property insured, shall be held and considered to be a liquidated demand and against the company taking such risk, for the full amount stated in such policy, or the full amount upon which the company charges, collects or receives a premium; provided, the provisions of this section shall not apply to personal property."

"The rule applicable in the present situation is stated in 29 Am. Jur., Insurance, § 1196, as follows: 'It is recognized by all the cases decided upon the question that under a valued policy or the provisions of a valued policy statute, the insured insuring the property at a given valuation accepted by the insurer at the time of the issuance of the policy as the value of the insured's interest may recover the full value insured, even though he in fact has a limited or qualified interest worth less than the amount of the insurance. The insurer may not go behind the policy and show that the insured's interest is worth less than the amount of the policy.' Cases from other jurisdictions which support this rule are collected in 68 A.L.R. 1352.

"We think the Washington court properly interpreted the purpose and effect of the valued policy statute in *Bright* v. *Hanover F. Ins. Co.*, 48 Wash. 60, 92 Pac. 779, where it said: 'The appellant contends that this section does not apply where the interest of the insured is a limited or qualified one, such as that of a tenant, a party in possession, etc.; but with this contention we are unable to agree. ***

'The courts hold that the valued policy law applies in cases of concurrent insurance, and we perceive no sound reason for holding that the act does not apply to insurance on special or limited interests in real property. On the contrary, we think the plain reason and policy of the law require us to hold otherwise. It is doubtless true, as contended by the appellant, that the aggregate insurance on the several parts may exceed the value of the whole, but so may a single policy, and so may concurrent policies. To a certain extent the law undoubtedly gives legal sanction to [a] wagering contract, but the policy of such a law is for the Legislature, and not for the courts.' "

Two subsequent decisions have upheld face-value recoveries when insureds had less than full interests in the respective properties. In *Hensley* v. *Farm Bureau Mutual Insurance Company of Arkansas*, 243 Ark. 408, 420 S.W. 2d 76, the insured had signed a contract to sell the property to a third

party before the fire occurred. The insured had remained liable on a mortgage on the property, however. The purchaser of the property also obtained coverage, and after the fire, was paid the full amount by his company. Thereupon, he paid Hensley. Hensley instituted suit to collect the full amount of his policy under the valued policy statute, but the trial court denied recovery on the basis that Hensley would be unjustly enriched. On appeal, we reversed and allowed full recovery. The point at issue was different from that in the present litigation, but, of course, we found that Hensley had an insurable interest for the full amount.

Similarly, in *Interstate Fire Insurance Company* v. *James,* 252 Ark. 638, 480 S.W. 2d 341, James had only a one-third interest in the insured property. The other owners had obtained separate insurance, however, and after a total fire loss the company sought to have liability prorated among the various insurers. This court affirmed a summary judgment for James for the face value of his policy under § 66-3901, stating that *Hensley* was controlling.

It is thus apparent that Mrs. Gravening was entitled to recover the full $15,000 (less, of course, the amount paid to the bank), and had the proper motion for directed verdict been made, the failure to grant same would have constituted error. Let it be remembered that Mrs. Gravning was also seeking $2,500.00 for loss of personal property. Under testimony presented as to the value of the personal property, the amount due was a fact question, and actually the jury returned a verdict of $2,000.00. Accordingly, appellant was not entitled to a directed verdict on this phase of the litigation. In making her motion, it may well be that counsel for Mrs. Gravning had in mind only the real estate, since he mentioned the indebtedness to the Bank of Lincoln, the mortgage and the note, and stated "clearly by Arkansas law this is an insurable interest as defined by the cases that would entitle her to the face amount of the policy. We ask for a directed verdict." However, the motion simply was for a directed verdict which would include all that she sought in her complaint, and if appellant only had reference to the property covered by the valued policy law, the motion should have been more specific.

However, appellant sought several instructions which the court refused, and the refusal is asserted to constitute error. We agree with appellant that four of these should have been given. The first of these, Requested Instruction No. 7, recited the statute (§ 66-3901).

Appellant's Requested Instruction No. 13, as follows, should also have been given:

> "Under a valued policy on the provisions of a valued policy statute, the insured insuring the property at a given valuation accepted by the insurer at the time of the issuance of the policy as the value of the insured's interest may recover the full value insured even though he, in fact, has a limited or qualified interest worth less than the amount of the insurance, and the insurer may not go behind the policy and show the insured's interest is worth less than the amount of the policy."

Four instructions were also requested on insurable interest, Requested Instruction No. 8 defining such an interest, and quoting verbatim the statute, Ark. Stat. Ann. § 66-3205 (Repl. 1966). While a more succinct instruction could have been given, the court did not in any of its other instructions properly inform the jury as to insurable interest, and the instruction should have been given. Likewise, Requested Instruction No. 6 should have been given, as follows:

> "The interest of the mortgagor is not defeated by a voluntary sale of the premises where he remains liable for the mortgage debt."[5]

It is contended, and we agree, that the court also erred in giving Instruction No. 10 and No. 12, the former being to the effect that if the deed from Mrs. Gravning to her brother was effective to convey title, she could not recover, and No. 12 erroneously telling the jury that if she had transferred her interest or ownership in the house prior to the fire, the verdict should be for appellee.

It follows from what has been said that the judgment

[5] See *Couch on Insurance* 2d § 24:71 (1960).

should be reversed. While the $2,000.00 awarded by the jury for the loss of personal property is not attacked on this appeal, still, under our cases, it is necessary that the entire judgment be reversed. The rule is that a verdict at law "is an entirety which we cannot divide by affirming in part." *Wilson* v. *Davis,* 230 Ark. 1013, 328 S.W. 2d 249. In *Martin* v. *Street Improvement District No. 349,* 180 Ark. 298, 21 S.W. 2d 430, Chief Justice Hart stated:

> "The practice in this State has been that, when a verdict is set aside as being inadequate, the court must grant a new trial in the whole case. The reason is that a verdict, as the foundation of a judgment at law, is an entity, and cannot be divided by the trial court."

Accordingly, because of the errors herein set out, the judgment is reversed and the cause remanded to the Washington County Circuit Court with directions to proceed in a manner not inconsistent with this opinion.

It is so ordered.

David ROTHGEB et ux *v.* SAFECO INSURANCE COMPANY of America

75-320 534 S.W. 2d 759

Opinion delivered March 29, 1976

Parker & Henry, for appellants.

Barnett, Wheatley, Smith & Deacon, for appellee.

FRANK HOLT, Justice. Appellants brought this action to recover damages under the provisions of a blanket corporate surety bond issued by appellee on the members of the Arkansas Realtors Association. A surety bond is required by Ark. Stat. Ann. § 71-1305 (c) (Supp. 1975). Appellants contend that the trial court erred in granting appellee's motion for summary judgment inasmuch as there existed material issues of fact.

It appears the undisputed facts are that Wimpy and Steele, a real estate partnership, owned some property which they sold to appellants. Appellants brought this action for damages against Wimpy and Steele, individually and as partners, alleging that Wimpy committed acts during the course of their dealings with them which were in violation of Ark. Stat. Ann. § 71-1307 (Supp. 1975). Also appellee surety was joined as a defendant pursuant to the provisions of § 71-1305. Wimpy and Steele declared bankruptcy. Appellee moved for a summary judgment on the basis that Wimpy and Steele were the owners of the property at the time appellants contracted with them and, therefore, Wimpy, as an owner of the property, was not functioning as a real estate agent within the meaning of Ark. Stat. Ann. § 71-1301, et seq. (Supp. 1975), at the time of the transaction. Alternatively, it was asserted that appellee's blanket statutory $2,000 bond with the Arkansas Realtors Association provided that it did not extend coverage to the members of that group who were bonded, as Wimpy was here, under another real estate broker's bond.

We must agree with appellee's position that since Wimpy was selling land owned by him and Steele, he could not be considered an agent or broker, which requires a license, within the meaning of § 71-1302. If Wimpy was acting solely as the owner, he would not come within the provisions of § 71-1302. Cf. *Phillips* v. *Ark. Real Estate Comm.,* 244 Ark. 577,

426 S.W. 2d 412 (1968). Likewise, since the property was jointly owned by him and his partner, Steele, the act is not applicable to them.

We deem it unnecessary to discuss appellee's alternative motion for a summary judgment.

Affirmed.

BYRD, J., not participating.

Sammy A. WEEMS and Doyle OWEN
v. STATE of Arkansas

75-147 534 S.W. 2d 753

Opinion delivered March 29, 1976

Reinberger, Eilbott, Smith & Staten, for appellants.

Jim Guy Tucker, Atty. Gen., by: *Terry R. Kirkpatrick,* Asst. Atty. Gen., for appellee.

OTIS H. TURNER, Special Justice. This appeal is from a

conviction of each of Appellants by a Prairie County Jury on charges of arson and conspiracy.

The transcript on this appeal is limited to proceedings transpiring after conclusion of all the evidence and Appellant asserts as error two narrow issues.

Trial of this cause began on June 16, 1975, and sometime in late afternoon on June 19, the case was submitted to the jury. Being unable to reach a verdict, Court was recessed until the morning of June 20th. The jury retired on that morning to resume its deliberation and after some three hours, reported deadlocked at 10-2, with no indication whether the numerical majority was for conviction or acquittal.

After recess for lunch and prior to resumption of deliberation, the following exchange occurred between the Court, the Foreman of the jury and Counsel for defendants:

"FOREMAN: Sir, what are the penalties for arson?

THE COURT: . . . Not less than one and no more than ten years. Would Counsel approach the bench? (at Bench and out of hearing of jury) would you like me to instruct them that while the Court is not bound to follow the recommendations, that should they return a verdict, they can recommend anything thay want to by interlineation?

COUNSEL: . . . Alright.

THE COURT: . . . Do you want me to, at the same time, instruct them that, if they agree on guilt and cannot agree on punishment, the Court will receive such a verdict?

COUNSEL: I don't want you to.

THE COURT: I kinda thought you wouldn't. (to Jury) It has been agreed by Counsel that the Court might instruct you to this effect. While the Court is not bound to follow a recommendation that a jury makes, the jury

does have the right, if you choose, to make any recommendation that you want to on a verdict form, simply by interlining anything . . . if you have any other questions, we can take them up now.

FOREMAN: We are not bound to that are we, to fill in the years, number of years in the penalty?

THE COURT: Now will Counsel approach the bench? (at bench) There isn't but one way to answer that question and I didn't invite it.

COUNSEL: No, but I am going to have to object if you answer it.

THE COURT: . . . Overrule. (to Jury) The answer to your question is this: Under the law, in the State of Arkansas, if a jury cannot agree on a punishment but can agree on guilt, a trial Judge may receive such a verdict and then he fixes the punishment . . .

FOREMAN: If we fix the penalty, is that to be unanimous, too?

THE COURT: Right . . . "

After some three hours of further deliberation, the jury returned a verdict of guilt as to both defendants, *without* recommendation as to punishment.

This instruction by the trial Court at a time *prior* to a finding of guilty by the jury, and over timely objection, constitutes reversible error.

The Arkansas Statute on this point provides that "When a jury find a verdict of guilty, and fail to agree on the punishment to be inflicted . . . the Court shall assess and declare the punishment . . . ". Ark. Stat. Ann. Sec. 43-2306.

In considering when it would be proper to so instruct the jury, this Court, in *Ward* v. *State,* 236 Ark. 878, 370 S.W. 2d 425, 426 (1963), laid down the following rule while holding that submission otherwise would be error:

"Thus, it appears, we have not previously announced any required rule in this regard to guide the trial Courts. After careful consideration, we now hold that the jury should not be told initially they can let the Court impose the punishment but should be told only *after* they report they have reached a verdict of guilty but are unable to agree on the punishment to be imposed."

Since a reversal is dictated by the untimely giving of the instruction, it is not necessary to consider Appellants' second point for reversal.

The judgment is reversed and the cause remanded.

HOLT, J., not participating.

Jay C. WILSON et al *v.*
Floydena M. TALBERT et al

75-327 535 S.W. 2d 807

Opinion delivered April 5, 1976
[Rehearing denied May 17, 1976.]

Keith, Clegg & Eckert, for appellants.

McKay, Chandler & Choate, for appellees.

J. FRED JONES, Justice. This is an appeal from a chancery court decree canceling an oil and gas lease. The appellee Talbert[1] owned an undivided three-fourths mineral interest and Mrs. Haltom owned the other one-fourth interest in a tract of land in Ouachita County and they executed separate leases to the appellants covering their respective interests. The primary term of the Talbert lease was two years and that of the Haltom lease was three years. The leases were executed in 1964 and 1965 and an oil producing well was drilled by the appellants. The well continued to produce and royalties were paid under the lease contracts until in March, 1974, when a leak developed in the bottom of one of the appellants' 500 barrel storage tanks and production from the well was discontinued.

The Haltom lease simply provided that it would remain in force for a term of three years from its date and as long thereafter as oil and gas, or either of them, was produced from the land by the lessee. The pertinent provisions of the Talbert lease provided as follows:

> "Subject to the other provisions herein contained, this lease shall remain in force for a term of two (2) years

[1]Both Mr. and Mrs. Talbert were parties but will be referred to in the singular.

from this date (herein called 'primary term') and as long thereafter as oil and gas, or either of them, is produced from said leased premises or drilling operations are continuously prosecuted as hereinafter provided. 'Drilling operations' includes operations for the drilling of a new well, the reworking, deepening or plugging back of a well or hole or other operations conducted in an effort to obtain or re-establish production or oil or gas; and drilling operations shall be considered to be 'continuously prosecuted' if not more than 60 days shall elapse between the completion or abandonment of one well or hole and the commencement of drilling operations on another well or hole. If, after the expiration of the primary term of this lease, oil or gas is not being produced from the leased premises but lessee is then engaged in drilling operations, this lease shall continue in force so long as drilling operations are continuously prosecuted; and if production of oil or gas results from any such drilling operations, this lease shall continue in force so long as oil or gas shall be produced from the leased premises. If, after the expiration of the primary term of this lease, production on the leased premises should cease, this lease shall not terminate if lessee is then prosecuting drilling operations, or within 60 days after each such cessation of production commences drilling operations, and this lease shall remain in force so long as such operations are continuously prosecuted, and if production results therefrom, then as long thereafter as oil or gas is produced from the leased premises."

The so-called *force majeure* clause in the Talbert lease reads as follows:

"All express and implied covenants of this lease shall be subject to all applicable laws, government orders, rules and regulations. This lease shall not be terminated in whole or in part, nor lessee held liable in damages because of a temporary cessation of production or of drilling operations due to breakdown of equipment or due to the repairing of a well or wells, or because of failure to comply with any of the express or implied covenants of this lease if such failure is the result of the exercise of governmental authority, war, lack of market,

act of God, strike, fire, explosion, flood or any other cause reasonably beyond the control of lessee."

On September 23, 1974, Talbert filed petition for cancellation of the lease as a cloud on his title. He alleged that there had been no production from the lease since March, 1974, and no royalty paid since February, 1974; that the lease had expired and had not been renewed. He alleged that he had made demand for release under Ark. Stat. Ann. § 53-313 (Repl. 1971); that his demand had been ignored; that the lease constituted a cloud on his title and he prayed that his title be quieted. By amendment to Talbert's petition, Haltom prayed the same relief as to her undivided one-fourth interest.

The appellants filed answer and counterclaim denying that the lease had expired. They alleged the rupture in a storage tank and the difficulties encountered in repairing it as the reason for cessation of production. They alleged that when they sought entry to the premises in July, 1974, in an attempt to repair the tank, that Talbert refused them permission to enter; that his conduct estopped him from enforcing a forfeiture and that they were damaged in the amount of more than $1,000 per month because of such refusal. They prayed for a restraining order and for damages.

On October 30, 1974, the chancellor entered a temporary restraining order permitting the appellants to enter the premises for repair of the tank and to restore production and, following a hearing on the merits, the chancellor rendered a letter-form memorandum opinion reciting in part as follows:

"It is clearly stated in the Talbert lease that after the expiration of the primary term if the lease is not producing and within sixty days after cessation of production the lessee does not 'commence drilling operations' the lease terminates by its own terms. The attorneys cited no Arkansas cases construing this provision in a lease and I have found none, however, I have found several cases from other jurisdictions construing similar provisions. These cases hold that the leases terminated by their own terms at the end of the stated period of time. *McQueen* v.

Sun Oil Company, et al, 213 F. 2d 889 (Ky. 1954); *Haby* v. *Stanolind Oil and Gas Company,* 228 F. 2d 298 (Tex. 1955); *Loeffler* v. *King,* 228 S.W. 2d 201 (Tex. 1950); *Francis et al* v. *Pritchett et al,* 278 S.W. 2d 288 (Tex. 1955). Also see *House et al* v. *Tidewater Oil Company, et al,* 219 So. 2d 616 (La. 1969).

The Haltom lease does not have a sixty days provision but is for a term of three years and as long thereafter as oil and gas is produced. The Supreme Court of Arkansas considered a similar question in the case of *Reynolds* v. *McNeill,* 218 Ark. 453, 236 S.W. 2d 723 (1951). * * * The Supreme Court stated than when a lessee's estate has vested it does not automatically terminate upon the temporary cessation of production, and that most authorities allow the lessee a reasonable time within which to reinstate paying production. The Court has not stated the number of days that constitutes a reasonable time, but has stated that it depends on the facts and circumstances in each case. In my opinion the lessees in this case did attempt within a reasonable time to reinstate paying production, and the Haltom lease should not be terminated."

The chancellor entered a decree in accordance with his findings and ordered an accounting for oil produced under the Talbert lease after its termination. There is no appeal from the chancellor's decree as to the Haltom lease but as to the Talbert lease, the appellants contend that the chancellor "erred in declaring a forfeiture of the Talbert lease under the 60-day clause."

The appellants argue that since the chancellor found the cessation of production was of such temporary nature and reasonable effort to reinstate production sufficient to prolong or keep in force the Haltom lease, the question on this appeal is narrowed to,

"(1) whether the language of the *force majeure* clause prevented the lease from terminating because of the temporary cessation of production due to the breakdown of equipment; if not, (2) whether the 60-day clause contained in the Talbert lease should be con-

strued as dealing with a production cessation of a temporary nature as here involved; and, in any event, (3) whether the efforts to restore production complied with the provisions of the 60-day clause."

As we interpret the first above provision of the lease which twice contains the so-called "60-day clause," it refers to cessation of production because of depletion or threatened depletion of the well or wells rather than a temporary cessation because of such things as temporary lack of storage facilities. The wording of this provision is somewhat ambiguous but it evidently refers to a threatened *permanent* cessation which can be averted only by extensive measures such as the drilling of a new well or the reworking or deepening or plugging back of an existing well.

As we interpret the "*force majeure* clause," it applies to *temporary* cessation of production as a result of causes beyond the control of lessee such as the ones therein set out. In this provision the parties fixed no minimum time, such as 60 days, in which to reinstate production because, obviously, the nature and extent of the breakdown, or cause of cessation or production, would govern the time required for making the necessary repairs or eliminating the cause of cessation of production. The length of such necessary time, in the absence of agreement to the contrary, could only be measured by such time as would be reasonable under the facts and circumstances of the particular case.

The appellants argue that "the question on this appeal is narrowed to whether the language of the *force majeure* clause prevented the lease from terminating because of the temporary cessation of production due to the breakdown of equipment." It is our view, however, that the question, under the *force majeure* clause, is narrowed to whether the time involved in making the necessary repairs and restoring production was reasonable under the facts and circumstances of this case and, upon review of the evidence de novo, we conclude that it was not.

The rupture in the tank bottom occurred in March and apparently there was no effort made to repair it until July. Furthermore, there was evidence to the effect that another

storage tank stood adjacent to the damaged one and that it could have been utilized by simply opening or closing valves, following minor repairs.

The rule is well established that on trial de novo in chancery cases, the chancellor's decree will be affirmed if it appears to be correct upon the record as a whole, even though the chancellor may have given the wrong reason for his conclusion. *Morgan* v. *Downs,* 245 Ark. 328, 432 S.W. 2d 454 (1968); *James* v. *Medford,* 256 Ark. 1002, 512 S.W. 2d 545 (1974).

The decree is affirmed.

CONTINENTAL INSURANCE COMPANY
v. David A. HODGES and Kaneaster
HODGES Jr.

75-340 534 S.W. 2d 764

Opinion delivered April 5, 1976

Barrett, Wheatley, Smith & Deacon, for appellant.

George Proctor, for appellees.

CONLEY BYRD, Justice. The sole issue on this appeal by Continental Insurance Company is whether, under the terms of a liability insurance policy, it is obligated to defend appellees David A. Hodges and Kaneaster Hodges, Jr. in an action brought against them for allegedly casting surface water upon their neighbor's property.

The policy provides:

> "The company will pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of
> A. bodily injury or
> B. property damage
> to which this insurance applies, caused by an occurrence, . . . "

The word "occurrence" is defined in the policy as:

> "An accident . . . which results . . . in property damage neither expected nor intended from the standpoint of the insured."

The chancery court action brought by Glen Odglen, et al, against appellees alleges that the appellees, and/or their tenants, have improved their property so as to greatly increase the total volume of surface water thereon by pumping water from beneath the surface for rice production; that this water was drained into a small drainage ditch crossing appellees' land thereby casting the water in a body upon the lands belonging to Odglen, et al; that substantial damage was done to the growing crops of Odglen, et al; and that damages and a temporary injunction should be granted.

The term "accident" is not defined in the policy, but as pointed out in 44 Am. Jur. 2d *Insurance* § 1219 (1969), "The definition that has usually been adopted by the courts is that an accident is an event that takes place without one's foresight or expectation — an event that proceeds from an unknown cause, or is an unusual effect of a known cause, and therefore not expected." The cases relied upon by appellees

generally support this statement. See *City of Kimball* v. *St. Paul Fire & Marine Ins. Co.*, 190 Neb. 152, 206 N.W. 2d 632 (1973), *Otterman* v. *Union Mutual Fire Ins. Co.*, 130 Vt. 636, 298 A. 2d 547 (1972), and *Cross* v. *Zurich General Accident & Liability Ins. Co.*, 184 F. 2d 609 (7th Cir. 1950).

In the *City of Kimball* case, *supra,* by a vote of 4 to 3 the Nebraska Court upheld a finding that an accident was involved where the seepage of the sewage from the city's lagoon occurred because of the negligence of the city's employees in failing to discover some seismograph holes before the lagoon was built. Of course, under the complaint filed against appellees by Odglen no negligence is charged or suggested.

In the case of *Otterman* v. *Union Mutual Fire Ins. Co., supra,* one Kennelly, a man with a history of mental illness, during a tantrum, fired a shot into a dark room that passed through a wall and struck an officer in the next room. In upholding the trial court's finding that the shooting was an occurrence under a policy identical to the one before us, the Vermont Court laid much stress upon the findings of the trial court that because of his mental illness Kennelly did not intentionally shoot the officer and that Kennelly did not know that the officer was in the house.

The case of *Gross* v. *Zurich General Accident & Liability Ins. Co., supra,* involved acid damages to windows that occurred during the cleaning of a building with acid. The undisputed proof showed that the insured used the customary method to protect the windows from the acid but that the damage occurred through the negligence of the insured's employees in applying the customary method for protecting the windows. In holding that the damage claims were accidental within the terms of the policy, the court said:

> "The basis for the decision of the trial court was that plaintiffs intentionally used hydrofluoric acid in the solution and failed to take the precaution of covering the windows with grease or heavy paper. But failure to take a proper or effective precaution does not prove intent to damage. Plaintiffs may have been negligent in not keeping sufficient water on the windows, but the very fact that water was applied to each window negatives any

idea that plaintiff intended to damage same. And lacking such intent, the damage was accidental, even though caused by negligence."

Under the allegations of Odglen's complaint against appellees, the damages alleged could not have taken place without foresight or expectation and did not involve any negligence on the part of appellees. Nor can it be said that the damages alleged proceeded from an unknown cause or were an unusual effect of a known cause. Rather the complaint states that appellees, after pumping the water onto their lands for use in irrigating the rice crops, drained it into a ditch crossing their lands and cast it upon the lands of Odglen, et al [inferentially by gravity]. It follows that the trial court erred in holding that the appellees' conduct constituted "an accident" within any reasonable definition of the word, see *Proctor Seed & Feed Co.* v. *Hartford Ins.*, 253 Ark. 1105, 491 S.W. 2d 62 (1973).

Reversed and dismissed.

HARRIS, C.J., dissents.

CARLETON HARRIS, Chief Justice, dissenting. The basis for the majority holding appears to be that the Odglen complaint against Hodges does not explicitly allege that negligence caused the flooding. The majority opinion does not analyze this point, but merely states that "the damages alleged could not have taken place without foresight or expectation and did not involve any negligence on the part of appellees." Yet nowhere in the Odglen complaint is it alleged that appellees acted willfully, *i.e.*, that appellees knew that the drainage ditch was inadequate to remove the water without flooding adjacent land. Without such specific charges, it hardly seems reasonable to *presume* willfulness, as the majority does, since it is improbable appellees would, in my view, have deliberately inundated the adjoining fields. The record certainly contains no support for such a presumption.

The great weight of opinion with respect to exclusions such as the one at issue is that the insurer is obligated under the policy unless it is shown that the insured party intended

not merely his act, but the injurious consequences of that act. The Pennsylvania Supreme Court summarized this rule in *Eisenman* v. *Hornberger,* 438 Pa. 46, 264 A. 2d 673:

> . . . "[T]he vast majority of courts which have considered such a provision have reached the conclusion that before the insurer may validly disclaim liability, it must be shown that the insured intended by his act to produce the damage which did in fact occur. Annot. 2 A.L.R. 2d 1238 (1965). We subscribe to such a view. There is a very real distinction between intending an act and intending a result and the policy exclusion addresses itself quite clearly to the latter."

In *Grand River Lime Company* v. *Ohio Casualty Insurance Company,* 32 Ohio App. 2d 178, 289 N.E. 2d 360, 200 residents had brought a class action against a nearby manufacturer, alleging damages from nuisance and trespass caused by emissions of industrial wastes and air pollution. The manufacturer then brought the *Grand River* suit against its insurer to compel the insurer to defend the class action. As in the instant case, the policy insured against damages caused by "occurrences," the latter term defined elsewhere in the policy as an "accident." The Ohio court held that the insurer was obligated to defend under the policy, stating:

> "We adopt the argument as propounded by the plaintiff that the word 'occurrence' is much broader than the term 'accident.' Such proposition is well stated in Aerial Agriculture Service v. Till (N.D. Miss. 1962), 207 F. Supp. 50, 57:
>
> > 'To begin with, the word "occurrence," to the lay mind, as well as to the judicial mind, has a meaning much broader than the word "accident." As these words are generally understood, accident means something that must have come about or happened in a certain way, while occurrence means something that happened or came about in any way. Thus *accident* is a special type of *occurrence,* but occurrence goes beyond such special confines and, while including accident, it encompasses many other situations as well.'

"We further adopt the plaintiff's proposition to the effect that while the activity which produced the alleged damage may be fully intended, and the residual results fully known, the damage itself may be completely unexpected and unintended.

"As an example, the plaintiff Grand River was certainly aware of its particular manufacturing activity, and was undoubtedly aware of the residual emission of smoke, dust, etc., but yet it is quite questionable whether Grand River expected or intended the damaging results to the property owners, at least in the sense that the policy uses such terms."

Actually, I consider that some of the cases cited by the majority support my view, but at any rate, it is apparent that I would affirm the judgment of the trial court.[1]

Gordon M. PELLERIN *v.* Kathryn Herring PELLERIN

75-341 534 S.W. 2d 767

Opinion delivered April 5, 1976

[1]While it has no probative value in the question before us, it is interesting to note that the trial court found for defendants (including appellees) in this case and dismissed the complaint of Odglen.

Lesly W. Mattingly, for appellant.

Spitzberg, Mitchell & Hays, for appellee.

FRANK HOLT, Justice. This appeal results from an order of the chancellor dismissing appellant's motion to quash garnishments of his income from his present employer and also his monthly retirement income from the United States government. The garnishments were issued to collect a $4,-640 judgment that was rendered by the chancellor in June, 1972, for child support arrearage. Appellant first contends that the chancellor erred in not applying the restrictions on garnishments found in 15 USC § 1673 (a) (1970). We cannot agree.

§ 1673 provides in pertinent part:

> (b) The [garnishment] restrictions of subsection (a) of this section do not apply in the case of
>
> (1) any order of any court for the support of any person.

Appellant argues that here there is no order, only a judgment for a debt due. He asserts an order and judgment are separate and distinct and, therefore, the exception under § 1673 (b) (1) does not apply. The legislative history of § 1673 appears to the contrary. In pertinent part, it provides:

> The restrictions on garnishment provided for in the bill does not apply to any debt due to a court order for the

> support of any person (domestic relations cases) or for State or Federal taxes. (U. S. Code Congressional and Administrative News. (1968) P. 1978.)

If the exception in subsection (b) (1), *supra,* was restricted to a mere order and not a judgment, it would render that subsection meaningless. There can be no garnishment on a support order that has not been reduced to a judgment. Cf. *Brun* v. *Rembert,* 227 Ark. 241, 297 S.W. 2d 940 (1957). We hold that, in the case at bar, the judgment, based upon a court order for child support arrearage, comes within the exception in § 1673 (b) (1) and the chancellor was, therefore, correct in holding that the limitations of § 1673 (a) were not applicable.

Appellant next asserts that the chancellor erred in applying the provisions of 42 USC § 659 (Supp. 1974) to a judgment entered on June 22, 1972. § 659 provides:

> CONSENT BY UNITED STATES TO GARNISHMENT AND SIMILAR PROCEEDINGS FOR ENFORCEMENT OF CHILD SUPPORT AND ALIMONY OBLIGATIONS
>
> Notwithstanding any other provisions of law, effective January 1, 1975, moneys (the entitlement of which is based upon remuneration for employment) due from, or payable by, the United States (including any agency or instrumentality thereof and any wholly owned Federal corporation) to any individual, including members of the armed services, shall be subject, in like manner and to the same extent as if the United States were a private person, to legal process brought for the enforcement, against such individual of his legal obligations to provide child support or make [money] payments.

The lower court applies this act to allow garnishment of appellant's retirement income from the United States Air Force. Appellant's position is that to permit garnishment of his income based upon a 1972 judgment is to give § 659 a retroactive effect. We do not read this statute to mean, as appellant contends, that it does not apply to judgments rendered before January 1, 1975. By the provisions of this act

the shielding cloak of sovereign immunity to garnishment proceedings was merely removed.

Affirmed.

Virgil WILLIAMS *v.* STATE of Arkansas

CR 75-208 534 S.W. 2d 760

Opinion delivered April 5, 1976

Bill E. Ross, Public Defender, for appellant.

Jim Guy Tucker, Atty. Gen., by: *Terry Kirkpatrick,* Asst. Atty. Gen., for appellee.

FRANK HOLT, Justice. Appellant was convicted by a jury of the crime of escape and his punishment assessed at three years in the Arkansas Department of Correction. Ark. Stat. Ann. § 41-3513 (Supp. 1973).

About five hours after a robbery occurred in Mississippi County, a Crittenden County police officer heard a police radio bulletin which gave a description of the robbers. At that time he had just arrested the appellant and two other individuals on a local law violation and had them in jail. Since they fit the broadcast description, the Mississippi County authorities were so notified. These officials promptly came to Crittenden County and interrogated appellant and his confederates during the day. One of them admitted participation in the robbery and implicated appellant. The Mississippi County officials placed appellant under arrest and asked the Crittenden County authorities to hold him pending the disposition of their local charges. The next day, however, (Monday) the Crittenden County authorities notified the Mississippi County officials that appellant would be released to them subject to a detainer. That same day the appellant and his codefendants were released to the Mississippi County officials and transported by them to their county jail where they were docketed with robbery and incarcerated. Four days later, the appellant and others escaped from the jail.

Appellant first contends for reversal of his escape conviction that the "trial court erred in holding that appellant was under lawful arrest at the time of his alleged escape." Appellant's argument, in effect, is that the evidence is insufficient to establish that he was under lawful arrest at the time of his alleged escape.

In defining the crime of escape, we recently said "[T]he crime is committed by a prisoner under lawful arrest and restraint when he goes away from his place of lawful custody before he is released or delivered by due course of law." *Cassady* v. *State,* 247 Ark. 690, 447 S.W. 2d 144 (1969). We

later said:

> The *lawfulness* of the imprisonment or custody from which the escape is made or attempted is the statutory essence of the criminal offense of escape or attempt to escape, and the lawfulness of the imprisonment or custody from which the escape is made or attempted must not only be alleged by the state in the indictment or information, it must also be proved.

Harding & Hildebrandt v. *State,* 248 Ark. 1240, 455 S.W. 2d 695 (1970).

Appellant argues that a warrantless arrest by a sheriff outside his own county, as here, is of no more validity than that of a private citizen. *Blevins* v. *State,* 31 Ark. 53 (1876). There we held that a sheriff could not validly serve a warrant outside his county. Therefore, appellant argues that since he was not taken into custody outside of the sheriff's jurisdiction with a warrant, which is now permissible by Ark. Stat. Ann. § 43-411 (Repl. 1964), and not as a result of fresh pursuit, Ark. Stat. Ann. § 43-501 (Repl. 1964), his apprehension was unlawful in its inception. Consequently, he was not under lawful arrest and restraint at the time of his alleged escape from the Mississippi County jail.

We cannot agree. There existed substantial evidence from which a jury could find that the appellant was in lawful custody or detention at the time of his alleged escape. Admittedly, appellant was incarcerated and charged with robbery. There was evidence of a substantial nature that the Mississippi County authorities had reasonable grounds or probable cause for the arrest and detention of appellant on a robbery charge. In *Stallings* v. *Splain,* 253 U.S. 339 (1920), appellant contended that he was entitled to habeas corpus relief inasmuch as his original arrest and detention were illegal. There it was said "[W]here it appears that sufficient ground for detention exists a prisoner will not be discharged for defects in the original arrest or commitment." See also *Nishimura Ekiu* v. *United States,* 142 U.S. 651 (1892). In the case at bar, as indicated, there is evidence from which the trier of the facts could find sufficient grounds that appellant was in lawful detention or custody at the time of his alleged

escape. Certainly, the illegality of appellant's arrest, as asserted here, would not affect or oust the trial court of jurisdiction to try appellant for the alleged robbery for which he was being held.

However, we agree with appellant's contention that it was error for the court to hold, as a matter of law, that appellant's arrest was lawful and, therefore, did not constitute a fact issue for the jury. This was in effect a directed verdict on a factual issue which is a requisite element of the alleged offense. As we said in *Harding* v. *State, supra,* the lawfulness of appellant's imprisonment or custody constitutes an essential statutory element of the criminal offense of escape which must be alleged and proved. There we reiterated that "[T]he burden rests on the state to prove its allegations against the appellants, and does not lie on the appellants to disprove the allegations made by the state."

Because of the error indicated, the judgment is reversed and the cause remanded.

Reversed and remanded.

FOGLEMAN, SMITH and ROY, JJ., concur.

JOHN A. FOGLEMAN, Justice, concurring. I concur in the result; however, I do not think that the majority's attempted graft into the law of escape can survive. The authorities cited for the highly novel approach to this matter are simply inapposite. Neither involves a charge of escape.

The principal authority, *Stallings* v. *Splain,* 253 U.S. 339, 40 S. Ct. 537, 64 L. Ed. 940 (1920), resembles this case in only one aspect, i.e., the original arrest was made without a warrant. The prisoner had been indicted in the United States District Court for the District of Wyoming. He was arrested in the District of Columbia by Splain, the marshal for the District of Columbia, not upon a warrant issued by a commissioner for the District of Columbia, but upon a bench warrant issued from the Wyoming court to the marshal of the Wyoming district on the indictment there. Stallings, the prisoner, filed a petition for habeas corpus, alleging that his arrest and detention were illegal, and was admitted to bail.

While he was at large on bail awaiting a hearing on his petition, a warrant was issued for him on the offense charged in Wyoming. At the hearing, certified copies of the indictment and other papers were filed. The United States Supreme Court held that the original arrest and detention were lawful, either upon the bench warrant or upon the marshal's reliance upon it as evidence of reasonable cause that Stallings had committed a felony. As a secondary basis for its holding, the Supreme Court held that the pendency of the habeas corpus proceeding did not deprive the commissioner before whom it was pending of jurisdiction to entertain an application for arrest on the affidavit of complaint by the marshal. The court, in dictum, held that, even if the original arrest had been illegal, Stallings would not have been entitled to discharge, if, before final hearing, in the habeas corpus proceedings, *legal cause for detaining him had arisen through the institution of removal proceedings*. As a third ground, the court held that when Stallings was admitted to bail on the Wyoming charge at his own request, his position was no better than it would have been if his petition for habeas corpus had been made *after* he had given bail to answer the charge in Wyoming. The court said that his giving this bail rendered the legality of his original arrest and detention immaterial.

I have puzzled over the possible application of that case to the present one. I can find only one possibility. If a warrant for Williams' arrest had been issued and executed before the alleged escape, his arrest and detention at the time of the escape would have been legal and the legality of the original arrest immaterial.

In the second authority, *Nishimura* v. *U.S.*, 142 U.S. 651, 12 S. Ct. 336, 35 L. Ed. 1146 (1892), a subject of the Emperor of Japan sued out habeas corpus alleging that she had been illegally restrained of her liberty upon the ground that she should not be permitted to land in the United States. The authorities had refused to allow her to land on the basis that she was an illegal alien immigrant. The Japanese subject was held by direction of the customs authorities under the provisions of the immigration laws. She was originally held by the commissioner of immigration of the State of California, who claimed to act under instructions of, and contract with, the Secretary of the Treasury of the United States.

While the petition for habeas corpus was pending, an inspector of immigration for San Francisco was appointed by the Secretary of the Treasury. He made an inspection and examination, made a report similar to that of the state commissioner, intervened in the habeas corpus proceeding, and insisted that his action was reviewable only by the superintendent of immigration and the Secretary of the Treasury. The Supreme Court of the United States agreed with the inspector of immigration that the finding of fact by the officers of the executive branch was final and binding on the courts. The court found it unnecessary to determine whether the original detention by the state commissioner was invalid because of an implied repeal of the act under which he acted, due to the fact that the validity of her continued detention depended upon the subsequent acts of the federal inspector of immigration, which the court found to be valid. Here again, the only possible application of this authority to the case at bench, would depend upon the intervention of the service of a warrant for the arrest of Williams prior to his escape.

The principles espoused by those authorities relied upon by the majority are sound, but not compatible with the law defining the crime of escape. That law requires that the detention be legal at the time of the escape and, in the circumstances of this case, the legality of the detention is dependent upon the legality of the arrest, not upon the sanitization of an illegal one. Time does not permit an elaboration upon all the elements of the offense of escape or its history. The basic fundamentals are capsuled in a section entitled "Validity of Arrest," 27 Am. Jur. 2d 854, Arrest, § 8, viz:

> In prosecutions for escape from the custody of an arresting officer prior to actual imprisonment, the escape has been held justifiable where the officer acted without authority so that the arrest was illegal. The invalidity of an arrest may also vitiate subsequent proceedings so that an escape from prison is justified. A person illegally arrested is entitled to resist any unlawful interference with his right of personal liberty and may use whatever force is reasonably necessary to do so. When an officer without authority to arrest a person attempts nevertheless to arrest him, the officer is to be regarded as a trespasser without any right to prevent the

> escape of the person whom he has thus accosted. It is no crime for one, without the use of violence, to rescue or assist in the rescue of another who has been unlawfully arrested. However, a mere informality or irregularity in the arrest is no justification for a prisoner's escaping from jail, as where, for example, a defendant is held on a bench warrant, substantially sufficient, although irregularly issued.

There is no doubt in my mind, however, that there was convincing evidence that the arrest was legal in this case. The state contends, and I agree, that the evidence shows that appellant was in custody by reason of a valid citizen's arrest by a peace officer. The overwhelming weight of authority sustains the validity of a warrantless arrest by a peace officer in the capacity of a private citizen, outside the geographical subdivision of the state in which he is an officer. *State* v. *Goldberg,* 540 P. 2d 674 (Ariz. 1975); *Nash* v. *State,* 207 So. 2d 104 (Miss. 1968); *Brown* v. *State,* 217 So. 2d 521 (Miss. 1969); *United States* v. *Kriz,* 301 F. Supp. 1329 (D. Minn. 1969); *United States* v. *Montos,* 421 F. 2d 215 (5th Cir., 1970); *State* v. *Jones,* 263 La. 164, 267 So. 2d 559 (1971), cert. den. 410 U.S. 946; *State* v. *Fritz,* 490 S.W. 2d 30 (Mo. 1973), cert. den. 411 U.S. 985; *Marden* v. *State,* 203 So. 2d 638 (Dist. Ct. App. Fla. 1967); *State* v. *McCullar,* 110 Ariz. 427, 520 P. 2d 299 (1974); *United States* v. *DeCatur,* 430 F. 2d 365 (9th Cir., 1970); and *Wion* v. *United States,* 325 F. 2d 420 (10th Cir., 1963), cert. den, 377 U.S. 946, 84 S. Ct. 1354, 12 L. Ed. 2d 309, same case, *Union* v. *Wellington,* 252 F. Supp. 306 (D.C. Col., 1965).

In this case the sheriff of Mississippi County, knowing that a felony had been committed in Mississippi County by someone, had gone to Crittenden County in a purely investigatory role. While there, the confession of one of the perpetrators of the crime, incriminating Williams and another, revealed probable cause for Williams' arrest, i.e., reasonable grounds for believing that he had committed the felony. This evidence was certainly sufficient basis to justify the sheriff, a peace officer, acting in the capacity of a private citizen, to make an arrest, which the sheriff promptly did. It was not only his right but his duty to do so. See *State* v. *Jones,* 91 Ark. 5, 120 S.W. 154; *Carr* v. *State,* 43 Ark. 99. He would have been derelict in his duty had he not done so. See *Russell*

v. *State,* 240 Ark. 97, 398 S.W. 2d 213.

This is not to say, however, that a private citizen who, knowing that a felony has been committed in the county where he resides, may undertake to make an arrest without a warrant in a county other than his own when he is not in fresh pursuit of a felon. The dangers inherent in such a practice are aptly enunciated in *McCaslin* v. *McCord,* 116 Tenn. 690, 94 S.W. 79 (1906), where the following caveat was issued:

> . . . . . [W]e deem it proper to say that we do not think it was within the contemplation of our statutes that private citizens of one county should take it upon themselves to go into other counties, without a warrant, in search of criminals, except in cases of fresh pursuit of a fleeing felon endeavoring to avoid immediate capture, in an original arrest, or on immediate pursuit after arrest and escape. An opposite view and practice would lead to more violence than it would suppress, since it would foster the incursion of roving bands of strangers who might be easily counterfeited by bands of marauders.

I agree that the trial court erred in not submitting the question of legality of the detention of Williams to the jury.

I am authorized to state that Mr. Justice George Rose Smith and Madam Justice Roy join in this opinion.

William Rupert BONDS *v.* Cecil Ruth Bonds LLOYD

75-315 535 S.W. 2d 218

Opinion delivered April 5, 1976

Richard L. Peel, for appellant.

Jon P. Shermer Jr., for appellee.

ELSIJANE T. ROY, Justice. Appellant William Rupert Bonds and appellee Cecil Ruth Bonds Lloyd, formerly husband and wife, were divorced in April, 1970, in Dallas, Tex-

as. Custody of their minor child, William Jonathan Bonds, was given to the mother. In July, 1975, the sister of appellee called appellant in Russellville, Arkansas, stating that appellee apparently had abandoned Jonathan and to come pick up his child. Appellant did so. The next day after appellant returned to Russellville he filed a petition for custody in the Pope County Chancery Court alleging appellee had abandoned Jonathan and was unfit to retain custody. Five weeks later appellee responded by filing a petition for a writ of habeas corpus seeking the return of the child.

After an abbreviated hearing the chancellor decreed that the child be placed with the Pope County Welfare Department. The decree further required that the Dallas Welfare Office be requested to investigate the conditions under which the child was living and to state its intention as to the custody of the child pending resolution of the action. If so desired by the Dallas Welfare Office the child could be transferred there until the Dallas County courts could determine which parent should have custody.

Appellant argued for reversal that the Chancery Court of Pope County erred in refusing to hear the case on the merits and in refusing to determine which parent should have custody.

Carolyn Presley testified she was a sister of appellee Cecil Ruth Bonds Lloyd and that she lived in Irving, Texas, a short distance from Dallas, the home of appellee. She said she frequently visited in her sister's home and often kept the children for her. The children were William Jonathan Bonds, son of appellant, who was six years of age at the time of the hearing, and Mrs. Lloyd's twin daughters, four years of age, children of her present husband. The last time Mrs. Presley kept the three children for her sister she expected her to pick them up in a few days. When she heard nothing from appellee for three weeks she called Mr. Lloyd, her sister's present husband, and requested that he come for the children because for financial and physical reasons she was unable to continue to feed and care for them. Mr. Lloyd advised her to call "Bill Bonds" and tell him to come get Jonathan, that he did not want him, and she could take the little girls to

appellee's mother, that he did not have time to take care of them.

Mrs. Presley testified her inquiries finally revealed Mrs. Lloyd had gone to California, that she had taken all of her clothes and none of the children's things. This led her to believe the children had been abandoned, and for this reason she called Jonathan's father to come for him and he was there within a few hours to get Jonathan. She testified the conditions in her sister's home were very unsanitary. That while Mrs. Lloyd was in California Mr. Lloyd asked her to come over and clean the house, at which time she found half-eaten food all over the place, even under the children's beds and "every time I swept out from under anything, out of closets . . . hundreds of roaches, not just a few at a time, but gobs of them at a time, came out from everywhere every time I swept under anything. * * * Dirty clothes in piles all over the house. It was just horrible. Absolutely horrible. The smell would have driven anybody out."

Other testimony concerning the deplorable condition of the house in which the children lived is too revolting to detail. Not until two weeks after Mr. Bonds picked up Jonathan did Mrs. Presley receive any inquiry from appellee concerning her own children.

Mrs. Ivy Sims, who lived in Texas at one time but now lives in Arkansas, testified that she used to baby-sit for appellee. Mrs. Sims essentially corroborated the testimony of Mrs. Presley as to the dirty, unkempt condition of the house and her testimony extended to the physical condition of the children as well as the house. Both women stated they had also seen evidence of maltreatment and physical abuse of Jonathan in addition to evidence of extreme neglect.

Appellant testified: Mrs. Lloyd's sister, Carolyn Presley, called me and told me that Mrs. Lloyd had disappeared and abandoned Jonathan and wanted me to come get Jonathan and take care of him. I went after my son on a Saturday two hours after Carolyn Presley called me, brought him back here, and was in my attorney's office the next Monday morning to seek custody of Jonathan. I consider that Jonathan had been neglected and abandoned by Mrs. Lloyd. I desire to

have custody of Jonathan so that I can take care of him, rear him, give him an education and the opportunity to grow up to be a fine young man. My wife has approved of this and she very much desires that we have custody of Jonathan. I have already made arrangements for Jonathan to go to school here, to collect his shot records, birth certificate and have had him examined by the doctor. I own my own home and have one child by my present wife to whom I have been married five years. On cross-examination appellant admitted he had not kept up support payments for Jonathan.

Appellant's present wife testified Jonathan's physical condition indicated he was a very much neglected child. She corroborated her husband's testimony and joined him in expressing a desire for Jonathan's custody.

In *Duncan* v. *Crowder,* 232 Ark. 628, 339 S.W. 2d 310 (1960), the Court stated:

> * * * Of course it is a universal rule of law that the paramount consideration in awarding custody of minor children is the best interest and welfare of the child. * * *

In *Larkin* v. *Pridgett,* 241 Ark. 193, 407 S.W. 2d 374 (1966), this Court said:

> . . . [T]he best interest of the child is a matter of vital importance in a habeas corpus case like this one. (Citation omitted)

The physical presence of the child in Arkansas is a proper basis for the exercise of jurisdiction by the chancery court to determine whether there should be a change in custody of the child involved, even though other courts may have concurrent jurisdiction. Leflar, American Conflicts Law § 245 (1968) and Restatement, Second, Conflict of Laws § 79 (1971).

In *Shaw* v. *Shaw,* 251 Ark. 665, 473 S.W. 2d 848 (1971), an action for divorce was filed in Bazoria County, Texas, and custody of the children was awarded to the father. The mother in an action in Miller County, Arkansas, sought

custody of the children on the basis of changed circumstances. Appellant-father contended the Arkansas chancery court failed to give full faith and credit to the Texas decree by not ordering immediate delivery of the children to him. We held in *Shaw* that the State where the child is physically present has the most immediate concern with the child and may be the best qualified jurisdiction to decide what will amount to his welfare.

This Court has held custody cases are not viewed as property cases and do not come within the rule of the full faith and credit clause of the Federal Constitution relating to foreign judgments. *Tucker* v. *Tucker,* 195 Ark. 632, 113 S.W. 2d 508 (1938).

Despite the above well established principles of law the trial court throughout the entire proceeding herein revealed obvious displeasure with having this matter in the Arkansas court and with appellant's actions in going to get Jonathan even though he had been called to come for the boy. The trial court repeatedly referred to appellant as a "child-snatcher", stating at one time in the hearing "That's right, and I stopped snatching kids across the state line." Appellant's testimony that he only went to get the child after he was called was verified by the testimony of his wife and Mrs. Presley. It also is to be noted that appellant was not attempting to act in a surreptitious manner since immediately upon his return to Russellville he filed a petition for custody.

The record makes it apparent that almost before hearing any testimony the court determined it was going to send the case back to Dallas, as reflected by the following excerpts from the transcript:

> The Court: I think you have made a sufficient record on it now on that part of it, because I am not to try Dallas facts on this thing now with the child here less than six weeks today.
>
> Mr. Peel: I'd just like to make my record on it. I think the Courts here in Arkansas are supposed to try them.
>
> The Court: We are going to sit here all day long and

listen to something that better would be tried in Dallas is what I am getting at. They are all from Dallas. Let them go back home.

Mr. Peel: No, sir, not all from Dallas. There's only two from Dallas, Mrs. Presley and Mrs. Lloyd.

The Court: Who else do we have here?

Mr. Peel: I have a lady from Grady, Arkansas. I have Mr. and Mrs. Bonds, also have the child that's here right now. Most of the parties are from here, not from out of Arkansas.

The Court: What do they know about what's happening in Dallas?

Mr. Peel: Your Honor, I know what you are talking about. You want to just send it back down there.

The Court: I certainly do.

Appellant's attorney stated to the court that he would like to call Mrs. Lloyd as a witness, but the court refused, stating "I am not going to make a decision on the merits." Then the court also commented:

He snatched the child across the state line. That's the thing, in violation of an order. That's the kind of thing I've been trying to stop for a long time, and I am not going to let this case be the exception.

Let them go there and litigate the case. I am not cutting anybody off, but I think this case needs to be in Dallas and I don't think it ought to be here at all. The child has only been here forty-one days.

In *Shaw,* supra, we held the fact that a court of this State had the power to make child custody orders regardless of simultaneous jurisdiction of the courts of other states did not require the court to entertain the suit, unless it was to the best interest of the child that the Arkansas court decide the custody action. Thus to a large extent the matter is dis-

cretionary with the court.

An abuse of discretion has been characterized as acting improvidently or arbitrarily. *Bowman* v. *Gabel,* 243 Ark. 728, 421 S.W. 2d 898 (1967). See also *Twist* v. *Mullinix,* 126 Ark. 427, 190 S.W. 851 (1916).

A review of the record herein reflects the chancellor acted in an arbitrary manner in that he determined he was going to send the case back to Dallas even before he heard the evidence to ascertain what action should be taken in the best interest of the child. The issues were drawn and all parties were personally before the court, and in reaching a decision on the matter he should have been guided by the well-established rule "that the welfare of the child is the polestar" in these cases.[1]

Also we note that despite the pleas of both the appellee-mother and the appellant-father requesting custody of Jonathan, the court placed him in custody of the Arkansas Welfare Department. The record does not reflect any reasonable basis on which the court made this decision.

Accordingly the case is reversed and remanded for proceedings not inconsistent with this opinion.

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[1]*Haller* v. *Haller,* 234 Ark. 984, 356 S.W. 2d 9 (1962).

Lowell E. SMITH and Martha S. SMITH
v. C. H. POND et al

75-352 534 S.W. 2d 769

April 5, 1976

Elrod, Elrod & Elrod, for appellants.

Walker, Campbell, McCorkindale & Young, for appellees.

PER CURIAM

This decree must be affirmed, owing to the appellants' noncompliance with Supreme Court Rule 9. Instead of submitting an abstract of the record, as the rule requires, the appellants have simply printed the record, including 265 pages of testimony in question and answer form. That is followed by a ten-page brief, arguing only an issue of fact turning upon the preponderance of the evidence. Under our settled practice an affirmance is required. *Sellers* v. *Harvey,* 222 Ark. 804, 263 S.W. 2d 86; *Gray* v. *Ouachita Creek Watershed Dist.,* 239 Ark. 141, 387 S.W. 2d 605. As pointed out many years ago, the rule is for the convenience of the court, to aid in the dispatch of its business. *St. Louis & S.F. R.R.* v. *Newman,* 105 Ark. 63, 150 S.W. 560. This instance demonstrates the need for the rule. This case and thirteen others were in the weekly submission on March 29. The printed abstracts and briefs totaled 2,516 pages, plus a number of exhibits. Obviously the court's constantly increasing caseload cannot be managed if records are printed in full, in disregard of the rule.

Decree affirmed.

James MANN *v.* RAY LEE SUPPLY

75-343 535 S.W. 2d 65

Opinion delivered April 12, 1976

Evelyn I. Drake, for appellant.

No brief for appellee.

GEORGE ROSE SMITH, Justice. In this suit upon a $454.96 open account the trial court entered a default judgment against the appellant, for his failure to answer interrogatories propounded by the plaintiff. For reversal it is argued that the

statute relied upon in the court below does not apply to interrogatories and that the court erred in entering judgment without notifying the defendant that a trial was to be held.

The appellant had filed a general denial. The plaintiff's nine interrogatories were not answered within the 15 days allowed by the statute, which *does* apply to interrogatories. Ark. Stat. Ann. § 28-355 (Repl. 1962). The plaintiff then obtained an order directing the defendant to respond to the interrogatories within 10 days "and upon Defendant's failure to so respond he shall be subject to the consequences set forth in Ark. Stat. Ann. 28-359." The interrogatories were still not answered. More than 10 days later the court, apparently without further notice, entered an order finding that the defendant had failed and refused to answer the interrogatories within the 10 days and awarding a default judgment to the plaintiff.

The appeal is without merit. A party who has been warned of the consequences of default is not entitled to a second notice that would add nothing to the first, else the progression of notices would never end. For instance, when a defendant is served with a summons warning him to answer within a specified time, under the penalty of the complaint's being taken as confessed, his failure to answer entitles the plaintiff to judgment. *Pyle* v. *Amsler,* 227 Ark. 785, 301 S.W. 2d 441 (1957); *Walden* v. *Metzler,* 227 Ark. 782, 301 S.W. 2d 439 (1957); *Alger* v. *Beasley,* 180 Ark. 46, 20 S.W. 2d 317 (1929).

Here the court's first order, explicitly authorized by § 28-359 (a), pointedly warned the defendant that his failure to respond within 10 days would subject him to the consequences set forth in that statute. Subparagraph (b) (2) (iii) of the section authorizes the court to enter judgment by default against a disobedient party. We see no need for still a second notice to a recalcitrant defendant. Of course, as we noted in *Walden* v. *Metzler, supra,* the entry of judgment did not foreclose the possibility of relief for unavoidable casualty or the like. Here, however, the defendant simply filed a notice of appeal, with no hint of any reason for his continued refusal to obey the court's unmistakable order.

Affirmed.

Richard HILEMAN *v.* STATE of Arkansas

CR 75-223 535 S.W. 2d 56

Opinion delivered April 12, 1976

Frierson, Walker, Snellgrove & Laser, by: *Mark Ledbetter,* for appellant.

Jim Guy Tucker, Atty. Gen., by: *Jack T. Lassiter,* Asst. Atty. Gen., for appellee.

GEORGE ROSE SMITH, Justice. The appellant was found guilty of possessing marihuana with intent to deliver and was sentenced to a term of five years, two of which were suspended. We need discuss only two of his points for reversal, as the third is not likely to arise upon a retrial.

There is no merit in the appellant's argument that he was arrested without probable cause and that therefore the marihuana found by the officers in their ensuing search of his vehicle was inadmissible. Officer McCasland testified that he stopped Hileman's automobile at about the break of dawn, because Hileman's headlights should have been on and because his brake lights did not seem to be working. Perhaps the officer's belief about the need for headlights was questionable, but it is undisputed that Hileman's brake lights were not working. Thus it cannot be said that the officer stopped the vehicle without probable cause.

We must, however, sustain the contention that the court should have stricken Officer Beach's testimony that Hileman admitted that he had bought the marihuana in Missouri. This is a pertinent excerpt from the officer's cross-examination:

> Q. Did you at any time indicate to Richard Hileman that your only interest in the green vegetable material was to ascertain whether or not it was Arkansas dope and that you were not interested in an out-of-state dope problem?
>
> A. Not to my knowledge. Possibly I did. I don't recall it.
>
> Q. And possibly his statement could have been made in response to that?
>
> A. Possibly, yes, sir.

We cannot agree with the State's argument that the motion to strike in effect requested the trial court to declare the statement involuntary as a matter of law. An in-custody statement, as this one was, is presumed to be involuntary, with the burden being upon the State to prove the contrary. *Mitchell* v. *Bishop,* 248 Ark. 427, 452 S.W. 2d 340 (1970), cert. dismissed, 400 U.S. 1025 (1971). Here the presumption was not overcome, for the officer in effect conceded that he may have used a misleading artifice to obtain Hileman's admission. The only certain way for the courts to disapprove the use of such artifices is to exclude any admission so induced.

A postscript: It is invariably with reluctance that we call attention to counsel's disregard of our rules, but without such admonitions the rules fail to achieve one of their purposes, which is to assist the court in its effort to handle its caseload. Rule 9 (b) requires that the appellant's opening statement be free from argument and that it be concise, ordinarily not exceeding two pages in length. In this case the appellant's statement of the case is highly argumentative. Moreover, it comprises seven printed pages, when a single page would have been more than adequate. And even with its length the statement is deficient, for it fails to tell the court what offense the defendant was charged with. We make it clear that the judgment is being reversed not as a result of the nonconforming opening statement, but in spite of it.

Reversed.

Jewel HILBURN *v.* FIRST STATE BANK
of Springdale, Arkansas, Administrator

75-353 535 S.W. 2d 810

Opinion delivered April 12, 1976
[Rehearing denied May 17, 1976.]

Franklin Wilder, for appellant.

Joe B. Reed, Rudy Moore and *James M. Roy Jr.,* for appellee.

JOHN A. FOGLEMAN, Justice. Since we agree with appellant that the probate court had no jurisdiction, we reverse its judgment without considering other points for reversal.

John Robert Hilburn died intestate October 16, 1974 at Springdale. He left a widow, Susan Jane Hilburn. He also left two sons, John and Steve Hilburn. The First State Bank of Springdale was appointed administrator. In the petition for appointment, personal property was valued at $10,000. Real estate was described as "value in question at this time." The real property that was the subject of this proceeding was described in the inventory and a value of $15,000 was ascribed to it.

Jewel Hilburn was the mother of the decedent. She filed exceptions to the inventory, on the ground that the lands involved did not belong to the decedent. The widow filed a petition for statutory allowances and dower. The administrator filed a petition asking that it be authorized to sell all the property of the estate.

Jewel Hilburn filed a response to the widow's petition, asking that the real estate be deleted from the inventory, and alleging that the land was not owned by the decedent and that the widow had surreptitiously secured and recorded an undelivered deed after the death of the decedent, knowing that the deed had never been delivered and that it had been secured by fraud and undue influence. Jewel Hilburn also filed a response to the petition for the sale of the realty and personalty, making the same allegations and asking that a hearing be had on her exceptions to the inventory. She later amended her response to the petition for sale of realty by alleging that at all times relevant to her execution of the deed under which appellees claim title to the realty, she was incompetent to execute a conveyance, by reason of her alcoholism resulting in brain damage. She also alleged that she had not intended to either execute or deliver the deed.

A hearing on these pleadings was held and the probate judge held against appellant Jewel Hilburn and dismissed her exceptions to the inventory. It should be noted at the outset that Jewel Hilburn was not an heir, distributee or devisee

of her son, or a beneficiary of, or claimant against, his estate. She was a "third person," i.e., a stranger to the estate. *Ellsworth* v. *Cornes,* 204 Ark. 756, 165 S.W. 2d 57.

The probate court is a court of special and limited jurisdiction, even though it is a court of superior and general jurisdiction within those limits. *Huff* v. *Hot Springs Savings, Trust & Guaranty Co.,* 185 Ark. 20, 45 S.W. 2d 508; *Branch* v. *Veteran's Administration,* 189 Ark. 662, 74 S.W. 2d 800; *Lewis* v. *Rutherford,* 71 Ark. 218, 72 S.W. 373. It has only such jurisdiction and powers as are expressly conferred by statute or the constitution, or necessarily incident thereto. *Huff* v. *Hot Springs Savings, Trust & Guaranty Co.,* supra; *Moss* v. *Moose,* 184 Ark. 798, 44 S.W. 2d 825; *Smith* v. *Walker,* 187 Ark. 161, 58 S.W. 2d 946; *Lewis* v. *Rutherford,* supra. A probate court is without jurisdiction to grant equitable relief, even though it may apply equitable doctrines in probate matters properly brought before it. *Jones* v. *Graham,* 36 Ark. 383. See also, *Merrell* v. *Smith,* 226 Ark. 1016, 295 S.W. 2d 624; *Bonner* v. *Sledd,* 158 Ark. 47, 249 S.W. 556; *Arkansas Valley Trust Co.* v. *Young,* 128 Ark. 42, 195 S.W. 36.

The constitution vested in the probate courts exclusive original jurisdiction "in matters relative to the probate of wills, the estates of deceased persons, executors, administrators, guardians, and persons of unsound mind and their estates, as is now vested in courts of probate, or may be hereafter prescribed by law. The judge of the probate court shall try all issues of the law and of facts arising in causes or proceedings within the jurisdiction of said court, and therein pending." Art. 7, § 34, as amended by Amendment 24, § 1. Ark. Stat. Ann., Const. (1947). The statutory jurisdiction of the court is stated by Ark. Stat. Ann. § 62-2004 (b) (Repl. 1971), viz:

> JURISDICTION. The Probate Court shall have jurisdiction of the administration, settlement and distribution of estates of decedents, the probate of wills, the persons and estates of minors, persons of unsound mind and their estates, the determination of heirship, adoption, and (concurrent with jurisdiction of other courts) jurisdiction to restore lost wills and for the construction of wills when incident to the administration of an estate;

> and all such other matters as are now or may hereafter be by law provided. The judge of the Probate Court shall try all issues of law and of fact arising in causes or proceedings within the jurisdiction of said court and therein pending. The court shall have the same powers to execute its jurisdiction and to carry out its orders and judgments, including the award of costs, as now exist in courts of general jurisdiction; and the same presumptions shall exist as to the validity of its orders and judgments as of the orders and judgments of courts of general jurisdiction.

The probate court's lack of jurisdiction to determine contests over property rights and titles between the personal representative and third parties or strangers to the estate has long been recognized. *Moss* v. *Sandefur,* 15 Ark. 381; *Fancher* v. *Kenner,* 110 Ark. 117, 161 S.W. 166; *Shane* v. *Dickson,* 111 Ark. 353, 163 S.W. 1140; *Gordon* v. *Clark,* 149 Ark. 173, 232 S.W. 19; *Huff* v. *Hot Springs Savings, Trust & Guaranty Co.,* supra; *Ellsworth* v. *Cornes,* supra. See also, *Snow* v. *Martensen,* 255 Ark. 1049, 505 S.W. 2d 20.

The enactment of the Probate Code did not enlarge the jurisdiction of the court to hear contests over property rights between the personal representative and third persons. See *Cross* v. *McLaren,* 223 Ark. 674, 267 S.W. 2d 956. See also, *Mills* v. *Latham,* 215 Ark. 128, 219 S.W. 2d 609. It was pointed out in *Cross* that the enlargement of the jurisdiction of the court by the Probate Code was by addition of determination of heirship, adoption, and concurrent jurisdiction to establish lost wills and for construction of wills "when incident to the administration of an estate." The probate courts also remained courts of law, not equity, after the adoption of the Probate Code and were not consolidated with the chancery courts. *Young* v. *Young,* 201 Ark. 984, 147 S.W. 2d 736; *Mills* v. *Latham,* supra. See also, *Thompson* v. *Dunlap,* 244 Ark. 178, 424 S.W. 2d 360.

The distinction between probate jurisdiction and jurisdiction of matters which are cognizable only in equity has been recognized by us. See *Bonner* v. *Sledd,* 158 Ark. 47, 249 S.W. 556, where we held that the probate court had jurisdiction of a claim for services to a decedent under an oral

contract to compensate the claimant by a testamentary bequest and devise, since the claimant did not seek specific performance of the contract. See also, *Arkansas Valley Trust Co.* v. *Young,* supra. Clearly, the relief sought by appellant was, like specific performance, peculiarly and exclusively within the jurisdiction of a court of equity. *Myers* v. *Hobbs,* 195 Ark. 1026, 115 S.W. 2d 880; *McCracken* v. *McBee,* 96 Ark. 251, 131 S.W. 450; *Tandy* v. *Smith,* 173 Ark. 828, 293 S.W. 735. See also, *Salyers* v. *Smith,* 67 Ark. 526, 55 S.W. 936.

Appellees rely upon *Hobbs* v. *Collins,* 234 Ark. 779, 354 S.W. 2d 551; *Massey* v. *Doke,* 123 Ark. 211, 185 S.W. 271; *Arkansas Valley Trust Co.* v. *Young,* supra; *Thomas* v. *Thomas,* 150 Ark. 43, 233 S.W. 808; *Gocio* v. *Seamster,* 203 Ark. 937, 160 S.W. 2d 194; *Jansen* v. *Blissenbach,* 214 Ark. 755, 217 S.W. 2d 849; *Carlson* v. *Carlson,* 224 Ark. 284, 273 S.W. 2d 542; and *Park* v. *McClemens,* 231 Ark. 983, 334 S.W. 2d 709, to sustain probate court jurisdiction. They also cite *Porterfield* v. *Porterfield,* 253 Ark. 1073, 491 S.W. 2d 48 and *Washam* v. *First National Bank,* 248 Ark. 984, 455 S.W. 2d 96 as examples of the exercise of probate jurisdiction and seek to distinguish *Ellsworth* v. *Cornes,* supra, classifying as dictum the language adverse to their position. Most of the cases cited by appellees are readily distinguishable, others not quite so easily. Others are clearly inapplicable. See *Jansen* v. *Blissenbach,* supra; *Massey* v. *Doke,* supra; *Arkansas Valley Trust Co.* v. *Young,* supra; *Gocio* v. *Seamster,* supra. *Gocio* v. *Seamster,* and *Carlson* v. *Carlson,* supra, are consistent with appellant's position. *Porterfield* v. *Porterfield,* supra and *Washam* v. *First National Bank,* supra, also seem consistent. At least there is nothing to indicate that they are inconsistent.

We first point out that we reviewed many of these cases in *Snow* v. *Martensen,* supra, where we reversed the probate court's dismissal of a challenge by beneficiaries under the will of the decedent to the inventory filed by the personal representative who was the other beneficiary, and who had not listed a savings account, claiming it by right of survivorship. The personal representative claimed to be a stranger to the estate, insofar as that account was concerned and this was the basis of her motion to dismiss. We rejected that contention and in reviewing the cases distinguished *Hart-*

man v. *Hartman,* 228 Ark. 692, 309 S.W. 2d 737, in which the contest was between the widow and her husband's estate and in which the validity of her assignment of the notes in question to her deceased husband was not passed on by the probate court. But we restated and applied the rule stated in *Ellsworth* v. *Cornes,* which appellee labels dictum, saying:

> In *Ellsworth* v. *Cornes,* 204 Ark. 756, 165 S.W. 2d 57, we stated a rule which we still adhere to and by which we measure the jurisdiction and distinguish the case at bar. In *Ellsworth* we said:
>
> > Throughout its history, this court has held that Probate Courts are without jurisdiction to hear contests of and determine the title to property between personal representatives of deceased persons and third persons claiming title adversely to the estates of deceased persons. [Omitting citations]

We held that the parties to the controversy were not "third parties" claiming adversely to the estate. Our approval of the rule so recently should have laid to rest any contention that our early position on the matter was not still in effect. We did not specifically overrule *Hobbs* v. *Collins,* supra, in *Snow,* but it is not wholly consistent with *Ellsworth,* to which we adhered, and it was not necessary to overrule it in reaching our result in that case. We did not, however, hold in *Hobbs* that the probate court had jurisdiction. We took the position that failure of the administrator to object to probate court jurisdiction barred him from raising the jurisdictional question on appeal, upon the authority of *Park* v. *McClemens,* supra. In *Park* (where three justices dissented), we said that the probate court should have taken and retained jurisdiction under the authority of *Hartman,* because, by agreement and cooperation of the parties, the question of ownership of the funds involved was submitted to that court. In the first place, *Hartman* was not authority for the court's holding.[1] But more importantly, both cases are aberrations that should be

[1]Nevertheless, we were even then troubled about the apparent inconsistency of *Thomas* v. *Thomas,* 150 Ark. 43, 233 S.W. 808 and *Carlson* v. *Carlson,* 224 Ark. 284, 273 S.W. 2d 542 with *Moss* and *Ellsworth,* but found it unnecessary to reconcile them. The conflict was more apparent than real. In *Thomas,* the controversy was between the woman who was found to be the

eliminated from our otherwise unvarying application of the rule that subject matter jurisdiction is always open, cannot be waived, can be questioned for the first time on appeal, and can even be raised by this court. *Hervey* v. *The Farms, Inc.,* 252 Ark. 881, 481 S.W. 2d 348; *Catlett* v. *The Republican Party of Arkansas,* 242 Ark. 283, 413 S.W. 2d 651; *Risor* v. *Brown,* 244 Ark. 663, 426 S.W. 2d 810; *Magnet Cove Barium Corp.* v. *Watt,* 215 Ark. 170, 219 S.W. 2d 761. And subject matter jurisdiction cannot be conferred by consent of the parties. *Risor* v. *Brown,* supra; *Sheffield* v. *Heslep,* 206 Ark. 605, 177 S.W. 2d 412. *Sugar Grove School Dist. No. 19* v. *Booneville Special School Dist. No. 65,* 208 Ark. 722, 187 S.W. 2d 339; *Thornton* v. *Commonwealth Federal Savings & Loan Assn.,* 202 Ark. 670, 152 S.W. 2d 304. We have said that it is not only the right but the duty of this court to determine whether it has jurisdiction of the subject matter. *Arkansas Savings & Loan Assn. Board* v. *Corning Savings & Loan Assn.,* 252 Ark. 264, 478 S.W. 2d 431.

The jurisdictional question is one relating to subject matter. *Huff* v. *Hot Springs Savings, Trust & Guaranty Co.,* supra. Appellees' contention that it was waived is without merit.

The judgment of the probate court upholding the validity of the deed and determining the title to the property as between appellant and appellees was void for want of jurisdiction. *Ellis* v. *Shuffield,* 202 Ark. 723, 152 S.W. 2d 535; *Huff* v. *Hot Springs Savings, Trust & Guaranty Co.,* supra; *Ellsworth* v. *Carnes,* supra. This case, however, is one which may properly be transferred to the chancery court for trial because of the probate court's lack of jurisdiction to grant the equitable relief sought by appellant. *Merrell* v. *Smith,* supra; *Davis* v. *Davis,* 227 Ark. 961, 302 S.W. 2d 769.

Since appellant has not only acquiesced in the procedure in the probate court, but actually invoked its jurisdiction, she thereby caused the incurrence of costs incident to the entire proceeding which might have been avoided by timely objec-

legal widow of the decedent and his heirs. The widow was also the administratrix and was in somewhat the same position as the personal representative in *Snow.* Actually the *Ellsworth* court read *Thomas* to support the rule here applied, just as we did in *Snow. In Carlson,* the controversy was between the personal representative and the widow. In upholding the probate court jurisdiction we referred to *Ellsworth.*

tion to the jurisdiction. For this reason, she shall not be relieved of costs adjudged against her in the probate court and costs on appeal are assessed against her. *Huff* v. *Hot Springs Savings, Trust & Guaranty Co.,* 185 Ark. 20, 45 S.W. 2d 508; *Fancher* v. *Kenner,* 110 Ark. 117, 161 S.W. 166.

Appellees have complained that appellant has violated Rule 9 by an insufficient abstract of the record and moved for a dismissal of the appeal for that reason. We no longer entertain such a motion. Whatever deficiencies exist have no bearing on the jurisdictional question on which we decide this appeal. Appellant's abstract of the record relating to that point is certainly sufficient to give this court a clear understanding of that question. The motion is denied. Rule 9 (d), (e), Rules of the Supreme Court of Arkansas, Vol. 3A, Ark. Stat. Ann. (Supp. 1975).

The judgment is reversed and the cause remanded with directions to transfer the contest over the realty to the Chancery Court of Washington County.

BYRD, J., dissents.

ROY, J., not participating.

Ben SHINN et ux *v.* Richard HEATH, Director of the Department of Finance and Administration of the State of Arkansas

75-284 535 S.W. 2d 57

Opinion delivered April 12, 1976

Chambers & Chambers, by: *Melvin T. Chambers,* for

appellants.

James R. Cooper, H. Ray Hodnett, Robert G. Brockman, and *James R. Eads Jr.,* for appellee.

J. FRED JONES, Justice. This is an appeal by Ben Shinn and his wife from an adverse decree of the chancery court on a petition they filed for the return of $6,461.65 in income taxes assessed for 1967 through 1970 and paid under protest. The question on this appeal is whether the appellants were residents of Arkansas and liable for income tax under the Income Tax Act of 1929, Ark. Stat. Ann. § 84-2001, et seq. (Repl. 1960).

Under § 84-2003 an income tax is imposed upon every individual resident of Arkansas and § 84-2002 (9) and (10) defines resident and nonresident as follows:

> "(9) The word 'resident' means natural persons and includes for the purpose of determining liability to the tax imposed by this act upon or with reference to the income of any taxable year, any person domiciled in the State of Arkansas and any other person who maintains a permanent place of abode within the State and spends in the aggregate more than six [6] months of the taxable year within the State.
>
> (10) The word 'nonresident' when used in connection with this act, shall apply to any natural person whose domicile is without the State of Arkansas, or who maintains a place of abode without the State, and spends in the aggregate more than six [6] months of the taxable year without the State."

The appellants were born and reared in Arkansas and the substance of their testimony was to the effect that for the past several years they have been engaged in building and selling motels, primarily in the State of Texas. It was their contention that their residence for tax purposes followed their occupation, in that they lived in the motels they would construct until the motel was sold and they would then move on to a new location and build and sell another motel. It was

their contention, and they so testified, that they maintained a mailing address in Magnolia, Arkansas, and would return to Magnolia periodically to pick up their mail from a post office box they maintained in Magnolia. All of their relatives lived in and around Magnolia. Some of the motels were sold before they were finished and in other instances the motels were built and operated by the appellants until they were sold.

Mr. and Mrs. Shinn filed Arkansas income tax returns for 1967 and gave their home address as "Post Office Box 338, Magnolia, Columbia County, Arkansas." In 1968 the Shinns filed a "nonresident (resident for part of year)" income tax return in Louisiana for 1967 and showed their home address as Box 338, Magnolia, Arkansas. Their 1968 and 1969 federal and state income tax returns showed the same address. On January 19, 1975, Mr. Shinn registered to vote in Arkansas and on his affidavit for registration he designated his home address as 916 Highland, Magnolia, and after designating his school district and voting precinct in Magnolia, he stated he had lived at that address for eight years.

According to Mr. and Mrs. Shinns' testimony, most of their time was spent in and around Tyler, Texas. They said that in 1969 they contemplated building a home in Tyler, but the motel business took them to other parts of Texas and they never did buy a lot or build a home in Tyler. They said they owned a house in Magnolia from 1962 until they sold it in 1970, but they never did live in the house. They said the house in Magnolia was unfurnished; that the house was under construction for about 18 months while they were in and out of Magnolia; that it was never furnished and that they sold it unfurnished. They said that since that time, however, [apparently since 1970] they have built a home in Magnolia.

Mr. Shinn said the reason they did not furnish the original house in Magnolia was that a banker from whom he borrowed money in Tyler, Texas, insisted that they settle down in Tyler, and they were thinking of doing so. He said he had been building and selling motels in Texas since 1959; that he maintained an office in a trailer on the job site while a motel was under construction and he would move it from job to job in various towns where he constructed motels.

Both Mr. and Mrs. Shinn had Arkansas driver's licenses which they had kept and renewed through the years. Mr. Shinn said he would be unable to pass a driver's examination in Texas. Mr. Shinn said he was registered to vote in Arkansas for the purpose of obtaining a liquor permit in connection with a motel he had built in Texarkana, Arkansas, while living across the state line in Texas. He said that while they kept the house in Magnolia from 1967 to 1970, he had a next-door neighbor look after it and mow the lawn. He said he never did vote in Arkansas and had no intention of doing so when he executed his voter registration affidavit. Mr. Shinn said he did not know what address J. W. put on his income tax returns.[1] Mr. Shinn then testified in part as follows:

> "Q. Mr. Shinn, while you were in Texarkana, did you intend one day to return to Magnolia where you say your relatives and . . .
>
> A. No, I really didn't. I loved Texas and I like it and still like it, and I really intended to stay in Texas, but I didn't. But, anyhow, Texas, one time I thought we would live in Texas because all our business was there.
>
> Q. But you did, in fact, change your mind and return to Arkansas?
>
> A. I will have to say we are in Arkansas now, uh huh.
>
> THE COURT: Did you tell anybody in Texas you were from Arkansas or did you hold yourself out to be from some place else?
>
> A. If I was in Greenville, Texas, I am from Greenville, Texas. In Tyler, from Tyler, Texas. Wherever I was living, at that time that is where I was living."

Mrs. Shinn testified that from January to May, 1967, they were in Manny, Louisiana; from May 1 to September 21, 1967, they were in Arkansas and were unemployed during that time. She said that from September, 1967, to June, 1968,

[1]The returns show that J. W. Powell of Magnolia, Arkansas, made out the returns.

they were in Sherman, Texas; that following vacation in 1968 they were in Tyler, Texas, from August, 1968, to August, 1969; that from August, 1969, to December, 1969, they were in Greenville, Texas; that the motel jobs they had in Greenville and Tyler overlapped and that while they were operating the motel in Tyler before they sold it, they began construction on one in Greenville. She said that following their vacation in 1970, they were in Alexandria, Louisiana, from February to July; that they were on vacation in August, 1970, and were in Texarkana from September, 1970, to March, 1971. She said they were building a motel in Texarkana, Arkansas, but were living in Texarkana, Texas. She said they lived in furnished apartments much of the time and owned no furniture.

On cross-examination Mrs. Shinn said that when they built the house in Magnolia in 1962, they thought they would live there. She said they kept the house and did not rent it until 1970 when they sold it. She said she also had an Arkansas driver's license and had purchased it in Arkansas when she began to drive and had maintained it ever since. Referring to the house built in Magnolia in 1962, Mrs. Shinn testified as follows:

> "Q. Did you ever intend to come back and live at that house?
>
> A. When you say ever, that is a long time. That covers an awful lot of time. But as we became more and more busy in our work in other parts of the country, we decided that since we were not using the house, we would sell the house.
>
> Q. You sold the house in 1970 after you had owned it since 1962?
>
> A. I believe we sold the house, I think, in 1969."

We deem it unnecessary to discuss the testimony further for the reason that this case actually turns on the statutory definition of who is a resident for tax purposes under the above statute. The appellants have designated the points on which they rely for reversal as follows:

"I. That section 84-2002, sub-sec. 9 of Arkansas statutes annotated does not include the appellants as being residents of the State of Arkansas for the time or years involved herein.

II. That section 84-2002, sub-sec. 10 of Arkansas statutes annotated excludes the appellants as 'residents' of the State of Arkansas for and during the time, or years, involved herein.

III. Exclusive of the definition contained in statutes involved the appellants are not subject to the taxes for the years involved for the following reasons:

a. They were not residents of the State of Arkansas at the times involved.

b. They were residents of the State of Texas during the times involved.

IV. The appellants are not restricted from changing their domicile or residence.

V. The appellants are entitled to a 'Commercial Domicile' for income tax purposes [under] sub-sec. B of § 84-2055, Ark. Statutes Anno."

In defining the word "resident" within the meaning of the statute here involved, the appellants rely on the general definition as set out in *Shelton* v. *Shelton,* 180 Ark. 959, 23 S.W. 2d 629 (1930), and *Jarrell* v. *Leeper,* 178 Ark. 6, 9 S.W. 2d 778 (1928), rather than as specifically defined in § 84-2002 (9) (10), *supra.* The *Shelton* case involved the appointment of administrator and the question was whether the administrator was a resident of the county in which he was appointed. The statute under which the appointment was made, Crawford & Moses' Digest, § 5, recited in part as follows:

" 'Letters testimentary and of administration shall be granted in the county in which the testator or intestate resided; or, if he had no known residence. . . . ' "

This court quoted from *Krone* v. *Cooper,* 43 Ark. 547 (1884), in the *Shelton* case, as follows:

> " 'We may conclude from the cases that, in contemplation of the attachment laws, residence implies an established abode, fixed permanently for a time, for business and other purposes, although there may be an understanding all the while to return at some time or other to the principal domicile; but so difficult is it found to provide a definition to meet all the varying phases of circumstances that the determination of this question may present, that the courts say that, subject to the general rule, each case must be decided on its own state of facts.' See also *Jarrell* v. *Leeper,* 178 Ark. 6, 9 S.W. (2d) 778."

In *Shelton* we found that the trial court correctly held that the decedent *resided* at Brinkley, Monroe County, at the time of his death, and that the trial court did not err in holding the letters void. In *Shelton* we cited other cases in which the words "resident" and "residence" were defined for the various purposes pertaining to the case involved and in doing so we said:

> "In *Smith* v. *Union County,* 178 Ark. 540, 11 S.W. (2d) 455, this court held, in construing the statute providing for the listing of property for taxation, (§ 9890, C. & M. Digest): 'Residence, as used in § 9890, Crawford & Moses' Digest, means the place of actual abode, and not an established domicile or home which one expects to return to and occupy at some future time.' The same construction was placed upon the word 'residence' under the taxation laws as had been given it under the attachment laws of the State."

If the appellants in the case at bar were relying on the definition of residence for purposes of listing property for taxation, as set out in *Smith* v. *Union County,* and cited in *Shelton,* the statute applicable to *Smith* v. *Union County* clearly distinguishes the meaning in that case from the definition applicable in the case at bar. Crawford & Moses' Digest, § 9890, provided as follows:

> "Every person of full age and sound mind shall list the real property of which he is the owner, situated in the county in which he *resides*. . . . " (Our emphasis).

In *Krone* v. *Cooper, supra,* cited in *Shelton,* the action was an attachment on a judgment *in personam* and in that case this court further said:

> "The terms 'resident' and 'non-resident' used in the provisions of our statute governing attachments, have never been defined by this court, and the provisions themselves do not profess to determine the meaning that was intended in their use. No exact definition of these terms, to fit all cases, is practicable, for the reason that their meaning varies with the subject matter to which they are applied.
>
> * * *
>
> . . . A mere presence, or temporary sojourn, in this state, whether on business or pleasure, unaccompanied by the intention of remaining for a length of time that would give some idea of permanency, would not constitute residence within the meaning of the attachment laws, though by permanency we are not to understand a determination to stay always. Such residence, when established, may be lost by departure from the state with the intention of not returning, or of taking up an abode elsewhere; but a mere temporary absence from the state, without this intention, would not render one amenable to the attachment law as a non-resident."

The Civil Code pertaining to *attachments,* as brought forward in Ark. Stat. Ann. § 31-101 (Repl. 1962), simply refers to "residents" and "nonresidents" without further definition.

Jerrell v. *Leeper, supra,* relied on by the appellants, was also an attachment case and in that case this court said:

> "What constitutes a nonresident within the meaning of our attachment law was considered and thoroughly dis-

cussed in the case of *Krone* v. *Cooper,* 43 Ark. 547. The court recognized that the words 'resident' and 'nonresident,' as used in our statute relating to attachments, had never been defined by this court, and that no exact definition, which will fit all cases, is practical. The court recognized that domicile has a broader meaning than residence, and includes residence."

The statute here involved, § 84-2002 (9) and (10), *supra,* defines a resident for tax purposes under subsection (9) as any person *domiciled* in the state of Arkansas and also any person who maintains a *permanent place of abode* within the state and spends in the aggregate more than six months of the taxable year within the state. Subsection (10) defines a nonresident as a person whose domicile is without the state of Arkansas, *or* who maintains a place of abode without the state, and spends in the aggregate more than six months of the taxable year without the state. Although the appellants contend that they were not domiciled in Arkansas, they argue that the statutory requirement of spending more than six months of the taxable year in Arkansas makes the place of their domicile unimportant. The second exclusion of subsection (10), appellants argue, "excludes those who maintain a place of abode outside of the State and spend more than six (6) months of the taxable year outside the state."

Actually the appellants failed to prove that they maintained any particular place of abode outside of Arkansas, they did *maintain* such *place of abode* in Magnolia but testified they did not abide there. In any event, to adopt the construction advocated by the appellants would put the two subsections into conflict. Subsection (9) makes "any person domiciled in the State of Arkansas" a resident. The primary rule in the construction of statutes is to ascertain and give effect to the intention of the Legislature. *Duty* v. *City of Rogers & Benton Cty.,* 255 Ark. 309, 500 S.W. 2d 347 (1973). In determining legislative intent, the courts look to the language of the whole statute or Act. *John B. May Co., Inc.* v. *McCastlain, Comm'r,* 244 Ark. 495, 426 S.W. 2d 158 (1968). In order to give effect to every part of a statute, it is the court's duty, as far as practicable, to reconcile the different provisions so as to make them consistent, harmonious and

sensible. *McLeod* v. *Santa Fe Trail Transp. Co.,* 205 Ark. 225, 168 S.W. 2d 413 (1943). To carry out the general purpose and intent of a statute, either civil or criminal, the words "and" and "or" are convertible. *Williams* v. *State,* 99 Ark. 149, 137 S.W. 927 (1911); *Pickens-Bond Const. Co.* v. *NLR Elec. Co.,* 249 Ark. 389, 459 S.W. 2d 549 (1970). Subsection (10), *supra,* can be made consistent with subsection (9) by reading the "or" which follows "state of Arkansas" as an "and." Even so, the case at bar falls within the purview of what we said in *Cravens* v. *Cook, Comm'r,* 212 Ark. 71, 204 S.W. 2d 909 (1947). In that case it was stipulated that Congressman Cravens was domiciled in Arkansas but that he maintained a place of abode in Washington and that he spent more than six months each year without the state. In rejecting his contention that he was exempt under the last clause of subsection (10), *supra,* this court said:

> "Appellant argues, however, that under the last clause (Subdivision (10) of § 14025, Pope's Digest) it must be held that appellant is a nonresident, within the meaning of the tax law, because it was stipulated that he had maintained a place of abode without the state and had spent more than six months of each year without the state.
>
> We cannot agree with this contention. We think the words 'place of abode' as used in this Act mean something more than a place of temporary sojourning, and that they imply a degree of permanence that did not attach to appellant's stay in Washington. This court has frequently held that 'place of abode' as used in our statute relating to service of process means a place where a person has fixed his permanent home, and that a given place may be a 'place of abode' of a party, though he may be actually absent therefrom for a long period of time. *DuVal* v. *Johnson,* 39 Ark. 182; *McGill* v. *Miller,* 183 Ark. 585, 37 S.W. 2d 689; *Shephard* v. *Hopson,* 191 Ark. 284, 86 S.W. 2d 30; *Husband* v. *Crockett,* 195 Ark. 1031, 115 S.W. 2d 882. In the last cited case we held that 'usual place of abode' is synonymous with residence.
>
> The stipulation shows that appellant was a resident of

> Arkansas, and did not establish or maintain without the state such a 'place of abode' as would constitute him a nonresident."

We have accepted "place of abode" and "residence" as synonymous terms within the context of an insurance policy. *Central Mfr's Mut. Ins. Co.* v. *Friedman,* 213 Ark. 9, 209 S.W. 2d 102 (1948). But we have held that "domicile" and "residence" are not synonymous terms since "residence" denotes an act, and "domicile" denotes an act coupled with an intent. *Jarrell* v. *Leeper, supra.*

In Leflar, Conflict of Laws, § 10, is found the following language:

> "Under the common law every person has a domicile; when any person attains his age of majority he at that moment has a domicile previously assigned to him by law. He may thereafter acquire a new domicile, but if he does not acquire a new one the old one persists. The principle manner by which a new domicile can be acquired is by physical presence at a new place coinciding with the state of mind of regarding the new place as HOME. New domicile arises instantaneously when these two facts concur."

See also Restatement (2d) of Conflicts of Laws, §§ 11-20 (1971).

In *Phillips* v. *Sherrod Estate,* 248 Ark. 605, 453 S.W. 2d 60 (1970), this court said:

> "We have held that to effect a change of domicile from one locality or state to another, there must be an actual abandonment of the first domicile, coupled with an intention not to return to it and there must be a new domicile acquired by actual residence in another place or jurisdiction, with intent of making the last acquired residence a permanent home. *Weaver* v. *Weaver,* 231 Ark. 341, 329 S.W. 2d 422, and cases cited therein."

In *Charisse* v. *Eldred,* 252 Ark. 101, 477 S.W. 2d 480

(1972), a case involving residential qualifications to vote and run for office under an election statute, the word "residence" was treated an synonymous with "domicile" in the context of the statute, but in that case we held that the question of intent (to make a certain place one's domicile) is one of fact to be ascertained not only by the statements of the person involved, but by his conduct as well.

The chancellor in the case at bar determined that the appellants were residents of Arkansas, and that determination is sustained by evidence in the record. Although the appellants contend that they were physically located outside of Arkansas, numerous documents prepared by appellants listed Arkaneas as their address. Furthermore, appellants had Arkansas driver's licenses and they owned a house in Arkansas which they did not rent. Mr. Shinn registered to vote in Arkansas in 1970 and declared that Arkansas had been their residence for the eight previous years. The appellants lived at no place outside Arkansas with the intent, or even the stated intent, of staying there. The appellants argue that they did not *intend* Arkansas to be their residence, but in *Charisse* v. *Eldred, supra,* we said:

> "[T]he fact finder is not bound to accept claims of intent when the circumstances point to a contrary conclusion. * * * When acts are inconsistent with a person's declarations, the acts will control, and declarations must yield to the conclusions to be drawn from the facts and circumstances proved."

The appellants' contention that they were entitled to a "commercial domicile" for income tax purposes under Ark. Stat. Ann. § 84-2051 et seq. (Supp. 1975) is without merit. That statute applies to income "from business activity which is taxable both within and without this state." (§ 84-2056). There was no evidence in the case at bar the appellants paid any income tax in the State of Texas or that Texas even had an income tax law. See *Collins* v. *Skelton,* 256 Ark. 955, 512 S.W. 2d 542 (1974).

The decree is affirmed.

FOGLEMAN, J., concurs in the result; BYRD, J., dissents.

E. G. BALENTINE *v.* STATE of Arkansas

CR 75-220 535 S.W. 2d 221

Opinion delivered April 12, 1976

Herby Branscum Jr., for appellant.

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

J. FRED JONES, Justice. E. G. Balentine was convicted of perjury in the first degree (Ark. Stat. Ann. § 41-3001 [Repl. 1964]) at a jury trial and was sentenced to the state penitentiary for a period of five years with four years suspended. On appeal to this court he has designated the points he relies on for reversal as follows:

> "The trial court erred in denying appellant's motion to quash the indictment.
>
> The trial court erred in refusing to allow appellant to introduce the testimony of Steven Taylor before the grand jury.
>
> The trial court erred in denying appellant's motion for a directed verdict.
>
> The trial court erred in allowing the prosecuting attorney to ask appellant irrelevant and immaterial questions about matters simply to inflame the jury.
>
> That the verdict is contrary to the evidence and to the law."

The facts appear as follows: On August 29, 1974, the prosecuting attorney for Stone County filed an information accusing Balentine of delivering a controlled substance, marijuana, in violation of Ark. Stat. Ann. § 82-2517 (a) (1) (ii) (Supp. 1975). A warrant was issued on the information but it was never served on Balentine, and apparently no further action was taken in connection with the information.

In September, 1974, the grand jury was in session in Stone County and, among other matters, it was investigating

the illicit drug and controlled substance traffic in Stone County, and was attempting to determine the source of the contraband.

On September 25, 1974, Balentine and several high school students and young people in the area were subpoenaed as witnesses before the grand jury. Two of the young people testified that they had purchased marijuana from Balentine and Balentine testified in part as follows:

> "Q. Well, wherever you lived in August of 1973, I would ask you about a day in August 1973 when Dennis Brandon was there at your house and ask whether or not you sold two ounces of marijuana to Steven Taylor for $12.00?
>
> A. No, sir, I never sold no marijuana to Steven Taylor.
>
> Q. Did you sell two ounces of marijuana to Steven Taylor for any price?
>
> A. No, sir, I didn't.
>
> Q. Did you sell any quantity of marijuana to Steven Taylor on that date?
>
> A. No, sir, I didn't even know Steven Taylor until just back in the summer sometime was the first time I ever met Steven Taylor.
>
> Q. Have you ever sold any marijuana to Steven Taylor?
>
> A. No, sir.
>
> Q. Have you ever sold any to anybody else?
>
> A. No, sir.
>
> Q. Have you ever given any marijuana to anybody?
>
> A. No, sir, I haven't."

On November 18, 1974, the grand jury indicted Balentine for perjury in the first degree, in that on September 25, 1974, he "did corruptly swear, testify or affirm falsely that he had never sold marijuana to anyone and that he had never given marijuana to anyone, and the testimony so testified was material, and against the peace and dignity of the State of Arkansas."

At the trial on June 10, 1975, Orville Johnson, the foreman of the grand jury before whom Balentine and the other witnesses appeared, testified that the grand jury, among other matters, was investigating the source of marijuana and illicit drugs and controlled substances coming into Stone County. He said that Balentine was called as one of approximately 25 witnesses who were questioned. He said that some of the other witnesses indicated that they had obtained marijuana from Balentine, but Balentine testified he had never sold or given away any marijuana. He said that many of the approximately 25 witnesses admitted using marijuana but were very evasive as to where it came from. He said that Balentine's name finally came up as the immediate source from whom some of the witnesses had purchased marijuana. He said that Balentine's denial that he had ever sold or given away marijuana greatly impeded the grand jury's progress in its investigation as to the source of contraband coming into Stone County.

Steven Taylor testified that he was 20 years of age and had smoked marijuana "fairly regularly" since he was about 15 years of age. He testified that he bought two ounces of marijuana from Balentine in August, 1973.

Eddie Jordan testified that he had been smoking marijuana for two or three years and had known the appellant Balentine for about a year. He said he testified before the grand jury and that he purchased some marijuana from Balentine about two months before the grand jury was in session. Both Taylor and Jordan testified in detail as to where and when they purchased marijuana from Balentine and the amount they paid for it.

Balentine testified in his own behalf. He did not state his age but testified that he lived with his wife in a house he built

around 1968 or 1970. He said he had seen Steven Taylor but did not know him in August, 1973. He said he only met Taylor a little more than a year ago and he denied selling any marijuana to Taylor in August, 1973. He denied owning a trailer near the fair grounds where the prosecuting witnesses said they purchased marijuana from him. He said everybody thought the trailer near the fair grounds belonged to him but it actually belonged to his daughter and her husband. He said that he was building a house for his daughter and son-in-law and would occasionally stay in the trailer with them. He also said he had seen Eddie Jordan and had inquired as to who he was, but that he had never sold any marijuana to Jordan.

The appellant, in support of his contention that the trial court erred in denying his motion to quash the indictment, relies on *Claborn* v. *State,* 115 Ark. 387, 171 S.W. 862 (1914), but that case is distinguishable from the case at bar. In *Claborn* v. *State* the appellant who had been indicted by the grand jury for carrying a concealed weapon was called to testify before the grand jury which was investigating the charge against him and for which he had been indicted. As a result of the appellant testifying that he had not carried a concealed weapon, he was indicted, tried and convicted of perjury. On appeal Claborn contended that the indictment should have been quashed because the allegedly perjurious testimony resulted from a violation of his constitutional right against self-incrimination. This court agreed with that contention and in reversing the perjury conviction said:

> "An indictment for perjury based upon alleged false swearing in a criminal proceeding pending before the grand jury against the person himself giving the alleged false testimony, is fatally defective unless it alleges that the accused voluntarily appeared before the grand jury to give the testimony upon which the indictment for perjury is predicated."

The indictment in the case at bar does not show that appellant was called to testify as a witness on a charge then pending against him before the grand jury. See *Warren* v. *State,* 153 Ark. 497, 241 S.W. 15 (1922); *State* v. *Roberts,* 148

Ark. 328, 230 S.W. 15 (1921). The record does not show why Balentine was indicted for perjury rather than for selling marijuana; but, be that as it may, Ark. Stat. Ann. § 28-532 (Supp. 1975) provided for Balentine, immunity from prosecution based on his testimony before the grand jury. Therefore, the reasoning of the court in *State* v. *Roberts, supra,* is applicable to the case at bar. In the *Roberts* case we said:

> "The question propounded might or might not have elicited information incriminating the defendant himself. But he could not refuse to answer on that ground, for the reason that the statute protects him from the use of his own testimony in the prosecution of a charge against himself. Crawford & Moses' Digest, § 3122; *State* v. *Bach Liquor Co.,* 67 Ark. 163; *Ex parte Butt,* 78 Ark. 262."

The appellant's contention that the trial court erred in failing to admit into evidence a transcript of Steven Taylor's testimony before the grand jury is without merit. The court sustained an objection to the admission of this transcript because it was not material to the perjury charge against the appellant. The transcript was available to the appellant on cross-examination of the witness and, furthermore, the appellant made no offer of proof.

The appellant's contention that the trial court erred in denying his motion for a directed verdict is likewise without merit. In *Munn* v. *State,* 257 Ark. 1057, 521 S.W. 2d 535 (1975), quoting from *Burks* v. *State,* 255 Ark. 23, 498 S.W. 2d 336 (1973), we said:

> " ' . . . 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.' "

The basis for the appellant's motion for directed verdict in the case at bar was that the state failed to prove the materiality of the appellant's testimony before the grand jury. In *Smith* v. *State,* 153 Ark. 645, 241 S.W. 37 (1922), this court was considering perjury resulting from testimony before a grand jury and in that case we said:

> "In the case of *Smith* v. *State,* 91 Ark. 200, a syllabus reads as follows: 'In an investigation before a grand jury any testimony is material whose necessary effect is to suspend, if not prevent, further investigation of a subject of inquiry, as where defendant's false testimony prevented the grand jury from investigating whether liquors in a given instance had been sold illegally.' "

The grand jury foreman, Orville Johnson, testified that the false testimony of the appellant delayed the grand jury in finding the source of the marijuana being distributed in Stone County. Thus a fact issue existed for the jury.

The appellant's contention that the trial court erred in allowing the prosecuting attorney to ask appellant irrelevant and immaterial questions about matters simply to inflame the jury is also without merit. When a defendant testifies in his own defense, he may be asked, in good faith, about other crimes he may have committed for the purpose of testing his credibility, but he cannot be asked if he has been charged, indicted or accused of other crimes. *Tarkington* v. *State,* 250 Ark. 972, 469 S.W. 2d 93 (1971); see also *Moore* v. *State,* 256 Ark. 385, 507 S.W. 2d 711 (1974).

There is no merit in the appellant's contention that the verdict was contrary to the evidence and to the law.

The judgment is affirmed.

THURSTON NATIONAL INSURANCE COMPANY *v.* George W. DOWLING

75-328 535 S.W. 2d 63

Opinion delivered April 12, 1976

Putman, Davis & Bassett, for appellant.

Little, Lawrence, McCollum & Mixon, by: *James G. Mixon,* for appellee.

ELSIJANE T. ROY, Justice. Appellant Thurston National Insurance Company issued a fire insurance policy to appellee George W. Dowling which covered a dwelling house owned by appellee. The face amount of the policy was $8,000, and it contained a $50 deductible provision. In May, 1973, the house was totally destroyed by fire, and after settlement negotiations proved fruitless suit was filed by appellee to recover the sum of $8,000, plus statutory penalty, interest and attorney's fee.

Appellant first denied the allegations of the complaint but later amended its answer, admitting liability to the extent of $7,950 by reason of the fire loss, but denying that it was liable to appellee for penalty, interest and attorney's fee for the reason that appellee had at all times demanded the sum

of $8,000.

Appellant deposited $7,950 into the registry of the court, a stipulation of facts was filed and both sides then moved for summary judgment. The trial court entered summary judgment in favor of appellee, holding that the $50 deductible provision in appellant's policy of insurance was void as being contrary to and in violation of the Arkansas Valued Policy Law. The court accordingly under the provisions of Ark. Stat. Ann. § 66-3238 (Repl. 1966) awarded penalty, interest and attorney's fee to appellee. From that judgment this appeal follows.

For reversal appellant urged that the trial court erred in ruling the deductible provision of appellant's fire insurance policy violated the Arkanaas Valued Policy Law and in awarding penalty, interest and attorney's fee to appellee.

Ark. Stat. Ann. § 66-3901 (Repl. 1966) commonly referred to as the Valued Policy Law, states:

> A fire insurance policy, in case of a total loss by fire of the property insured, shall be held and considered to be liquidated demand and against the company taking such risk, *for the full amount stated in said policy,* or the full amount upon which the company charges, collects or receives a premium; provided, the provisions of this section shall not apply to personal property. (emphasis supplied)

Appellant's position is that the full amount of the policy is $7,950 after being reduced by the deductible. However, the policy, under Item No. 1, clearly shows that the full amount of insurance stated in the policy is the sum of $8,000.00 on a one-story frame dwelling. The parties stipulated appellant had one basic policy for rural dwellings which always included a deductible provision and it did not offer the same coverage without a deductible clause for a premium in a different amount. The deductible provision, therefore, diminishes the actual amount of recovery to an amount less than "the full amount stated in said policy".

Our cases have very carefully protected *full recovery* of the insured under the Arkansas Valued Policy Law. In several cases we have held invalid provisions in fire policies which have attempted to limit or diminish the companies' liabilities to amounts less than the full amounts of the policies.

In the case of *Farmers Home Mutual Fire Ass'n* v. *McAlister,* 171 Ark. 574, 285 S.W. 5 (1926), this Court struck down a clause in a fire policy which limited the liability of the insurance company to two-thirds of the actual value of the property which had been totally destroyed by fire. We held that under the Arkansas Valued Policy Law any clause in the policy which limits liability in the event of a total loss is void.

In *Fireman's Insurance Company* v. *Little,* 189 Ark. 640, 74 S.W. 2d 777 (1934), a policy provision was voided which tended to limit the company's liability to the actual cash value of the insured property. In the case of *Tedford* v. *Security state Fire Insurance Company,* 224 Ark. 1047, 278 S.W. 2d 89 (1955), a limitation in a fire policy was struck down which restricted the amount an insured could recover to the amount of his interest in the insured property. The basis of this decision was the Valued Policy Law, and the Court stated:

> Since the enactment of the statute in 1889 this court has consistently held it cannot be evaded by contrary policy stipulations. * * *

In the case of *Interstate Fire Insurance Company* v. *James,* 252 Ark. 638, 480 S.W. 2d 341 (1972), this Court also voided a policy provision which limited the company's liability to a pro-rata share of the insurance in force against a particular dwelling which was totally destroyed by fire. This Court quoted with approval from the case of *Hensley* v. *Farm Bureau Insurance Co.,* 243 Ark. 408, 420 S.W. 2d 76 (1967), as follows:

> This provision in the policy avails appellee nothing in the way of defense in this case as the insured property was a total loss.

Our cases hold that where a total loss is involved a clause which diminishes recovery to less than the full amount stated

in the policy is void. The parties stipulated appellee's "dwelling was totally destroyed by fire".

For the foregoing reasons the case is affirmed.

WHEELING PIPE LINE, Inc., A Delaware Corporation *v.* John A. EDRINGTON

75-260 535 S.W. 2d 225

Opinion delivered April 19, 1976

Barrett, Wheatley, Smith & Deacon, for appellant.

Mitchell D. Moore, P.A., for appellee.

CARLETON HARRIS, Chief Justice. Appellee, John A. Edrington, brought this action against appellant, Wheeling Pipe Line, Inc., and others to recover for damages that resulted to his cotton crop from the application of a contaminated herbicide. The other defendants, not involved in this appeal, were Monsanto Company, the manufacturer of the herbicide, and Maxwell Oil Company, Inc., its distributor. Appellant transported the herbicide from Monsanto to Maxwell.

The trial court submitted the case to the jury on the theories of breach of warranty (against Maxwell and Monsanto) and negligence (against appellant). The jury returned a verdict for appellant of damages in the amount of $24,-583.00. In answers to special interrogatories, the jury found that Monsanto had been guilty of a breach of warranty, and appellant guilty of negligence; the jury apportioned the responsibility by allocating 50 per cent to Monsanto and 50 per cent to appellant.

Following this verdict the trial court granted Monsanto's motion for judgment *n.o.v.* and entered a judgment against appellant for $24,583.00. On appeal, appellant relies upon one point, *viz.*,

> "It was error for the trial court, after granting the motion for judgment notwithstanding the verdict of Monsanto Company, to then enter a judgment against the remaining defendant, Wheeling Pipe Line, Inc. for the full amount of the damages, rather than 50% of the damages, based upon the answers of the jury to the interrogatories propounded by the court."

It is appellant's position that it cannot be held liable for the full amount for the reason that the jury found against Monsanto for breach of warranty, and against appellant for negligence; accordingly, it is argued that since the two were not joint tortfeasors who were jointly and severally liable for the full judgment, the judgment for the entire amount cannot properly be entered against Wheeling. It is pointed out that under Arkansas law, a breach of warranty has historically

been treated as a matter of contract and not as a matter of tort.

We think appellant has misconstrued the real issue. Edrington established that he was damaged, and he was thus entitled to full damages from someone. Appellant does not question the judgment *n.o.v.* for Monsanto — there is no contention that it should not have been granted. Rather, the only contention is that Wheeling, which the jury had found 50 per cent guilty, should not because of the *n.o.v.* judgment, be required to pay the full 100 per cent of damage found by the jury. When does a court properly grant a judgment *n.o.v.*? Such a judgment can only be granted when the court should have properly directed a verdict for the movant, rather than permitting the issue to go to the jury in the first place. See *Swafford Ice Cream Company* v. *Sealtest,* 252 Ark. 1182, 483 S.W. 2d 202, and cases cited therein. In other words, the actual result of the judgment *n.o.v.* is that Monsanto's purported liability should never have been submitted to the jury. This left only Wheeling as a defendant from whom damages could be recovered. Of course, we have said that a plaintiff can recover from any defendant if his (plaintiff's) negligence was less than 50 per cent. This is even true where there are several joint tortfeasors, though the negligence of the defendant ultimately liable is considerably less than that of the plaintiff himself. *Walton* v. *Tull,* 234 Ark. 882, 356 S.W. 2d 20.

In the case before us, as pointed out, the net result of the *n.o.v.* judgment in behalf of Monsanto was that there was only one defendant, and the question of breach of warranty was completely removed from the case. This left only a case in tort. Appellee (plaintiff) was not guilty of any negligence and accordingly entitled to collect the full amount of his damages from appellant. The jury's apportionment of responsibility between defendants does not affect the joint or several liability of any single defendant for the full amount of the damages; rather, apportionment only affects defendants' rights against each other.

Affirmed.

Clifford COPELAND and POTLATCH CORPORATION *v.* Verner HOLLINGSWORTH

75-358 535 S.W. 2d 815

Opinion delivered April 19, 1976
[Rehearing denied May 24, 1976.]

Wright, Lindsey & Jennings and *Richard E. Griffin,* for appellants.

Huey & Vittitow, for appellee.

FRANK HOLT, Justice. This appeal results from a jury verdict against the appellants for damages to appellee's tomato crops sustained from the spraying of 2,4,5-T herbicide. Pursuant to a written contract, appellant Copeland sprayed appellant Potlatch's timberland with this herbicide.

Appellants assert that the trial court erred in giving certain instructions to the jury. Appellants first argue that neither strict liability nor *res ipsa loquitor* was alleged in the complaint and, therefore, the trial court erred in submitting the case to the jury on theories not pleaded. Appellee responds that the allegation in his complaint that the herbicide was a "known hazardous chemical was sufficient to advise the Appellant and to constitute the theory of strict liability."[1] We cannot agree with appellee. Suffice it to say that the only theory affirmatively alleged in the complaint was negligence. The issues were joined on the allegations of various acts of negligence by appellants. Neither is it asserted that the pleadings were amended to conform to the proof. It was the duty of the court to submit a cause to the jury only upon issues raised by the written pleadings, or within the pleadings treated as amended to conform to the proof. *Ozark Fruit Growers Assn.* v. *Tetrick,* 130 Ark. 165, 197 S.W. 30 (1917). See *General Motors Accept. Corp.* v. *Whatley,* 182 Ark. 378, 31 S.W. 2d 526 (1930). Therefore, in the case at bar, it was reversible error for the trial court to instruct the jury on strict liability and *res ipsa.*

Appellants also assert error in that part of an instruction which tells the jury it is the duty of one applying regulated herbicides to use a high degree of care. Appellants argue that the reference to "high degree of care" was erroneous and

[1]This allegation appears only in appellee's complaint against appellant Potlatch.

prejudicial and is not the law in Arkansas. As appellants point out, the instruction is a modification of AMI 1301 on explosives. Suffice it to say that the proof adduced was insufficient to justify this instruction.

Appellants also contend for reversal that the trial court erred in giving instructions which identified appellant Copeland as an employee when all the evidence shows he was an independent contractor. The theory of the individual contractor relationship does not apply whenever there is a negligent application of an inherently dangerous substance. *The Hammond Ranch Corp.* v. *Dodson,* 199 Ark. 846, 136 S.W. 2d 484 (1940); *Walton* v. *Sherwin-Williams Co.,* 191 F. 2d 277 (8th Cir. 1951). In *Hammond* we quoted with approval:

> 'As a general rule the employer is not liable for the negligence of an independent contractor. There are, however, certain exceptions to this general rule. One of such exceptions is that the law will not allow one who has a piece of work to be done that is necessarily or inherently dangerous to escape liability to persons or property negligently injured in its performance by another to whom he has contracted such work. This is espeically true where the agency or means employed to do the work, if not confined and carefully guarded, is liable to invade adjacent property, or the property of others, and destroy or damage it. **** [B]ecause of the very great likelihood of the poisonous dust or spray spreading to adjoining or nearby premises and damaging or destroying valuable property thereon, it could not delegate this work to an independent contractor, and thus avoid liability.'

It is possible upon a retrial, of course, that appellee can sufficiently adduce proof to meet this requirement.

We deem it unnecessary to consider the appropriateness of the other instructions since the same evidence is not likely to be presented on retrial. Furthermore, since we remand, we do not reach appellant Potlatch's contention that if the judg-

ment is affirmed, it is entitled to judgment over against appellant Copeland for complete indemnification of the damages which were assessed against it in favor of appellee.

Reversed and remanded.

BYRD, J., dissents.

Nolan McCOY Jr. *v.* STATE of Arkansas

CR 75-218 535 S.W. 2d 439

Opinion delivered April 19, 1976

Harold L. Hall, Public Defender, by: *Michael Castleman,*

Dep. Public Defender, for appellant.

Jim Guy Tucker, Atty. Gen., by: *Terry Kirkpatrick,* Asst. Atty. Gen., for appellee.

ELSIJANE T. ROY, Justice. On May 9, 1974, appellant Nolan McCoy was charged by informations with the delivery of heroin and the delivery of marijuana. Appellant was tried to the court and found guilty on each charge and was sentenced to five years in the state penitentiary.

For reversal appellant first contends "the state failed to establish a proper chain of evidence." We find this contention without merit.

Perry Randall, an undercover agent for the Little Rock Police Department, testified he purchased heroin from appellant on October 31, 1973. Almost immediately after the purchase he returned to the police department where he appropriately marked, initialed, sealed and tagged the heroin with property tag No. 817 and then stored it in the narcotics safe.

He testified further that thereafter he purchased marijuana from appellant which he brought back to the police department where he again logged, tagged, sealed and stored it in the narcotics safe under property tag No. 860.

Officer Jerry Royster testified he transported a package with property tag No. 817 to Manuel Holcomb at the Arkansas State Health Department. That later he transported a package bearing property tag No. 860 to James Henry at the Arkansas State Health Department, and that both packages were taken from the locked narcotics safe at the police department.

Holcomb, chemist for the State Health Department, testified he received the substance with tag No. 817 from Officer Royster and assigned it a laboratory number. The substance proved after analysis to be heroin, and he had kept it in his possession since its reception.

Chemist James Henry testified to a similar procedure for

the substance tagged No. 860, which he found to be marijuana.

The drugs which were introduced at the trial were identified as the substances received from appellant by the undercover agent, according to tagging procedures and numbers assigned, and by the chemists for the State Health Department, who verified receipt, analysis and possession until the date of trial. Thus custody and control was established at each stage of the procedure.

Appellant next urges that his arrest was illegal and he should be given credit for all time spent in jail from his arrest on April 11, 1974, until the felony information was filed on May 9, 1974.

Appellant contends his arrest was illegal because it was authorized on the basis of a warrant originally issued in the name of Robert Curry, which name at some time before arrest was scratched out and appellant's true name inserted.

The warrant contained two additional accurate descriptive elements, appellant's alias "Monk" and his correct address. Officer Randall testified that appellant was known to him as "Monk", and he identified "Monk" at the trial as being McCoy and as being the person from whom he made both purchases.

The Fourth Amendment to the Constitution of the United States does not require an arrest warrant to set forth the name of the arrestee. The constitutional requirement is that no warrant shall issue unless the description is sufficient to identify the person to be seized. "By the common law, a warrant for the arrest of a person charged with crime must truly name him, or *describe him sufficiently to identify* him." (emphasis supplied) *West* v. *Cabell,* 153 U.S. 78, 14 S. Ct. 752, 38 L. Ed. 643 (1894). The inquiry is not whether the correct name was used, but whether the person has been sufficiently described for identification. See also 22 C.J.S. Criminal Law, § 311.

Thus the arrest warrant sufficiently described appellant so that his identity was established with reasonable certainty

despite the use of the erroneous name.

Furthermore, appellant was sentenced to only five years, and the addition of his pretrial incarceration time (less than a month) does not exceed the maximum penalty of thirty years for delivery of heroin or ten years for marijuana. There is no absolute right to pre-sentence detention credit absent some constitutionally impermissible basis; i.e., a denial based on poverty. See *Parker* v. *Estelle*, 498 F. 2d 625, (5th Cir. 1974), rehearing denied 503 F. 2d 567, cert. denied, 421 U.S. 963, 95 S. Ct. 1951, 44 L. Ed. 2d 450 (1975). In the absence of a statute so providing, it is not error to refuse credit for pretrial incarceration where the defendant was sentenced to less than the maximum. *Amato* v. *U.S.*, 374 F. 2d 36 (3d Cir. 1967).

In *Howard* v. *Blackwell*, 389 F. 2d 84 (5th Cir. 1967), the appellant was sentenced to ten years which was less than the maximum. The court found in *Howard* that in such circumstances it will be presumed that credit had been given for 184 days of pre-sentence incarceration.

It should also be noted that at trial appellant raised no objection to his sentence, nor did he request credit for that period of time he now alleges to be an illegal incarceration. The absence of an objection precludes appellant from raising the point for the first time on appeal. *Gregory* v. *Gordon*, 243 Ark. 635, 420 S.W. 2d 825 (1967).

Finding no reversible error, the case is affirmed.

Howard WEEMS *v.* Purl Fuss BOILLOT

75-370 535 S.W. 2d 817

Opinion delivered April 26, 1976
[Rehearing denied May 24, 1976.]

Epley & Epley, Ltd., by: *Alan D. Epley,* for appellant.

Maberry & Buice, by: *R. Edward Buice,* for appellee.

GEORGE ROSE SMITH, Justice. This is an appeal from the trial court's refusal to set aside a default judgment in an action upon a promissory note. There were two defendants, Howard Weems and McKinley Weems, co-makers of the

note. Howard alone appeals. Although three points for reversal are argued, the principal issue is whether the court erred in simultaneously setting aside the default judgment against McKinley but refusing to set it aside as to Howard.

The original amount of the note was $7,029.73. The complaint alleged, and an indorsement on the note showed, a part payment of $3,252.45, leaving an unpaid balance of $3,-777.28. No answer having been filed by either defendant within 20 days after the ostensible service of summons, the plaintiff filed a motion for a default judgment. The court granted that motion, the judgment reciting that evidence for the plaintiff was introduced, with exhibits and other matters and proof.

The defendants jointly filed a motion to set aside the judgment. McKinley asserted that, contrary to the sheriff's return, he was not actually served with a summons. The proof was that Howard asked the deputy sheriff to leave both summonses with Howard, but Howard failed to tell McKinley anything about the matter. There is no appeal from the trial court's finding that McKinley was not properly served and that the default judgment against McKinley should be set aside.

Howard was properly served, but in the motion he asked that the default judgment against him be set aside on the ground that it was for an excessive amount, as he had made a payment of $6,000 upon the note. The court denied Howard's application for relief, holding that Howard had shown no unavoidable casualty, excusable neglect, or other just cause for his failure to file a timely answer. Ark. Stat. Ann. § 29-401 (Repl. 1962).

In seeking a reversal Howard relies primarily upon a one-sentence decision, apparently written by our court reporter in an 1842 case: "HELD, that when there are several defendants, one of whom is not served with process, nor appears, and judgment taken by default, against all, it is erroneous as to all." *Moss* v. *Gibson,* 4 Ark. 427 (1842). No other Arkansas case on the point is cited.

The *Moss* decision is no longer a correct statement of the law, for either of two reasons. First, its basis was the common-law theory that a judgment is an indivisible entity, which cannot be vacated only in part. There is really no sound basis for the rigid common-law view. Consequently only about five jurisdictions now adhere to that position, with 20 or more taking the opposite view. Annotation, 42 A.L.R. 2d 1030 (1955). The annotator cites several cases holding that the judgment may be set aside in part when, as here, one of the defendants was not properly served with process.

Secondly, the Civil Code, adopted in 1868, cannot be reconciled with the earlier notion that a judgment is an unbreakable unit. The Code declares that in an action against several defendants the court may render a judgment against one or more of them, leaving the action to proceed against the others. Ark. Stat. Ann. § 29-103 (and see § 29-104). That part of the Civil Code was construed in a case that came before us twice: *Parke* v. *Meyer,* 27 Ark. 551 (1872), and *Parke* v. *Meyer,* 28 Ark. 281 (1873). There, as here, one defendant was served with process, the other was not. A default judgment was entered against the former. Upon his appeal we cited the Civil Code provision and sustained the trial court's discretionary power to enter a default judgment against one defendant only. We adhere to that view and consequently reject the appellant's insistence that the *Moss* case requires the default judgment against Howard Weems to be set aside. Whether a more favorable subsequent judgment against McKinley Weems may inure to Howard's benefit, under such cases as *Burt* v. *Henderson,* 152 Ark. 547, 238 S.W. 626 (1922), need not be determined now, for that possibility may never become an actuality. It is not our practice to decide abstract questions of law.

The other two points for reversal may be disposed of together. It is argued that after Howard Weems failed to file an answer he was entitled to notice that a hearing would be had upon the question of how much he owed and that he could not constitutionally be denied that notice. We do not agree. The summons served upon him carried the statutory warning that he was required to answer within 20 days, under the penalty of the complaint's being taken as confessed.

Ark. Stat. Ann. § 27-306. One explicit warning is sufficient. *Mann* v. *Ray Lee Supply,* 259 Ark. 565, 535 S.W. 2d 65 (1976). Our holding in *Kohlenberger* v. *Tyson's Foods,* 256 Ark. 584, 510 S.W. 2d 555 (1974), is easily distinguishable, for there the defendant appeared in the case, albeit belatedly, and contested the plaintiff's unliquidated claim for damages. This appellant failed to file any pleading until after the court had entered a default judgment, apparently upon proper proof adduced by the plaintiff. *Brittain* v. *Mammoth Spring Motor Co.,* 233 Ark. 468, 345 S.W. 2d 373 (1961).

Affirmed.

BYRD, J., dissents.

MOHAWK RUBBER COMPANY, Employer, and THE TRAVELERS INSURANCE COMPANY, Insurance Carrier *v.* Fred L. BUFORD, Employee

75-364 535 S.W. 2d 819

Opinion delivered April 26, 1976

Wright, Lindsey & Jennings, for appellants.

Youngdahl, Larrison & Agee, for appellee.

JOHN A. FOGLEMAN, Justice. This is a workmen's compensation case. The question for decision is the liability of the insurer for medical services provided by a physician selected by the injured employee rather than one of a panel of physicians designated by the employer pursuant to Rule 21 of the Workmen's Compensation Commission, which is a partial implementation of Ark. Stat. Ann. § 81-1311 (Repl. 1960).

On 24 October 1972, appellee Fred Buford suffered a compensable spinal injury while working in the employ of Mohawk Rubber Company at its West Helena facility. He reported the injury to his supervisor but did not then see a physician and worked the remainder of that day and the following day. On the 26th of October, Buford, on his own initiative, visited his family physician at Marianna, where appellee lived. That physician made x-rays of the injury and referred Buford to Dr. Robertson, a Memphis neuro-surgeon, for an appointment on 30 October. Appellee knew at this time that appellants had retained a panel of doctors to be used by injured employees, and he had been treated by one of them, Dr. Traylor, a chiropractor, for a previous compensable injury. He also knew that there had been letters on the bulletin board with reference to the use of company doctors for treatment of job-related injuries.

On 29 October, appellee reported his injury to Mrs. Joann Smith, an employee of Mohawk charged with the administration of such affairs. He explained to her the visits he had made and arranged with doctors of his own choosing. Mrs. Smith advised him that it was a company policy that he use one of the "company doctors," a panel of five Helena medical doctors and a chiropractor retained by the company who, if necessary, would refer appellee to a group of specialists in Little Rock. She further told him that the company would not pay for the services of a physician other than a member of its retained panel or a specialist referred by one of the panel. But appellee expressed a preference for his own doctor. He objected to Mrs. Smith to having to go all the way to Little Rock which is further from his home in Marianna than is Memphis in order to see a specialist and told her, with regard to treatment by Dr. Robertson, "I'll pay it." He even-

tually agreed to accept an appointment with Dr. Traylor. Mrs. Smith phoned Dr. Traylor and arranged for an appointment for 30 October, which appellee did not keep. Instead, he saw Dr. Robertson in Memphis.[1]

Appellants controverted appellee's claim for the expenses of treatment he received in Memphis on grounds that Workmen's Compensation Commission Rule 21 permits the employer to furnish medical treatment in the first instance of its own choosing. That rule, in pertinent part, reads:

> The employer and/or insurance carrier has the right and duty in the first instance to provide prompt medical care to injured employees through physicians and hospitals of the respondents' choice.

After a hearing on the claim, a referee held appellants liable for appellee's medical expenses. On appea' to the Workmen's Compensation Commission, it was again held that appellants were liable for these medical expenses on the strength of Commission Rule 23, which permits a deviation from Rule 21, whenever good cause is shown, insofar as compliance may be found to be impossible or impractical. The commission cited as one of the circumstances where a deviation had been permitted as "when claimant receives treatment through a chain of referral initiated by the first treating physician." Appellee suggests (and the commission agreed) that, having already entered upon a chain of referral when appellants offered the services of the physicians on the panel, he was justified in going to Dr. Robertson and should be reimbursed for this expense. See *Zeeb* v. *Workmen's Compensation Appeal Board,* 62 Cal. Rptr. 753, 432 P. 2d 361 (1967). The commission concluded:

> In this case, the claimant saw his family physician in Marianna because it was more convenient than traveling the distance between Marianna and Helena to see a company physician. We find the claimant's actions reasonable under the circumstances and his further treatment appears to have been reasonable and

[1]Although the evidence is, for the most part, not in conflict, we have, as usual, viewed it in the light most favorable to the commission's findings.

> necessary through a normal chain of referral. In fact, there is no contention by respondent that the treatment given was either excessive in cost or failed to achieve satisfactory results. The record reflects that the claimant has returned to normal work duties and has been released with no permanent disability even though a ruptured cervical disc is suspected, all of which strongly suggest that the conservative treatment administered was highly successful.

Appellants argue on appeal that there were no circumstances to justify a deviation from Rule 21 in this case, submitting that the relative convenience for appellee to visit his family doctor and the resultant establishment of a chain of referral were not "criteria for excusing non-compliance."

Ordinarily, the decisions of the Workmen's Compensation Commission will be affirmed if there is any substantial evidence to support them and the question of whether the evidence is substantial in nature is one of law. *Cummings* v. *United Motor Exchange,* 236 Ark. 735, 368 S.W. 2d 82. But, where the decision is based upon the application of the commission's own rules, we must also view it in deference to the commission's treatment of these rules.

The Workmen's Compensation Commission is empowered to make such rules and regulations for the administration of the Workmen's Compensation Law as may be found necessary. Ark. Stat. Ann. § 81-1343 (9). Any reasonable construction or interpretation given such rules is certainly entitled to great weight upon judicial review, even if it is not controlling. *Walker* v. *International Paper Co.,* 230 Miss. 95, 92 S. 2d 445 (1957); *Winslow* v. *Carolina Conference Ass'n. of Seventh Day Adventists,* 211 N.C. 571, 191 S.E. 403 (1937); *Employer's Mutual Liability Ins. Co.* v. *Dept. of ILHR,* 62 Wis. 2d 327, 214 N.W. 2d 587 (1974); *Russomanno* v. *Leon Decorating Co.,* 282 App. Div. 18, 121 N.Y.S. 2d 732 (1953); *Honeywell Inc.* v. *Haley,* 216 S. 2d 745 (1968); *Kramer* v. *Chapman & Gerber, Inc.,* 235 S. 2d 489 (Fla., 1970). See also, *Christian* v. *Industrial Commission,* 13 Ariz. App. 285, 475 P. 2d 770 (1971). Certainly, if an administrative agency's interpretation of its own rule is not contrary to statute or irreconcilably contrary to the plain

meaning of the regulation itself, it may be accepted by the courts. *Employers Mutual Liability Ins. Co.* v. *Dept. of ILHR,* supra. Furthermore, even if rules made by the commission may not be disregarded, they may be relaxed by it. See *In Re DaLomba's Case,* 352 Mass. 598, 227 N.E. 2d 513 (1967); *Wasson* v. *Tulsa Dairy Supplies,* 315 P. 2d 773 (Okla., 1957).

Where the commission's rules have the effect of establishing guidelines or standards, some relaxation of them, in the discretion of the commission, is permissible. *Anheuser Busch, Inc.* v. *Industrial Commission,* 29 Wis. 2d 685, 139 N.W. 2d 652 (1966). Great weight should be accorded the findings of the commission with reference to compliance with its rules and regulations, since it, being authorized to make them, is in a superior position to determine whether they have been complied with. *Libby, McNeill & Libby* v. *Alaska,* 109 F.S. 101 (D.C., Alaska, 1952). Consequently, testimony must be weighed in its strongest possible light in favor of the commission's Industrial Board findings. *American Casualty Co.* v. *Jones,* 224 Ark. 731, 276 S.W. 2d 41. The controlling consideration in the interpretation of a workmen's compensation statute is that the act must be liberally construed with all doubts resolved in favor of the claimant, which is necessary to effectuate the beneficient and humane purposes of the act. *Hartz Seed Co.* v. *Thomas,* 253 Ark. 176, 485 S.W. 2d 200.

First of all, this is not the sort of situation with which we dealt in *Sallee Bros.* v. *Thompson,* 208 Ark. 727, 187 S.W. 2d 956, in applying Ark. Stat. Ann. § 81-1320 (a) (Supp. 1975), which reads, in part:

> No agreement by an employee to waive his right to compensation shall be valid, and no contract, regulation or device whatsoever, shall operate to relieve the employer or carrier, in whole or in part, from any liability created by this act. . .

There is no assertion that appellee's comment "I'll pay it" constituted such an agreement. All parties agree that the injury was indeed compensable in nature.

The general rule is that, where a panel of physicians is

retained by an employer, as here, and an employee engages other medical services and disregards the panel made available to him, the employer is not liable for the expense of the private care. Larson's Workmen's Compensation Law § 61.12 at 10-446. Accord, *Caldwell* v. *Vestal,* 237 Ark. 142, 371 S.W. 2d 836.

Here appellee knew of the availability of the company doctors but chose to visit his family physician and the Memphis specialist to whom he was referred since both were closer to his home town, Marianna and thus more convenient to visit than the company doctors in Helena and specialists in Little Rock. In *Caldwell* v. *Vestal,* supra, where we awarded payment of medical expenses to the claimant who had made an unauthorized change of physicians, we cautioned:

> Our holding is not intended to, and does not, give an injured workman unrestricted freedom to reject the medical care offered by his employer.

We said that an employee who does so acts at his own peril in disregarding a warning that an expense will not be covered by his insurer, despite the fact that there may be circumstances in which the employer will remain liable notwithstanding (see *Bell Telephone Co.* v. *Brown,* 256 Ark. 54, 505 S.W. 2d 207) but found, in that situation, no sound basis for exempting the employer from liability. So the question before the commission was, granting that appellee acted at his own peril in electing not to visit Dr. Traylor, whether his reasons for doing so were such as to justify the application of Rule 23 to permit a deviation from Rule 21.

Viewing the testimony in the light most favorable to the commission's findings, we agree that appellee's visits to the doctors in closer proximity to his home than those offered by appellants were certainly more convenient or even more practical for him. But more importantly, we find that, in these circumstances, the Commission exercised its discretion and we are unable to say that it was abused. The central rule defining the circumstances under which a claimant may himself incur compensable medical expense may be put as follows: If the employer has sufficient knowledge of the injury to be

aware that medical treatment is necessary, he has the affirmative and continuing duty to supply medical treatment that is prompt, in compliance with the statutory prescription on choice of doctors, and adequate; if the employer fails to do so, the claimant may make suitable independent arrangements at the employer's expense. Larson's Workmen's Compensation Law § 61-12 at 10-450.

In the instant appeal appellee reported the injury to his supervisor but was neither relieved from work nor referred to Mrs. Smith who administered the medical program. According to appellee, nothing specifically was said by either party at the time of the injury about his seeing a physician and his supervisor did not even take the time to report his injury until four hours later. Appellant fully informed appellee of its provisions for medical care and offered the services of the panel of physicians only when appellee reported to Mrs. Smith, at which time appellee had already procured medical attention independently. We cannot say that appellee had no justification for his independent procurement of medical care, although he admits he was aware of the existence of the panel of physicians retained by his employer. *Draney* v. *Industrial Accident Commission,* 95 Cal. App. 2d 64, 212 P. 2d 49 (1949). Under these circumstances, the Commission concluded that the appellee's independent procurement of medical treatment was reasonable. See *Zeeb* v. *Workmen's Compensation Appeals Board,* supra; cf. *Pacific Indemnity Co.* v. *Industrial Accident Commission,* 220 Cal. App. 2d 327, 33 Cal. Rptr. 649 (1963) and *Montyk* v. *Workmen's Compensation Appeals Board,* 245 Cal. App. 2d 334, 53 Cal. Rptr. 848 (1966).

Viewing the evidence most favorably to the commission's findings and giving due deference to its interpretation and application of its own rules, we cannot say that it erred.

The judgment of the circuit court affirming the decision of the commission is affirmed.

R. C. MABRY et al *v.* Betty MABRY and William H. HODGE, Administrator

75-366 535 S.W. 2d 824

Opinion delivered April 26, 1976

John B. Hainen, for appellants.

Tackett, Moore, Dowd & Harrelson, for appellees.

J. FRED JONES, Justice. This is an appeal by R. C. Mabry and other collateral heirs of Gordon Mabry, deceased, from a summary judgment of the probate court in favor of Betty

Mabry, the widow and sole devisee under the will of the decedent, whereby a will contest instituted by the appellants was dismissed.

The facts appear as follows: On January 22, 1972, the decedent, Gordon Mabry, then 64 years of age, married the appellee Betty Sue Mabry, then Betty Sue Canada who was 40 years of age. On February 27, 1975, during his last illness, Gordon Mabry executed his last will and testament in which he directed that after his just debts were paid, all the rest and residue of his estate should go to his wife, Betty Sue Mabry, and he nominated Betty Sue as executrix.

Mr. Mabry died on March 17, 1975, and his will was duly filed for probate by the appellee Mrs. Mabry. On April 11, 1975, the appellant-surviving brothers and sisters of the decedent filed an instrument designated "Will Contest" alleging invalidity of the will because of incompetency. On June 16, 1975, the appellee Betty Sue Mabry filed a motion for summary judgment alleging the death of Gordon Mabry and her marital relationship to him as above set out. She alleged that the decedent left no descendants surviving him and that, under the provision of Ark. Stat. Ann. § 61-149 (b) (Repl. 1971), she was entitled, as surviving widow, to inherit his entire estate. She alleged that the petitioner-appellants, being collateral heirs, had no standing to contest the last will and testament of Gordon Mabry.

The appellants responded with the contention that Mrs. Mabry had "abandoned the marriage" and was, therefore, not entitled to take under § 61-149 (b).

After some preliminary proceedings and a partial hearing in the matter, the probate court agreed with the appellee Mrs. Mabry and granted her motion for summary judgment. The probate court concluded its final order as follows:

> "The Motion For Hearing as filed wherein opponents of the probate of the Will of Gordon Mabry seek to introduce proof on the matter of 'continuously married' is denied."

The appellants contend on appeal to this court that "the

trial court erred in refusing to hear evidence and testimony offered by will opponents that surviving wife had abandoned the marriage so as not to qualify under Arkansas statute 61-149 (b) as 'continuously married.' "

Ark. Stat. Ann. § 62-2113 (Repl. 1971) provides as follows:

> "An interested person may contest the probate of a will, or any part thereof, by stating in writing the grounds of his objection thereto and filing the same in the court."

Just any collateral heir is not necessarily an "interested person" with a right to contest the probate of a will under this statute.

In *Hawkins* v. *Hawkins,* 218 Ark. 423, 236 S.W. 2d 733 (1951), a decedent willed his property to his wife and willed $1.00 to a previously adopted son, explaining in his will that the son was first adopted by him and later adopted by other parties. The widow offered the will for probate and the brothers and sisters of the decedent filed a petition to set aside the will on the grounds of lack of mental capacity and because of undue influence. In that case we said:

> "Appellants prosecute this appeal from the judgment of the lower court and in the briefs and oral arguments of both sides we are confronted with the question of whether or not appellants are *interested persons* and, therefore, whether or not they have any standing in court to contest the validity of the will. The answer to that question depends on whether or not Clyde Eugene Brown, as an adopted child, can inherit from the deceased even though the said child had again been adopted by other parents several years before the death of the deceased and the same relationships still existed at the time of the death of the testator.
>
> * * *
>
> Having come to the conclusion that Clyde Eugene Brown is an heir to the estate of Jacob B. Hawkins the

> same as if he were a natural son it must naturally follow that appellants, who are the brothers and sisters of the said Hawkins, cannot be interested persons in the sense that they can maintain a suit to contest the validity of Hawkins' will. Since the legal heir was not made a party to this suit the judgment of the lower court was a nullity. We of course express no opinion as to the validity of the will as that question is not before us."

At the time of our opinion in *Hawkins, supra,* in 1951, a widow only had dower and homestead interest in her husband's estate and had no interest as an heir by descent and distribution. However, by Act 303 of 1969, Ark. Stat. Ann. § 61-149 (b) (Repl. 1971), a surviving spouse is made an heir where she survives the husband and he dies intestate and is survived by no descendants. This section provides that the heritable estate of an intestate shall upon his death pass to his children and to the descendants of such children who predecease the intestate. Then subsection (b) of § 61-149 provides as follows:

> "(b) Second, if the Intestate is survived by no descendant, to the Intestate's surviving spouse unless the Intestate and such surviving spouse had been continuously married less than three [3] years next preceding the death of the Intestate, in which event the surviving spouse will take merely 50% of the Intestate's heritable estate."

In the case at bar the decedent Mr. Mabry was survived by no descendants. There is no question that the appellee Betty Mabry was the surviving spouse of the decedent and was the surviving spouse at the time of his death. The appellants contend, however, that the appellee Betty Mabry had not been "continuously married" to the decedent within the meaning of § 61-149 (b), *supra,* and that the trial court erred in failing to hear and consider evidence that the appellee Betty Mabry "abandoned" her marriage with the decedent. We find no merit in this contention. It is quite true that the appellee had only been married to the decedent three years and two months at the time of his death. But there was no evidence proffered and no contention made on the part of

the appellants that a divorce and remarriage intervened between the time Mr. Mabry and the appellee Betty Mabry were married on January 22, 1972, and the date of his death on March 17, 1975.

The proffered proof on the part of the appellants was to the effect that the appellee Mrs. Mabry was very inattentive to the decedent; that she disposed of a considerable amount of his property during their marriage; that she had abandoned the decedent on a number of occasions and for a period during his last illness. As a matter of fact the appellants proffered testimony to the effect that the appellee Mrs. Mabry was living the life of a free and unmarried person while dissipating the money and property of her husband. But, be that as it may, we are of the opinion that the probate judge was right in refusing to hear and consider such testimony for the purpose it was offered in this case.

It is entirely possible that one spouse may abandon the other and it is common knowledge that in many instances they do so under circumstances giving grounds for divorce. But neither spouse, individually or in collusion with the other, may effectively nullify, suspend or interrupt the binding force of their marriage contract by mere abandonment, and such abandonment does not end the marital status. A state of marriage can only be dissolved during the lives of the parties to the marriage by annulment under Ark. Stat. Ann. § 55-106 (Repl. 1971), or by divorce under Ark. Stat. Ann. § 34-1201 et seq. (Repl. 1962 and Supp. 1975).

As already stated, the appellants failed to allege or offer to prove either an annulment or divorce of the marriage between the decedent and the appellee Betty Sue Mabry, so we conclude that the order of the probate court must be affirmed.

The order is affirmed.

Robert HOWELL and TALL TIMBER DEVELOPMENT CORPORATION *v.* WORTH JAMES CONSTRUCTION COMPANY

75-367 535 S.W. 2d 826

Opinion delivered April 26, 1976

[redacted]

Spitzberg, Mitchell & Hays, by: *Beresford L. Church* for appellants Tall Timber Dev. Corp.

Smith, Williams, Friday, Eldredge & Clark, for appellees and cross-appellant.

FRANK HOLT, Justice. The appellant Tall Timber Development Corporation is the owner and developer of Tall Timber subdivision. In March, 1973, Tall Timber Development Corporation entered into a contract with the appellee Worth James Construction Company. Pursuant to this contract, the appellee constructed water and sewer lines for the subdivision. The appellee was fully paid the contract price of $363,672.22. In October, 1973, the appellant Tall Timber entered into a separate contract with appellant Howell (who does not favor us with a brief) under which Howell did the trenching for the installation of the underground power cables for the subdivision. The appellee brought suit against both appellants for damages in the sum of $8,961.88 which it allegedly suffered as a result of broken water lines in the course of Howell's trenching operations. The trial court, sitting as a jury, awarded judgment against both appellants, jointly and severally, in the amount of $7,000, holding, *inter alia,* that:

> By so providing in its contract, the owner became in effect the bonding company for Howell and is liable to the plaintiff as one of the utility contractors which was intended to be protected by the provision in its contract requiring the retainage of 40% of the contract price. ****This judgment shall also be against Tall Timber Development Corporation on the basis that its president, John D. "Doug" Toney, made a verbal assurance to the plaintiff on May 28, 1974, that it would stand behind Robert Howell.

Appellant Tall Timber first argues for reversal that the trial court erred in holding that it was liable to appellee by virtue of the provisions of its contract with Howell. That con-

tract provides in pertinent part:

> Performance Bond Provisions as set out in paragraph 4 or any other part of this contract is hereby waived provided the owner shall retain 40% of any amounts due contractor until all damages, if any, to other utility lines have been repaired and installation accepted by Arkansas Power & Light Company. Then, owner shall release to contractor all of the retainage except 10% which shall be retained by the owner until the installation has been accepted by all appropriate governmental and utility agencies, at which time the 10% shall be paid to the contractor.

Appellant Tall Timber asserts that apparently the trial court's holding was based on a third-party beneficiary theory and argues that there is absolutely nothing in the record to indicate that the quoted provision was intended by either party to the contract, Tall Timber or Howell, to benefit the appellee or anyone else other than the contracting parties. Also there was no provision for payment by Tall Timber to any damaged utility contractor or any other person and there was no existing obligation from Howell to the appellee at the date of the contract. Tall Timber argues further that the clear intent of the provision was to protect it, not some third party like the appellee. We cannot agree with appellants' contentions.

It is true, as Tall Timber asserts, the presumption is that parties contract only for themselves and a contract will not be construed as having been made for the benefit of a third party unless it clearly appears that such was the intention of the parties. *Walker* v. *Wittenberg, Delony & Davidson, Inc.*, 242 Ark. 97, 412 S.W. 2d 621 (1967). In the case at bar, there is substantial evidence that it was the clear intention of the parties to contract for the benefit of appellee and that appellee was a beneficiary of their contract. We have repeatedly held that a contract made for the benefit of a third party is actionable by such third party. *Freer* v. *J.G. Putnam Funeral Home, Inc.*, 195 Ark. 307, 111 S.W. 2d 463 (1937); *Spears Mining Co.* v. *Shinn*, 93 Ark. 346, 124 S.W. 1045 (1910); and *H. B. Deal & Co., Inc.* v. *Head*, 221 Ark. 47, 251 S.W. 2d 1017 (1952. See

Restatement, Contracts, § 135. Also Comment, Enforceability of Third-Party Beneficiary Contracts in Arkansas, 5 Ark. L. Rev. 66 (1950-51). In *Freer, supra,* we said:

> The intention of the parties, so far as these may be determined, may be examined to gain understanding of the meaning of the parties by the language employed, and their conduct in relation thereto may help to clarify what might otherwise be doubtful.

In 17 Am. Jur. 2d, § 314, it is said:

> It is not essential, in order to enable a third person to recover on a contract made and intended for his benefit, that he knew of the contract at the time it was made. The fact that he did not act upon the faith of, or in reliance upon, the contract does not defeat his recovery.

In *Carolus* v. *Arkansas L&P Company,* 164 Ark. 507, 262 S.W. 330 (1924), we said:

> Where from the language of the contract itself, or the testimony *aliunde,* it could be said that it was the intention of the parties to the contract to confer a direct benefit upon a third person, then such person may sue on the contract. It is not necessary that the person be named in the contract, if he is otherwise sufficiently described or designated, he may be one of a class of persons if the class is sufficiently described or designated.

Here the contract provides that Tall Timber will retain 40% of any amount due Howell until all damages to other utility lines have been repaired. By the terms of the contract, Tall Timber agreed to waive performance bonds for Howell and in effect became the surety for Howell. Clearly, the intent of the retainage provision of the Tall Timber-Howell contract was to provide bonding for Howell for damages he might cause to other utility lines. Therefore, it could logically be found that appellee Worth James is a third party beneficiary for whom this provision was specifically designed. This result is also buttressed by the testimony of a witness that the president of Tall Timber assured appellee that "as far as he was

concerned that Howell was their contractor and they would stand behind him."

Since we hold the trial court's finding, that Tall Timber is jointly liable to appellee as a third party beneficiary, is supported by substantial evidence, we deem it unnecessary to consider Tall Timber's next contention that the trial court erred in finding it was additionally liable because it made a binding verbal assurance to appellee.

Appellants also assert that the appellee's proof was insufficient to sustain the amount of damages awarded. The trial court found and awarded appellee judgment against Tall Timber and Howell jointly and severally in the amount of $7,000. Tall Timber argues that appellee failed to introduce any evidence as to the direct cost of repairs of any break or combination of breaks which was caused by Howell. Appellants argue further that appellee's damages are completely in the realm of speculation and should not be charged against either Howell or itself. We cannot agree. No citation is required that on appeal we need consider only that evidence which is most favorable to appellee and affirm if there exists any substantial evidence to support the finding of a jury or the court sitting as a jury. Appellant Howell testified that he may have been responsible for up to seventeen or eighteen breaks. One witness testified that Howell admitted responsibility to him for thirty-two or thirty-three breaks. There was also evidence of a total of sixty-two "actual breaks" caused by Howell. Another witness testified that from December 13, 1973, to February 6 or 7, 1974, the only reason appellee's crew worked on the subdivision site was for the sole purpose of repairing the breaks caused by Howell. Appellee introduced an itemized statement of the total expense of $8,961.88 incurred by it for repair of breaks allegedly caused by Howell. Appellee presented evidence of invoices and payrolls to support those items. One witness testified that it took longer to repair the lines broken by Howell than to build the whole water system. There was ample substantial evidence to sustain the finding of the amount of damages awarded appellee.

Appellee Worth James contends on cross-appeal that the

trial court erred in refusing to grant it a materialman's lien on the property of Tall Timber. Appellee, as cross-appellant, argues that it is entitled to a materialman's lien under Ark. Stat. Ann. § 51-601 (Repl. 1971), which provides in pertinent part:

> Every mechanic, builder, artisan, workman, laborer, or other person who shall do or perform any work to or upon, or furnish any material, fixtures, engine, boiler or machinery for any building, erection improvement to or upon land * * * under or by virtue of any contract with the owner or proprietor thereof, or his agent, trustee, contractor or subcontractor, upon complying with the provisions of this act, shall have for his work or labor done, or materials **** furnished a lien upon such building, erection or improvement upon the land. . . .

Appellee argues that the materialman's and laborer's lien statute was designed to protect those who expend their money and efforts in improving the property of others; that appellee fits exactly into the catagory of those whom the statute was designed to protect, and that there is no persuasive reason as to why the lien statute would not apply for the work done by appellee. Appellant Tall Timber responds that appellee is not entitled to a materialman's lien against Tall Timber's real property for any amount, whatever its damages ocasioned by the actions of Howell. Tall Timber argues that whatever the expense to appellee of damaged lines occasioned by Howell or by anyone else, it is not "under or by virtue of any contract with" Tall Timber or any agent, contractor, or subcontractor of Tall Timber. Appellant submits that not even the most liberal construction of our lien laws would permit appellee to have a materialman's lien against Tall Timber's land and improvements for its claim against Howell.

We agree with appellee on its cross-appeal with respect to being entitled to a materialman's lien. In *Gillison Discount Building Materials, Inc.,* v. *Talbott,* 253 Ark. 696, 488 S.W. 2d 317 (1972), we said "The necessary contract can be by express agreement or implied from the circumstances or conduct of the parties." In the case at bar appellee's contract

with Tall Timber required that appellee construct and complete a water distribution system which would be acceptable to the city. Tall Timber had notice from appellee of the continuing damages being caused by Howell, Tall Timber's contractor, and stood by and allowed appellee to make the necessary repairs which were required to meet the city's requirements. These repairs inured to Tall Timber's benefit by improvements to its property. Furthermore, Tall Timber's president assured appellee it would stand behind Howell. As indicated, appellee should be awarded a materialman's lien against Tall Timber's real property for the amount of appellee's judgment.

Appellee next asserts on cross-appeal that the trial court erred in its failure to award a judgment for appellee for the full amount of $8,812.11. As indicated, $7,000 was awarded. Appellee argues that the proof shows that appellee is entitled to judgment against Tall Timber for $8,812.11 and there is no evidence to support a reduction of that amount. Therefore, we should direct the trial court to enter judgment for the full amount sought. We cannot agree. Where the trier of the facts, as here, awards more than a mere nominal sum based upon substantial evidence, the courts are without authority to increase it. *Wharton* v. *Bray,* 250 Ark. 127, 464 S.W. 2d 554 (1971); and *Fulbright* v. *Phipps,* 176 Ark. 356, 3 S.W. 2d 49 (1928).

For the error indicated on the cross-appeal, the judgment is reversed and the cause remanded for proceedings not inconsistent with this opinion. Otherwise, the judgment is affirmed on direct and cross-appeal.

Affirmed on direct and reversed in part on cross-appeal.

Tommie D. COLDING *v.* STATE of Arkansas

CR 75-203 536 S.W. 2d 106

Opinion delivered May 3, 1976
[Rehearing denied June 1, 1976.]

Ed Daniel, for appellant.

Jim Guy Tucker, Atty. Gen., by: *Robert A. Newcomb,* Asst. Atty. Gen., for appellee.

CARLETON HARRIS, Chief Justice. A jury convicted appellant, Tommie D. Colding, Jr., of possession of heroin, and fixed his punishment at five years of confinement in the Department of Correction. From the judgment so entered, Colding appeals, arguing that the trial court erroneously failed to suppress the heroin found on his person pursuant to an allegedly unconstitutional search.

The facts pertinent to the challenged search are not disputed, nor is the validity of the search warrant itself challenged. The warrant commanded the executing officers to search the Ebony Pal, a bar, which had in its employment one Ronald Colding. The affidavit for the warrant stated that Dilaudid, heroin, and other controlled substances were

believed to be concealed on the premises, along with the records of illegal sales of controlled substances. The affidavit further stated that reliable informants had made narcotics purchases at the Ebony Pal from Ronald Colding and from unidentified sources, and that neighbors and local businessmen had complained to police about suspected narcotics traffic and "drug related disturbances" at the bar. The affiant, Detective H. L. Walters, also said that police had kept the bar under surveillance for approximately three hours, and "[d]uring this surveillance several known narcotics dealers came to this establishment."

At the hearing on the motion to suppress, Detective Richard Fulks testified that he was the first of ten officers to enter the building for the search. Upon entry, he saw appellant and three other persons; he did not know appellant personally. Fulks went to the counter, identified himself as a police officer, and asked who was running the club. When appellant answered that he was running the club at that time, Fulks gave him a copy of the search warrant and told him to place his hands against the wall. According to Fulks, the police had information that substantial amounts of narcotics were dealt at the club, and they believed that a majority of the club's habitués were armed. Accordingly, the first priority of the searching officers was to secure the establishment and to check all persons therein for weapons.

Detective Ron Bullerwell was the officer who frisked appellant for weapons. Bullerwell said that while he was "patting down" appellant he felt a "suspicious bulge" in appellant's right rear pocket. Bullerwell testified that he knew that appellant's billfold was in his left rear pocket, and he also knew from his experience as a narcotics officer that dealers usually packaged heroin for street sale in tinfoil packets inside plastic bags. When he removed the "suspicious bulge" from appellant's pocket, it proved to be a plastic bag containing tinfoil packets; the detective opened one packet and found that it contained a powdery brown substance. At that point Bullerwell arrested appellant and gave him the warnings required by *Miranda* v. *Arizona,* 384 U.S. 436. The court denied the motion to suppress.

On trial, additional facts were developed, *viz.*, Bullerwell

testified that in the course of the frisk he determined that the bulge in appellant's pocket was definitely a plastic bag before he pulled it out, and the officer also testified that while Colding generally cooperated with the search, the appellant did at one point try "to push back off the wall, come around and get me" after Bullerwell had commenced the frisk.

The most authoritative federal decision concerning this type of search involved facts quite similar to the instant appeal. In *Guzman* v. *Estelle,* 493 F. 2d 532 (5th Cir. 1974), Guzman, convicted in Texas courts of possession of heroin, petitioned for federal habeas corpus, alleging that the search that uncovered the narcotics on his person had violated his Fourth Amendment rights. The basis of Guzman's argument was that the police who conducted the search had a warrant authorizing only a search of the premises on which he was found,[1] since the warrant did not name Guzman specifically. Guzman also contended that a warrantless search of his person could not have been justified because no probable cause existed and because the search exceeded the scope of a permissible frisk for weapons.

The court reviewed the facts in detail. Before going to a suspected narcotics dealer's house, the Texas police had obtained a warrant authorizing the search of the residence; the affidavit for the warrant stated that the owner of the house, Soliz, had been observed trafficking in drugs in the house, and that police surveillance had disclosed the presence of known drug users in the house. The officers executed the warrant by giving a copy to Soliz's wife and proceeding through the house. They found Guzman in a bedroom; he jumped to his feet and appeared to be startled and frightened. An officer frisked Guzman for weapons and detected an object in his right front pocket, which he removed; it was a fingerstall[2] containing six gelatin capsules of heroin.

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[1]The court did not actually reach the question of whether Guzman could have been validly searched pursuant to the authority of the narcotics search for the premises, deciding the case simply on the basis of the fact that the weapons frisk produced probable cause for a warrantless search.

[2]A fingerstall is a small rubber protector that clerical personnel place over fingertips to avoid cuts while turning pages.

The Fifth Circuit reasoned that "the fact that [the searching officer] felt such an object in the course of the pat-down must be considered in determining probable cause." Noting that users and sellers of narcotics frequently carry drugs on their persons in easily disposable and salable forms such as capsules, the court pointed to the fact that "the criminal activity recited in the warrant involved not only the possession of narcotics, but their sale, that is, the transfer of narcotics from one person to another." Under the circumstances, the court observed, "it would not be unreasonable, for example, to assume that [Guzman] was a customer or dealer who was purchasing or selling narcotics and was holding same in his pocket." The court concluded:

> "In light of these and the aforementioned elements, [the searching officer] was not required to ignore the object he discovered in the course of his frisk. A search for narcotics may be justified where an officer's search for weapons unexpectedly produces evidence providing or contributing to probable cause to believe that a person possesses narcotics. See *Pace* v. *Beto,* 5 Cir. 1972, 469 F. 2d 1389, 1390-91. [12]

After finding that probable cause existed for the search, the *Guzman* court turned to the issue of whether "this case presents exigent circumstances to justify the search of appellee without obtaining a warrant." The court ruled that such circumstances did exist, stating:

> "After appellant had been frisked, the officers had probable cause to believe that he concealed narcotics in his pocket. Unless appellant was briefly detained and his pocket searched, he could walk from the premises with the contraband. It would be unreasonable in this situation to expect the police to seek a warrant prior to their search — and after their frisk — of appellant in the hope that appellant would be at the Soliz premises when they returned. [Citations omitted.] Clearly, time was of the essence: if appellant's pocket was not searched im-

[12] Stated differently, this means that the search for narcotics is not tainted by the fact that probable cause for this later search derives, solely or partially, from an earlier search for weapons."

> mediately, either appellant would flee or the contraband on his person would be removed or destroyed. The Fourth Amendment does not protect under such circumstances. Searching appellant without a warrant was reasonable under the Amendment, for 'the exigencies of the situation made that course imperative.' "

Another case remarkably similar to the instant appeal is *Poole* v. *State,* 247 So. 2d 443 (Fla. App. 1971). Officers obtained a warrant for the search of Poole's residence, but it did not name Poole; the warrant was based on information from confidential informants that they had purchased drugs in the residence. When the officers entered the building, they asked Poole who was in charge of the premises, and he said that it was he. The officers read the warrant to him and began the search, and noticed "an unnatural bulge under [Poole's] clothing in the area of his crotch. As a result of such suspicious circumstance, [Poole] was searched and a plastic bag containing a quantity of marijuana was removed from the area where [Poole] had attempted to secrete it. It was not until after the evidence was discovered and the search of the premises completed that appellant was arrested and charged with the offenses for which he was ultimately convicted."

Poole appealed his conviction of possession of marijuana, making the same argument as appellant in the instant case — "that although the search warrant involved in this case authorized a search of the premises and curtilage, it did not authorize a search of all persons who might be found on the premises at the time the search was conducted." The Florida court rejected this argument and affirmed the conviction, stating:

> "When appellant acknowledged to the officers that he was in charge of the premises, they were justified in more carefully scrutinizing his outward appearance and demeanor than they would have been under other circumstances. It was with the information furnished them by the confidential informers [about drug traffic on the premises] in mind that they observed a bulge in appellant's clothing within the area of his crotch. Such a condition was, to say the least, unusual and justified

further exploration by the officers in order to determine whether at that moment appellant was engaged in illegal drug traffic which they were informed was being conducted on the premises. Since the officers were in appellant's dwelling under lawful authority conferred upon them by the court which issued the search warrant, and had reasonable cause to suspect that appellant was engaged in or connected with the unlawful activity against which the search warrant was directed, we are not persuaded that the search which they made of appellant's person which was triggered by the unusual bulge appearing in the crotch of his trousers was so unreasonable in a constitutional sense as to condemn the contraband seized as a result of that search."

Other cases, the rationale of which would uphold the search in the instant case, are *Guerra* v. *State,* 496 S.W. 2d 92 (Tex. Cr. App. 1973), *cert. denied,* 415 U.S. 975; *State* v. *De Simone,* 60 N.J. 319, 288 A. 2d 849 (1972); *Guzman* v. *State,* 461 S.W. 2d 603 (Tex. Cr. App. 1970); *Samuel* v. *State,* 222 So. 2d 3 (Fla. 1969); *Hernandez* v. *State,* 437 S.W. 2d 831 (Tex. Cr. App. 1968), *cert. denied,* 395 U.S. 987; *People* v. *Pugh,* 69 Ill. App. 2d 312, 217 N.E. 2d 557 (1966).

It is apparent that the court did not err in admitting the evidence.

Affirmed.

Babe FLETCHER et al *v.* James HURDLE and Shirl HURDLE, Individually and as Co-Executors

75-245 536 S.W. 2d 109

Opinion delivered May 3, 1976
[Rehearing denied June 1, 1976.]

W. B. Howard, for appellants.

John R. Henry, for appellees/cross-appellants.

Barrett, Wheatley, Smith & Deacon, for cross-appellee.

JOHN A. FOGLEMAN, Justice. This action originated as a suit in ejectment brought by Nash Fletcher, Gerald Fletcher, Bruce Fletcher, Rose Fletcher Crabtree and Joann Fletcher States against James Hurdle and Shirl Hurdle, the co-executors of the will of Betty Roach, deceased, and her only devisees. These defendants, appellees here, claimed title to the real property involved under their decedent's will. They asserted that she had title by the virtue of a warranty deed executed by Barbara Jean Stephens, the sister of the plaintiff-appellants. These parties, along with Barbara Jean Stephens, were heirs of Asbury Fletcher, who died intestate. The Asbury Fletcher heirs, who originated the suit, will hereafter be referred to as the plaintiff-appellants. Barbara Jean Stephens will be referred to as Barbara Jean. The appellees, who cross-appealed on the dismissal of a third party complaint against the executor of the estate of Barbara Jean will be referred to as the Hurdles.

Babe Fletcher, the brother of Asbury Fletcher, intervened, claiming that he was the owner of an undivided one-half interest in the lands in question in fee simple as a residual devisee under the will of I. N. Fletcher, deceased, the father of Asbury and Babe Fletcher. At the time of the trial, the plaintiff-appellants took the position that they were the owners in fee simple of an undivided five-twelfths interest in the land in question. On the basic issue the positions of the plaintiff-appellants and the intervenor-appellant are identical.

I. N. Fletcher was the common source of title claimed by all parties. He died on September 20, 1950. The issues turn upon the proper construction of his will and of a deed executed by the plaintiff-appellants to their sister Barbara Jean. The pertinent provisions of the will of I. N. Fletcher are:

> 3. I devise and bequeath to my granddaughter, Barbara Jean Fletcher, for and during her natural life, then to the heirs of her body, if any, and if not then to Asbury Fletcher, his heirs and assigns, the following described real estate situated in Craighead County, Arkansas to-wit: [describing the lands in controversy].
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> ******
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> 7. After payment of all specific bequests and devises herein, I hereby devise and bequeath the entire residue of my estate, real, personal, or mixed to my two sons Asbury Fletcher and Babe Fletcher in equal parts.

Asbury Fletcher died October 11, 1956, leaving the plaintiff-appellants and Barbara Jean as his surviving heirs at law. Barbara Jean claimed title as an heir of her father Asbury Fletcher and by virtue of a quitclaim deed executed by the plaintiff-appellants on December 6, 1956. Barbara Jean died without issue in March of 1974, having conveyed the lands in controversy to Betty Roach by warranty deed dated September 12, 1968. The appellants contend that paragraph three of I. N. Fletcher's will created a life estate with alternative contingent remainders, so that the testator retained a divestible reversion which, when Barbara Jean died without having heirs of her body, but surviving her father Asbury, vested the fee title in the appellants by virtue of the residuary clause of I. N. Fletcher's will. On the other hand, the Hurdles contend that their title comes through Asbury Fletcher as a contingent remainderman under the will of I. N. Fletcher, but that his heirs took as remaindermen, and the interest of all the heirs merged in Barbara Jean through the quitclaim deed to her in December, 1956. That deed was entitled "Quitclaim Deed" and by it the plaintiff-appellants did thereby "grant, sell and quitclaim unto the said Barbara Jean . . . the following

lands," to wit:

> All of our interest and possibility of remainder by reason of the will of our Grandfather, recorded in Probate Record Book 1, at page 116, Records of Craighead County Lake City District, as to [the lands in controversy].

The appellees alleged, but did not prove, that at the time of the deed to Barbara Jean, her grantors knew that she was incapable of bearing children. Jury trial was waived and the cause was submitted to the court on the pleadings, stipulations of counsel and oral testimony. The circuit judge found that appellants had no interest in the land in controversy and dismissed the complaint and intervention. The judgment was based upon oral findings of the circuit judge. Among other things, he found that:

> I. N. Fletcher, by specifically listing and naming the subject property, attempting to convey it to his granddaughter Barbara Jean, for her life, then to her children, and if no children, to Asbury Fletcher and his heirs, did divest himself of the subject property to the heirs of Asbury Fletcher in fee, whether by a vested remainder or to the heirs of Asbury Fletcher, or his devisee, of the reversionary interest to the heirs of Asbury Fletcher. I. N. Fletcher intended to, and did, divest himself of the property by paragraph three of his will and the property did not constitute a part of the residual estate disposed of in paragraph seven.

We agree with appellants that the circuit court erred in treating paragraph three of the will as creating a vested remainder, either in Asbury Fletcher, who predeceased the life tenant, or in his heirs. Of course, the devise to Barbara Jean Fletcher for life, "then to the heirs of her body, if any," vested only a life estate in Barbara Jean, with remainder to the heirs of her body. Ark. Stat. Ann. § 50-405 (Repl. 1971). The words "if any," are certainly indicative that any remainder in the heirs of the body of Barbara Jean was contingent, if there could otherwise have been any doubt about the matter.

A remainder is contingent when the remainderman cannot be ascertained until the death of the life tenant and no title passes until the happing of the contingency, i.e., the death of the life tenant. *Eversmeyer* v. *McCollum,* 171 Ark. 117, 283 S.W. 379. Where the estate in remainder is limited to take effect either to a dubious or uncertain person or upon a dubious and uncertain event, the remainder is contingent. *Wallace* v. *Wallace,* 179 Ark. 30, 13 S.W. 2d 810. Where the right of the remainderman to succeed to the enjoyment of the estate depends upon some contingency which may never arise or where the person who is entitled to succeed to possession is not, and may never be, ascertained, or is not in being, the remainder is contingent. *Hurst* v. *Hilderbrandt,* 178 Ark. 337, 10 S.W. 2d 491; *Wise* v. *Craig,* 216 Ark. 144, 226 S.W. 2d 347. It is the uncertainty of the right of enjoyment and not the uncertainty of actual enjoyment that renders a remainder contingent. *National Bank of Commerce* v. *Ritter,* 181 Ark. 439, 26 S.W. 2d 113. Where the persons who may take under a will are uncertain and cannot be ascertained until the life tenant dies, the remainder is contingent. *National Bank of Commerce* v. *Ritter,* supra. See also, *Steele* v. *Robinson,* 221 Ark. 58, 251 S.W. 2d 1001 (overruling *Deener* v. *Watkins,* 191 Ark. 776, 87 S.W. 32, in *Hurst* v. *Hilderbrandt,* supra, viz:

The distinction between contingent and vested remainders is well made by a quotation from 23 RCL 500, § 32, in *Hurst* v. *Hilderbrandt,* supra, viz:

> The fundamental distinction between the two kinds of remainders is that in the case of vested remainder, the right to the estate is fixed and certain, though the right to possession is deferred to some future period, while, in the case of a contingent remainder, the right to the estate as well as the right to the possession of such estate is not only deferred to a future period, but is dependent on the happening of some future contingency. The broad distinction between vested and contingent remainders is this: In the first there is some person in esse known and ascertained who, by the will or deed creating the estate, is to take and enjoy the estate, and whose right to such remainder no contingency can defeat. In the second it depends upon the happening of a contingent event,

> whether the estate limited as a remainder shall ever take effect at all. The event may either never happen, or it may not happen until after the particular estate upon which it depended shall have been determined, so that the estate in remainder will never take effect.

That the remainder to the heirs of the body of Barbara Jean was contingent is beyond cavil. Appellees do not contend otherwise.

Turning then to the subsequent clause in paragraph three of the will, and applying the well-established rules of property distinguishing between vested and contingent remainders, we come to the inevitable conclusion that any remainder in Asbury Fletcher was a contingent remainder, because the remainder could not possibly have vested unless Barbara Jean predeceased him without having heirs of her body. Any estate in Asbury Fletcher was necessarily dependent upon the happening of this contingency. The remainder was obviously to a dubious or uncertain person or upon a dubious or uncertain event. The person or persons who might take under this clause of the will were uncertain and could not be ascertained until the death of the life tenant. If Barbara Jean had left an heir of her body, the remainder over would have been gone forever, insofar as Asbury Fletcher or his heirs are concerned. That contingency would have defeated any remainder in Asbury Fletcher and no estate would ever have vested in him. See *Hurst* v. *Hilderbrandt,* supra; *Wise* v. *Craig,* supra. In the absence of any showing to the contrary there is a presumption that a woman may have issue so long as life continues. *Wise* v. *Craig,* supra. Cf. *Steele* v. *Robinson,* supra; *Greer* v. *Parker,* 209 Ark. 553, 191 S.W. 2d 584. As previously pointed out, there was no evidence to indicate that Barbara Jean was incapable of bearing children.

If there were any lingering doubt about the contingency of the remainder to Asbury Fletcher, the use of the word "then" immediately following the creation of the life estate in Barbara Jean denotes the time the fee would vest, i.e., at the time of Barbara Jean's death. *Reynolds* v. *Nicks,* 205 Ark. 1046, 172 S.W. 2d 239. Where the interest of a remainderman is contingent upon his surviving the life tenant and he dies dur-

ing the continuance of the life estate, he takes no interest in the land under the remainder and no interest devolves upon his heirs. *Cox* v. *Danehower,* 211 Ark. 696, 202 S.W. 2d 200; *Wise* v. *Craig,* supra. It is clear that the interest of Asbury Fletcher was contingent upon his surviving Barbara Jean.

Appellees argue, however, that the contingent remainder to Asbury Fletcher descended to his heirs at law. In advancing this argument, they attempt to distinguish *Wise* v. *Craig,* supra. But the rules there announced clearly apply in this case. See also, *Cox* v. *Danehower,* supra.

Appellees seize upon 33 Am. Jur. 618, § 152, for a qualification of the general rule that a contingent remainder does not pass by descent. The application of the principle espoused by appellees depends, however, upon the certainty of the person who is to take and the lack of necessity for his surviving some particular time or event as a part of the contingency upon which the remainder is intended to take effect. It is unnecessary for us to pass on the validity of the rule for which appellees contend, because the clear language of the will required that Asbury Fletcher survive his daughter Barbara Jean before any estate vested in him. A contingent remainder can hardly become vested in a person who is not in being. The only way that any contrary intention could be found in this clause of the will would be by resort to an impermissible construction of the words "his heirs and assigns" following the naming of Asbury Fletcher. Of course, these words cannot be more than words of limitation. It is presumed that the word "heir" is used in its primary legal sense, i.e., as a word of limitation, in the absence of qualifying or explanatory words which are repugnant to the acceptance of the word in its strict legal sense. *Ryan* v. *Ryan,* 138 Ark. 262, 211 S.W. 183. In determining the intention of the testator, the question is not what the testator meant, but it is the meaning of his words. *Galloway* v. *Darby,* 105 Ark. 558, 151 S.W. 1014. The addition of the words, "and assigns," is merely declaratory of the power of alienation which the taker possesses without them and they cannot operate to enlarge the grant or defeat its express limitations. *Watson* v. *Wolff-Goldman,* 95 Ark. 18, 128 S.W. 581. See also, *Alexander* v. *Morris & Co.,* 168 Ark. 31, 270 S.W. 88. The words "heirs and assigns" are to be taken in their technical sense to denote

the character of the estate or the extent of the interest to be taken by a named devisee and, as such, are words of limitation, and cannot be words of substitution. *Galloway* v. *Darby,* supra. The rule in Shelley's case has such an impact in Arkansas that it is to be applied, regardless of the intention of a testator or grantor, who cannot disavow the rule, even in express words. *Bishop* v. *Williams,* 221 Ark. 617, 255 S.W. 2d 171. In other words, this language cannot be taken as a substitution of the heirs and assigns of Asbury Fletcher, for him, as a remainderman, if he should not be living at the time of the death of Barbara Jean without heirs of her body.

We find nothing in Ark. Stat. Ann. § 61-101 (1947)[1] to support the argument of appellees. The definition of real estate in Ark. Stat. Ann. § 61-120 (1947)[1] eliminates any such possibility. One cannot be "seized or possessed" of a contingent remainder as is required when those two sections are read together. Furthermore, Ark. Stat. Ann. § 61-137 (Repl. 1971) is inapplicable to this situation because it was not in effect at any time critical to the issues here.

The characterization of the interest remaining after the death of Barbara Jean and its disposition remain to be determined. It is quite clear that under Arkansas law a grant to one for life with remainder to the heirs of his body leaves a divestible reversion in the grantor, which would remain in him if the grantee should die without bodily heirs during the lifetime of the grantor. *Hutchison* v. *Sheppard,* 225 Ark. 14, 279 S.W. 2d 33; *Davis* v. *Davis,* 219 Ark. 623, 243 S.W. 739 (in which we corrected a misnomer of this reversion as a possibility of reverter in *LeSieur* v. *Spikes,* 117 Ark. 366, 175 S.W. 413).

But here we have alternative remainders. Alternative remainders, limited upon a single precedent estate, are always contingent. *Wise* v. *Craig,* supra; *Cox* v. *Danehower,* supra. It would be helpful to examine the nature of a reversion, as distinguished from a remainder, and to consider the effect of the failure of alternative contingent remainders. The distinction was clearly made in *Wilson* v. *Pharris,* 203 Ark. 614, 158 S.W. 2d 274. There we pointed out that a remainder

[1]Now repealed.

is an estate limited to take effect in possession immediately after the expiration of a prior estate created at the same time and by the same instrument. We also pointed out that a reversion is the residue of an estate left in the grantor to commence in possession after the determination of some particular estate granted out by him and that, unlike a remainder, which must be created by deed or devise, a reversion arises only by operation of law. Furthermore, in quoting from 23 RCL p. 111, Reversions, we said:

> . . . At common law, if a man seised of an estate limits it to one for life, remainder to his own right heirs, they take not as remaindermen, but as reversioners; and it will be, moreover, competent for him, as being himself the reversioner, after making such a limitation, to grant away the reversion. The same result is reached when an ultimate remainder in fee is contingent. Until it vests there is a reversion in the grantor or devisor and his heirs.

By application of the rules of property hereinabove set out, I. N. Fletcher created a life estate in Barbara Jean, alternative contingent remainders to the heirs of the body of Barbara Jean and Asbury Fletcher and left in himself a reversion. Such a reversion is divestible and may pass by deed or inheritance and, in the absence of a grant by deed in the lifetime of the creator, it will pass by will, and in the absence of a specific devise, will pass under the residuary clause of the will of the holder of the reversion. *Wilson* v. *Pharris,* supra. *Luster* v. *Arnold,* 249 Ark. 152, 458 S.W. 2d 414; *Hutchison* v. *Sheppard,* supra; *Davis* v. *Davis,* supra; *Nuckolls* v. *Mantooth,* 234 Ark. 64, 350 S.W. 2d 512; Core, Transmissibility of Certain Contingent Future Interests, 5 Ark. Law Rev. 111, 125 (1951). Thus, the reversionary interest in I. N. Fletcher passed under the residuary clause in the will to Babe Fletcher and Asbury Fletcher. This made Babe Fletcher the holder of an undivided one-half interest in fee upon the death of Barbara Jean. Consequently, the holding of the circuit court was erroneous as to him.

The reversionary interest in I. N. Fletcher could not possibly have passed to Asbury Fletcher under paragraph

three of the will because to so hold would mean that no remainder, contingent or otherwise, was created in Asbury Fletcher by paragraph three. The basis of the trial court's holding in this respect was that, by making the devise to Asbury Fletcher and his heirs, the testator divested himself of the property to the heirs of Asbury Fletcher in fee, regardless of whether the interest was a vested remainder or a reversionary interest. The fallacy of this holding has been pointed out in our treatment of the signficance of the word "heirs" in paragraph three.

We cannot agree, however, that the plaintiff-appellants are not bound by their quitclaim deed to their sister Barbara Jean. It is true that ordinarily a contingent remainder cannot be conveyed by deed. *Hurst* v. *Hilderbrandt,* supra; *National Bank of Commerce* v. *Ritter,* supra. But see, *Clark* v. *Rutherford,* 227 Ark. 270, 298 S.W. 2d 327. On the other hand, the conveyance by the plaintiff-appellants of all their interest as to the property would carry the reversionary interest, even if they didn't realize they had it. *Nuckolls* v. *Mantooth,* supra; Core, Transmissibility of Certain Contingent Future Interests, 5 Ark. Law Rev. 111, 121. Although we would agree that the interest passed to the plaintiff-appellants by descent from Asbury Fletcher, we do not agree with these appellants that the words "by reason of the will of our grandfather" limit the words "all of our interest." The limitation is upon the possibility of remainder. This divestible reversion was a present and not a prospective interest held by the plaintiff-appellants. So even if the limitation is upon "our interest," the result is the same. In this respect, the holding of the circuit judge was correct, and his judgment should be affirmed to that extent.

This brings us to the cross-appeal. Appellees filed a third party complaint against the executor of the estate of Barbara Jean. This pleading was authorized by order of the circuit court. In it the appellees alleged that the property was conveyed to their decedent by general warranty deed dated September 12, 1968, executed by Barbara Jean and that if appellees should be evicted and ousted from the property or any part thereof, the eviction would be a breach of the covenants of warranty in that deed, that the third party defen-

dants had taken no action to defend the suit and that, if evicted, they were entitled to recover from the third party defendant either the consideration of $30,000 given for that deed for breach of warranty or a fraction thereof proportionate to the value of the property from which they were evicted and ousted.

The circuit court dismissed that third party complaint and, properly so, upon the court's holding on the other points. In view of the disposition we make of the case on direct appeal, this part of the judgment must be reversed on cross-appeal. The cause of action of appellants did not accrue until the death of Barbara Jean. *Luster* v. *Arnold,* supra. It is true that a covenant of warranty is not broken until eviction, but a constructive eviction is sufficient, so we do not agree with the cross-appellees that the action was prematurely brought. See *Security Bank* v. *Davis,* 215 Ark. 874, 224 S.W. 2d 25; *Smiley* v. *Thomas,* 220 Ark. 116, 246 S.W. 2d 419; Ark. Stat. Ann. § 27.1134.1 (Supp. 1975).

The judgment of the circuit court is affirmed on direct appeal as to the plaintiff-appellants and reversed and remanded for the entry of a judgment in favor of appellant Babe Fletcher consistent with this opinion. The judgment of the circuit court on the third party complaint is reversed on cross-appeal and the cause is remanded with directions to reinstate the third party complaint.

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

CONLEY BYRD, Justice, dissenting. The majority somewhat syllogistically reasons that since the testator gave alternative contingent remainders under paragraph three of his will then it follows that Asbury Fletcher had to survive the life tenant before his interest under paragraph three could pass by descent to his children. At page six of the majority opinion, they state "the clear language of the will required that Asbury Fletcher survive his daughter Barbara Jean before any estate vested in him." Both suppositions are erroneous. The will of I. N. Fletcher, in so far as here pertinent provides:

"KNOW ALL MEN BY THESE PRESENTS:

That I, I. N. Fletcher, of Craighead County, Arkansas, being of sound mind and disposing memory and above the age of twenty-one years, do hereby make, publish and declare this to be my last will and testament, and do hereby revoke all other Wills or codicils thereto heretofore by me made, that is to say:

1. I direct that as soon after my death as practicable all of my just debts, including burial expense be paid.

2. I here devise to my son, Asbury Fletcher, in fee simple, the following described real estate situated in Craighead County, Arkansas, to-wit:

The Southwest Quarter (SW ¼) of the Northeast Quarter (NE ¼) Section Eight (8), Township Fourteen (14), North, Range Six (6) East and also the South Three (3) acres of the Northwest Quarter (NW ¼) of the Northeast Quarter (NE ¼) of said Section Eight (8).

3. I devise and bequeath to my granddaughter, Barbara Jean Fletcher, for and during her natural life, then to the heirs of her body, if any, and if not then to Asbury Fletcher his heirs and assigns, the following described real estate situated in Craighead County, Arkansas, to-wit:

All that part of the West Half of the Southeast Quarter (SE ¼) of Section Five (5), Township Fourteen (14) North, Range Six (6) East which lies South of Thompson Creek Drainage Ditch containing approximately Eighteen (18) acres and Twenty (20) acres in the Northwest Quarter (NW ¼) of the Northeast Quarter (NE ¼) of Section Eight (8), Township Fourteen (14) North, Range Six (6) East bounded on the West by the west line of said Northwest Quarter (NW ¼) of Northeast Quarter (NE ¼) of Section Eight (8) and on the South by the North line of the three (3) acre tract described in Paragraph number two (2).

4. I hereby devise to my son Babe Fletcher, in fee simple, the following described real estate situated in Craighead County, Arkansas, to-wit:

All that part of the North Half (N ½) of the Northeast Quarter (NE ¼) of Section Eight (8), Township Fourteen (14) North, Range Six (6) East of which I am the owner at the date of this Will, except that portion devised to Barbara Jean Fletcher under paragraph three (3).

Said North Half (N ½) of Northeast Quarter (NE ¼) of said Section Eight (8) is an Eighty (80) acre tract of which I originally owned Seventy-eight (78) acres, a Mr. Gipson now owns one and one-half (1 ½) acres and Charles McDuffee Three (3) acres, leaving Seventy-three and a half (73 ½) acres, more or less, of which I am the owner, but of which I have devised Twenty (20) acres to my Granddaughter Barbara Jean Fletcher as shown above. I also devise to my son Babe Fletcher the fractional North Half (N ½) of Northwest Quarter (NW ¼), Section Nine (9) containing Thirty-three and ninety hundredths (33.90) acres, more or less, and the North four and Sixty-five hundredths (4.65) acres of the Southwest Quarter (SW ¼) of the Northwest Quarter (NW ¼) of said Section Nine (9), both in Township Fourteen (14) North, Range Six (6) East.

5. I hereby bequeath to my daughter, Mattie Velma McDuffee, the sum of Three Thousand and No/100 ($3,000.00) Dollars.

6. It is intended and I so direct that if at my death any liens exist upon any of the real estate herein devised, then that said liens be released and discharged by payment of the amounts owing so that the title in fee simple, free and clear of all encumbrance will vest in the devisees; and that such payments be made by my Executors out of the residue of my estate.

7. After payment of all specific bequests and devises

herein, I hereby devise and bequeath the entire residue of my estate, real, personal, or mixed to my two sons Asbury Fletcher and Babe Fletcher in equal parts.

. . . "

That the intention of the testator is of prime importance in determining the rights of the parties under the provisions of a will can be seen in *Cox* v. *Danehower,* 211 Ark. 696, 202 S.W. 2d 200 (1947), cited and relied upon by the majority, which states:

> "At the outset we are confronted with the fact that an interpretation of only one item of a will is sought by the parties and the whole will is not before us. The entire will is not set forth in the pleadings and does not appear in the record. One of the cardinal rules in the construction of wills is that it is the court's duty to ascertain the intent of a testator, and in doing so such intent is not to be determined by one clause only, but must be gathered from a full consideration of the entire will. In the case at bar, however, the parties seem willing to assume that a consideration of the other portions of the will would not aid their respective contentions, and are content to rest their case upon the devise above quoted. Acting upon this assumption, we proceed to determine whether the language of this devise alone supports the conclusion reached by the Chancellor."

When we remember that Barbara Jean Fletcher is the daughter of Asbury Fletcher, it is at once obvious to me that the testator wanted the land given to Barbara Jean to go back to Asbury if she should die without heirs of her body. There is nothing in any clause of the will that requires Asbury to survive Barbara Jean. Any assertion by the majority to the contrary is unsupported by provisions of the will.

There is nothing in *Wise* v. *Craig,* 216 Ark. 144, 226 S.W. 2d 347 (1949), that supports the majority view that Asbury must survive his daughter. The will in the *Craig* case specifically provided what would happen if the remaindermen did not survive the life tenant, in the following words:

> "In case any of my said nephews and nieces are dead at the time of the death of my daughter, Sallie, then the descendants of such deceased devisee shall take such share as would have gone to such nephew or niece if living."

The real issue in the instant case is whether the interest of Asbury Fletcher is inheritable since he did not survive the life tenant. I think there is no question that it is. In L. Sims and A. Smith, *The Law of Future Interests,* § 135 (2d ed. 1956), in a discussion on whether survivorship is a condition precedent, it is stated:

> "In a large number of cases in which the discussion proceeds as if the problem were merely whether the remainder is vested or contingent, the real question involved is simply whether there is a requirement that a certain devisee must survive until his interest becomes possessory; it being conceded that he has not so survived. In many of such cases the whole discussion of the distinction is irrelevant, because exactly the same result would be reached if the remainder in question were treated as contingent or as vested subject to complete defeasance on the death of the remainderman before the termination of the particular estate. Thus, in a limitation to A for life and then to B and his heirs if he survives A, the interest of B ends when he predeceases A, whether we classify the interest as contingent or as vested subject to complete defeasance. More dangerous are the cases in which it does make a difference how the interest is classified and in which the courts get involved in a peculiar mingling of fallacies concerning the meaning of the terms 'vested' and 'contingent.' On the one hand, these cases seem to assume that if there is no condition precedent of survivorship, the remainder is necessarily vested (thus purporting to give the term 'vested' the meaning: 'not subject to a condition precedent of survivorship'). On the other hand, they assume that all contingent remainders are necessarily subject to a condition precedent of survivorship. Both of these assumptions are invalid and do not conform to the normal meanings of the two terms in question. As to the

first, it is true that if there is a condition precedent of survivorship, the remainder in question is contingent, but the converse is not true. If survivorship is not a requisite, it does not follow that the remainder is vested. A remainder may be subject to some other condition precedent which renders it contingent, even though there is no condition that the devisee must survive until the termination of the preceding estate.

The second assumption — that all contingent remainders are subject to an implied condition of survivorship — is equally invalid. While it is true that the courts will sometimes imply a condition precedent of survivorship (and thus make the remainder contingent), it is also true that some contingent remainders are inheritable, and thus capable of transmission even though the holder thereof does not survive until the interest becomes possessory.

These cases represent an area of the law which engenders confusion because of the narrow meaning which is given to the term 'vested' and because of a failure to appreciate that the question of whether there is a requirement of survivorship is not synonymous with the question of whether the remainder is vested or contingent."

In 23 Am. Jur. 2d *Descent and Distribution* § 32 (1965), we find, contrary to the suggestion of the majority opinion in the second full paragraph on page six, the following statement:

"As a general rule, a contingent remainder passes under the statute of descent and distribution. Similarly, in the case of an executory interest, where the fee is limited to commence in the future upon a contingency, the fee passes, until the contingency happens, in the usual course of descent to the heirs at law.

. . .

. . . While contingent interests have sometimes been considered as subject to an implied condition of the

donee surviving the particular estate, seemingly just because they are subject to *some* condition precedent, this is not logically sound where the contingency refers only to the time of enjoyment and possession and not to the time for the title to pass or for the determination of the person taking."

That it was not necessary for Asbury Fletcher to survive the life tenant is eminently supported by *Black* v. *Todd,* 121 S.C. 243, 113 S.E. 793 (1922). In that case the will devised the property to Corrinna Mystis Harris for life, the remainder to her children, if any, and if no children then to Mary Brown for life with remainder to her children, if any, and if none then to Samuel P. Black. Corrinna Mystis Harris outlived both Mary Brown and her children, all of whom died without issue. After the death of Corrinna Mystis Harris without children, the court held that a conveyance from the children of Mary Brown was valid as against the claims of Samuel P. Black.

For the reasons stated, I respectfully dissent.

HARRIS, C.J., and JONES, J., join in this dissent.

Philip C. BATES and Shirley J. BATES
v. George R. SIMMONS and Jewel Ann SIMMONS

75-389 536 S.W. 2d 292

Opinion delivered May 3, 1976

Gean, Gean & Gean, by: *Roy Gean Jr.* and *Lawrence W. Fitting,* for appellants.

N. D. Edwards, for appellees.

JOHN A. FOGLEMAN, Justice. Appellants brought this action to rescind a contract for the purchase of property from the appellees, asserting misrepresentation, mutual mistake and failure of consideration. The contract was entered into on November 24, 1969. For a consideration of $17,500, payable at the rate of $150 per month, plus interest, and an additional payment of $500 per year beginning in 1970, the Simmonses sold the Bates property described as:

> All of Block D, Town of Graphic, Arkansas, including the store building, dwelling house and all other structures and improvements of every kind, sort and description situated on said property. . . .

The store building was not located on Block D, but on adjacent property, and the purchasers were put in possession and occupied a dwelling house on Block D and the store building at least until May, 1975, when they were evicted from the store building by William Roberts, who had purchased the land on which the store building was located at a sale for partition among the owners. The Bates purchase was made upon the representation that the Simmonses held a 99-year lease on the store building site.

Appellants made all payments called for in the contract prior to the eviction and met all other contractual obligations except for keeping the property insured against loss by fire and windstorm. Appellants filed this suit shortly after the eviction, alleging that the store building was material to the bargain and that, because there was a fatal defect in the seller's title thereto, appellants had sustained "damages" in the sum of $12,400. This figure, however, represented the total payments made by appellants under the contract and appellants actually sought to return the lot purchased and the dwelling house, cancel the contract and recover these payments.

Appellees answered with a counterclaim labelled "cross-complaint," alleging that appellants had breached the contract by failing to carry insurance on the property after July 16, 1971, and by disposing of store fixtures and equipment. Appellees asked that the contract be terminated and that they have judgment for the balance due under it.

The chancery court, by decree, found appellants had defaulted in the performance of the contract by failing to keep the property insured and that appellees had defaulted because they were unable to deliver the store building and held that the contract became null and void in March, 1975, at the time of the purchase of land on which the store building was located by Roberts. The court held that appellants occupied the premises as tenants after March 1, 1975, and entered judgment in their favor for monthly payments in excess of $100 per month made thereafter and prorated the annual payment. The court also decreed that all prior payments made by appellants under the contract be treated as rent, and that damages to the two parties were too nearly equal to permit the award of any judgment in any specific amount to either. Appellants were given 30 days within which to vacate the property.

Appellants' first point for reversal is the action of the chancellor in allowing appellees to amend their pleadings at the conclusion of the evidence on behalf of appellants. Actually the motion was made at the very beginning of the trial, when appellees made an oral request that their pleadings be

amended to ask allowance of credit against any recovery by appellants for the cost of restoring the house to its condition when sold, for the store business and fixtures and for the reasonable rental value of the property. The chancellor took this oral motion under advisement, but granted it after denying appellees' motion to dismiss the complaint for insufficient evidentiary support.

Appellants complain that this request came some three months after issue was joined and radically changed the cause of action for foreclosure under the contract originally asserted in appellees' pleadings. In considering the court's action, we note that a variance between pleading and proof is not to be considered as material unless it had actually misled the adverse party and that the court may, at any time, in the furtherance of justice, amend any pleadings by inserting new allegations material to the case, upon such terms as may be proper. Ark. Stat. Ann. § 27-1155 (Repl. 1952) and 27-1160 (Supp. 1975).

The chancellor in allowing the amendment offered appellants a continuance if they were taken by surprise, but their attorney stated that they would like to dispose of the case on that day and did not want to take any additional time unless absolutely necessary. We note that both appellant Philip Bates and an expert witness testified on behalf of appellants as to rental values.

We will not reverse the trial court's action on requests for amendment of pleadings at the trial unless there has been a manifest abuse of discretion and material prejudice to the adverse party. *Rucker* v. *Martin, Phillips & Co.,* 94 Ark. 365, 126 S.W. 1062; *Cole* v. *Branch & O'Neal,* 171 Ark. 611, 285 S.W. 353. See also *Hogue* v. *Jennings,* 252 Ark. 1009, 481 S.W. 2d 752. Since appellants were seeking a rescission, the parties were entitled to be placed, as nearly as circumstances would permit, in their respective positions at the time of the sale. *Berland's Inc. of Tulsa* v. *Northside Village Shopping Center,* 447 P. 2d 768 (Okla., 1968); *Cruse* v. *Clawson,* 137 Mont. 439, 352 P. 2d 989 (1960); *James* v. *Hogan,* 154 Neb. 306, 47 N.W. 2d 847 (1951). An amendment specifically requesting that this be done in the manner asked did not so substantially change the

issues that allowing the amendment was an abuse of discretion unless it could be said that appellants had been so misled that the court's action took them by surprise. The court's offer of a continuance was proper under the terms of Ark. Stat. Ann. § 27-1160. The failure to take advantage of it or to ask for a continuance after appellants' evidence was heard certainly indicates that appellants' surprise was not so great that they felt unable to controvert appellees' evidence on this point. We find no manifest abuse of discretion in the court's action. See *Royal Service Co.* v. *Whitehead Construction Co.,* 254 Ark. 234, 492 S.W. 2d 423.

It appears to us that there was error in the holding that appellants were in default for failure to keep the property insured. We find a clear preponderance of the evidence to indicate that the failure to carry this insurance for some four years was known to Mr. Simmons. The insurance was cancelled in July, 1971, because the carrier discontinued the writing of such insurance in unincorporated areas, such as Graphic. When this was reported to Simmons, he requested that Mr. Bates obtain insurance elsewhere. Bates testified that he was able to find only one company writing this insurance in Graphic, but the premium was $54 per year per $1000 of value as against $8 previously paid. Bates testified that when Simmons inquired he told Simmons he could not afford the insurance at this price, and that Simmons neither objected nor requested Bates to obtain the insurance or to surrender the property. Simmons does not appear to have actually denied this testimony. He did say that he never told Bates that he did not require insurance. It does clearly appear that appellees did not assert any rights arising from this alleged default until they filed their "cross-complaint" in this case. Any error in this respect, however, is harmless because a clear preponderance of the evidence shows appellants' entitlement to rescission and the trial court did not give judgment for the balance due under the contract. Rather than do so, the court attempted to restore the parties to the situation in which they were when the contract was made.

Appellants also complain of the trial court's finding that they were in default for failure to defend the title to the store

building. The evidence shows that Mr. Bates had discussed the situation with Mrs. Simmons shortly after the service of process in a partition suit brought by co-owners of the land on which the building was located. He had given her a copy of it, which she promptly returned. No formal demand was made upon appellees to defend the title. Mr. Bates testified that he asked Mr. Simmons to deliver a copy of the 99-year lease to the attorney for the plaintiffs in the partition suit. He said that he took no other action to protect his rights relative to the store building because this attorney assured him that the store building belonged to the Bateses and that the land beneath it was not involved in the partition suit. He also stated that the heirs who were parties to the partition suit had agreed that he was entitled to use the store building site under a 99-year lease. This lease had not been mentioned in the contract of sale, no assignment of it to appellants was ever made, and Mr. Bates only asked Mr. Simmons to put a piece of paper purported to be the lease in a safety deposit box. Appellants took no steps to defend the partition suit, or to intervene in it, to remove the building or to contest the right of the purchaser at the partition sale to possession of it. There was evidence that the building could have been moved onto Block D.

Even if there were a duty on the part of the appellees to defend in the partition suit, appellants might well have acted to preserve their rights or minimize the loss, at least by attempting to remove the store building before the partition sale. Not having done so, they are in no position to complain about the chancery court's holding in this regard, particularly in view of the fact that there was no cross-appeal from the chancellor's holding appellees were also in default for failure to defend the title to the store building. *Lindenborg* v. *M & L Builders and Brokers, Inc.*, 302 N.E. 2d 816 (Ind. App., 1973). Cf. *Baston* v. *Davis*, 229 Ark. 666, 318 S.W. 2d 837; *Childress* v. *Tyson*, 200 Ark. 1129, 143 S.W. 2d 45.

Appellants say that the chancellor erred in holding that damages to the parties were too nearly equal to award any judgment to either. But appellants conclude the argument by pointing out that neither party pleaded or proved damages. Since this is true, any error in harmless.

The most difficult question presented on this appeal arises from appellants' contention that the chancellor erred in considering the payments made under the contract as rent. We have concluded that the evidence does not support this holding. As we have pointed out, any liability based on contract terms that might have resulted from appellants' failure to carry insurance is unfounded. As appellees pointed out, both parties ultimately asked that the contract be cancelled and rescinded, and the problem to be resolved was restoring the status quo, as nearly as possible. This was not to be easily accomplished because appellants had occupied and used the property for more than five years, during which time all payments called for by the contract had been made. It was stipulated that 68 monthly payments of $150 and five annual payments had been made and that the total amounted to $12,700. Possession had been held by appellants for 70 months. Witnesses for appellees placed the average rental value of the dwelling house during this period at $100 per month. A witness for appellants placed it at $37.50 per month. Appellants occupied the store building 64 months. Appellees' expert witness fixed the rental value of this building at $75 per month, as against $37.50 per month stated by appellants' expert.

Clearly appellees were entitled to be restored to the property sold. After five years of use and occupancy, it is hardly reasonable to say that by merely surrendering it to appellees, appellants had restored them to their precontract condition. But this restoration or return to status quo is governed by equitable principles, so applied in each case as will best subserve the undoing of wrong. *Dermott Land & Lumber Co.* v. *Walter A. Zelnicker S. Co.,* 271 F. 918 (8 Cir., 1921); *Berland's Inc. of Tulsa* v. *Northside Village Shopping Center,* supra. Although Mr. Bates testified that the physical condition of the house at the time of the trial was comparable to its physical condition at the time he took possession, for some reason he said that he did not feel that he was required to return or restore the property in the same condition that he received it and added that any deterioration had been due to natural aging and not because of abuse or neglect. On the other hand, Mr. Simmons testified that the house had been remodeled at the time the contract was entered into but was

considerably run down at the time of the trial, and pointed out specific items that would require repairs, replacements and renovation. The expense for this restoration was not shown. The testimony of the expert witnesses as to the present value of the house and lot varied widely. Appellees' expert valued it at $17,500, except for ordinary wear and tear since the sale. He did not state what the value would have been if the normal depreciation had been taken into consideration. It was his opinion that the property was worth $10,000 at the time of the sale. Appellants' expert was of the opinion that the present value of the house was only $6,000. We would be unable to say from the evidence what adjustment, if any, should be made for restoring the dwelling house to its previous condition.

The chancellor decreed that appellants pay rent to appellees at the rate of $100 per month from the date of eviction. We consider this a finding that the current rental value was at that rate. It was the average rental value during appellants' occupancy as fixed by appellees' expert. It is considerably in excess of the rental fixed by appellants' expert. The basis each of these witnesses used was subject to question because neither found a really comparable situation on which to base his opinion. The chancellor's finding seems to accord more weight to the testimony of appellees' expert, and we cannot say that it was erroneous to do so. In view of the very indefinite testimony about the relative condition of the property and its comparative value, and the lack of evidence of costs of repairs, it seems that the only practical means of restoration to appellees is by allowance of rent. Certainly, the requirement that appellants, as purchasers, pay rent to appellees, the sellers, for the time appellants occupied the property is equitable. *Troxell* v. *Sandusky,* 247 Ark. 898, 448 S.W. 2d 28.

For the house, we have arrived at the conclusion that the chancellor's finding as to rent to be paid after March 1, 1975, is fairly representative of average rental values over the period of occupancy by appellants. Appellants were also liable for interest on the rental value for each month. Otherwise, appellees would not be restored to status quo. *Lutz* v. *Cunningham,* 240 Iowa 1037, 38 N.W. 2d 638 (1949); *Kunde* v.

O'Brian, 214 Iowa 921, 243 N.W. 594 (1932); *Halcomb* v. *Ison*, 140 Ky. 189, 130 S.W. 1070 (1910). See also, *Storthz* v. *Williams*, 86 Ark. 460, 111 S.W. 804.

This brings us to the problem of the store building. Its use as a store was discontinued by appellants in October, 1974, for economic reasons. Thereafter, appellants used it for storage of insulation used in a business commenced by Mr. Bates, and he said that it was useful for that purpose. But it developed that appellees had never been in position to deliver title to it, because the lease for the land it occupied had expired in 1963. In spite of this, the landowners seem to have laid no claim to the building but the purchaser at their partition sale successfully obtained possession of it. Obviously, appellees had possession of the building in 1969 or they could not have delivered possession to appellants, who had the use of it at all times for 68 months.

When the contract is rescinded because of the failure of the vendor's title, he cannot ordinarily recover from the purchaser for the use and occupation, prior to rescission, of the land to which the title failed. *Hough & Wood* v. *Birge*, 11 Vt. 190 (1839); *Griffith* v. *DePew*, 3 A K Marsh (Ky.) 177, 13 Am. Dec. (1820). Upon rescission in equity, the courts require the purchaser in possession to account for rents during his occupancy as an offset to, or abatement of the consideration recovered, only when it appears that the purchaser cannot be made liable therefor to the owner of the paramount title to the property. *Curtis* v. *Brannon*, 98 Tenn. 153, 38 S.W. 1073, 69 LRA 760 (1897). When the purchaser is accountable to the actual owner for rents, the offset is not allowed. *Webb* v. *Conn*, 1 Litt (Ky.) 83, 13 Am. Dec. 225 (1822).

Applying equitable principles, appellants are entitled to recover the purchase money paid, with interest from the date of each payment. *Shelton* v. *Ratterree*, 121 Ark. 482, 181 S.W. 288. There should be credited against this total, the rental value of the dwelling house and grounds ($100 per month) with interest on the rental value for each month. No credit should be allowed for use and occupancy of the store building.

We conclude that appellees are not entitled to have the value of the store fixtures and the good will of the business they had been conducting there as part of their restoration to the position they occupied at the time of the sale. These were not a part of the property sold under the contract. Mr. Bates testified that he bought the stock, fixtures and equipment for $4,000 by a separate agreement and paid George R. Simmons by check for that amount on November 14, 1969 and exhibited the check. Simmons claimed that this payment was for inventory alone and did not include fixtures of the value of $2,000, most of which were probably not permanently affixed to the building. According to Simmons, these fixtures were a part of the property sold under the contract, but we do not agree with him that they should be considered as "structures and improvements" under the written contract, and we are inclined to accept appellants' testimony in view of the fact that these items are not described in the contract.

Since real estate is involved, we remand the case to the chancery court for the entry of a decree consistent with this opinion.

Robert Lewis WILLIAMS *v.* STATE of Arkansas

CR 76-7 535 S.W. 2d 842

Opinion delivered May 3, 1976

Charles D. Barnette, for appellant.

Jim Guy Tucker, Atty. Gen., by: *B. J. McCoy,* Asst. Atty. Gen., for appellee.

JOHN A. FOGLEMAN, Justice. Robert Lewis Williams filed a petition for post-conviction relief from his conviction of possession of heroin, a felony, after trial on June 4, 1973, resulting in a sentence to seventy years' imprisonment on three counts. He also filed a motion for disqualification in the post-conviction proceeding of Circuit Judge John W. Goodson, who had presided over his trial. In support of this motion, appellant Williams filed an affidavit in which he stated that immediately preceding the jury's being excused from the

courtroom to begin its deliberations in his trial, Judge Goodson had stated to the jury that he saw no reason why the defendant Williams should not be found guilty as charged. Thereafter, Williams was charged with and convicted of perjury in violation of Ark. Stat. Ann. § 413001 (Repl. 1964) in the making of this statement under oath.

For reversal, Williams first contends that the court erred in denying his motion for directed verdict. His argument on this point is not well taken. He contends that the matter pending before the court was his petition for post-conviction relief and that the alleged false statements were not material to the issues raised by it, since the affidavit was in support of his motion for disqualification of the presiding judge only. He relies on *Lednum* v. *State,* 169 Ark. 396, 275 S.W. 699. There are three factors that made the denial of the motion proper. In the first place, reliance on *Lednum* is inappropriate. The governing statute has been amended since that decision. We held that a perjury conviction cannot be based upon a false affidavit which does not show upon its face that its subject matter is material in a cause, matter or proceeding before a court, tribunal, body corporate or other officer having authority to administer oaths. The amendment has materially changed the definition of the crime of perjury upon which the holding in *Lednum* was based. This amendment was made by Initiated Act No. 3 of 1936. The statute, as amended, appears as Ark. Stat. Ann. § 41-3001 (Repl. 1964) which now reads as follows:

> Perjury *in the first degree* is the wilful and corrupt swearing, testifying or affirming falsely to any material matter in any cause, matter or proceeding before any court, tribunal, body corporate or other officer having by law authority to administer oaths, or to *any affidavit, deposition or probate authorized by law to be taken before any court, tribunal, body politic or officer.* (Italicized words were added by amendment.)

Secondly, appellant's contention is unsound in that perjury in the second degree is a lesser included offense. *People* v. *Samuels,* 284 N.Y. 410, 31 N.E. 2d 753 (1940). That crime is defined in Ark. Stat. Ann. § 41-3002 (Repl. 1964) which, in

pertinent part, reads as follows:

> A person who swears . . . that any . . . affidavit . . . by him subscribed, is true, in any action of any kind, or in a special proceeding, or upon any hearing, or inquiry, or on any occasion in which an oath is required by law, or is necessary for the prosecution or defense of a private right, or for the ends of public justice, or may lawfully be administered, and who in such action or proceeding, or on such hearing, inquiry or other occasion, wilfully and knowingly testifies, declares, deposes or certifies falsely, in any matter, or states in his testimony, . . . affidavit, or certificate, any matter to be true which he knows to be false, and who is not guilty of perjury in the first degree, is guilty of perjury in the second degree . . .

The third factor is that the statements in the affidavit were certainly material, as a matter of law, to the proceeding before the court, which was the motion to disqualify, not the petition for post-conviction relief. Where there is no dispute about the facts sworn to, any question of materiality is one of law for the court. *Bryant* v. *State,* 208 Ark. 192, 185 S.W. 2d 280; *Carter* v. *State,* 181 Ark. 665, 27 S.W. 2d 781.

Williams also asserts that there was error in the court's refusal to give his requested instruction that if the facts sworn to were not material to the proceedings before the court, the defendant should be found innocent. It seems to us that there was no question of fact for the jury as to materiality. Furthermore, the materiality of the statements in an affidavit is not an essential element of perjury in either degree under the statutes applicable to this prosecution. Ark. Stat. Ann. § 41-3001, 3002 (Repl. 1964). In this respect our statutes make the crime with which appellant was charged that which was known to the common law and in many statutes as "false swearing." To constitute that offense, the false statement need not be material, even though it should be relevant. *Beckley* v. *State,* 443 P. 2d 51 (Alaska, 1968); *State* v. *Ellenstein,* 121 N.J.L. 304, 2 A. 2d 454 (1938); *Barkley* v. *Commonwealth,* 264 S.W. 2d 297 (Ky. 1954); *People* v. *Samuels,* 284 N.Y. 410, 31 N.E. 2d 753 (1940); *State* v. *Byrd,* 28 S.C. 18, 4 S.E. 793, 13 Am. St. Rep. 660 (1888); *State* v. *Miller,* 26 R.I. 282, 58 A. 882 (1904).

The instruction offered was not a correct statement of the law, so its refusal was not error. *Walker* v. *State,* 241 Ark. 300, 408 S.W. 2d 905, appeal dism. and cert. den. 386 U.S. 682, 87 S. Ct. 1325, 18 L. Ed. 2d 403, reh. den. 387 U.S. 926, 87 S. Ct. 2027, 18 L. Ed. 2d 987.

The third point for reversal is well taken. Appellant elected not to testify and offered no evidence. He had entered a plea of not guilty. By so doing, he availed himself of any defense and all matters of justification and excuse available under the law, which are not required to be specifically pleaded. *Baker* v. *State,* 236 Ark. 91, 365 S.W. 2d 119; *Flake* v. *State,* 156 Ark. 34, 245 S.W. 174. He put all material facts alleged in the information in issue. Ark. Stat. Ann. § 43-1223 (Repl. 1964); *Hill* v. *State,* 253 Ark. 512, 487 S.W. 2d 624. Even the most patent truths were in issue. *Roe* v. *U.S.,* 287 F. 2d 435 (5 Cir., 1961); cert. den. 368 U.S. 824, 82 S. Ct. 43, 7 L. Ed. 2d 29. This plea was a continuing denial of every bit of evidence and every statement of every witness who testified against him. *State* v. *Whitney,* 7 Ore. 386 (1879); *United States* v. *DeAngelo,* 138 F. 2d 466 (3 Cir., 1943); *State* v. *Godwin,* 227 N.C. 449, 42 S.E. 2d 617 (1947). More importantly, he invoked his right to the presumption of his innocence and put the burden upon the state to prove his guilt beyond a reasonable doubt, as well as the right to remain silent in the hope that the jury would not be convinced of his guilt beyond a reasonable doubt. *State* v. *Hardy,* 189 N.C. 799, 128 S.E. 152 (1925); *State* v. *Godwin,* supra.

The presumption of innocence is so strong that it serves an accused as evidence in his favor throughout the trial and entitles him to an acquittal unless the state adduces evidence which convinces the jury beyond a reasonable doubt that he is guilty of the crime charged. *Cranford* v. *State,* 156 Ark. 39, 245 S.W. 189. It is a fundamental right in the American system antedating any constitution and an essential of due process of law. *Reynolds* v. *United States,* 238 F. 2d 460 (9 Cir., 1956); *Shargaa* v. *State,* 102 S. 2d 814 (Fla., 1958), cert. den. 358 U.S. 873, 79 S. Ct. 114, 3 L. Ed. 2d 104; *State* v. *Cynkowski,* 19 N.J. Super. 243, 88 A. 2d 220 (1952); aff'd. 10 N.J. 571, 92 A. 2d 782 (1952); *People* v. *Morris,* 260 Cal. App. 2d 848, 67 Cal. Rptr. 566 (1968); *People* v. *Weinstein,* 35 Ill. 2d

467, 220 N.E. 2d 432 (1966); *People* v. *Di Manno,* 15 Misc. 644, 182 N.Y.S. 2d 937 (1959). It alone puts in issue the truth and credibility of all of the evidence offered against an accused. *State* v. *Lackey,* 251 N.C. 686, 111 S.W. 2d 891 (1960); *State* v. *Hardy,* supra.

In spite of this, the deputy prosecuting attorney in opening the arguments to the jury stated, "To me it is just a pure and simple matter of a man lying who has been convicted, is now in the penitentiary, and is coming up here and lying to the Court, and he is lying to the jury to get himself out of a pickle." Prompt and proper objection was made and overruled. The last clause certainly reminded the jury immediately that appellant had not testified. Even though this, in and of itself, may not have constituted reversible error, had it not, at the same time, carried the clear implication that, by remaining silent, as he had a constitutional right to do, and by not offering any evidence, his plea of not guilty, which he had a clear right to enter even if he had no doubt in his own mind about his guilt, constituted lying to the jury, rather than just relying on the presumption of his innocence and putting the burden on the state to prove his guilt beyond a reasonable doubt. This, of course, was a misstatement, even though we are confident that, instead of being intentional, it resulted from the prosecutor's zeal and the natural indignation that he would feel when convinced that wholly unwarranted and baseless charges had been made against the presiding judge of the court.

The statement constituted error beyond doubt. Closing arguments must be confined to questions in issue, the evidence introduced and all reasonable inferences and deductions which can be drawn therefrom. *Simmons* v. *State,* 233 Ark. 616, 346 S.W. 2d 197. Whenever trial counsel argues matter that is beyond the record and states facts or makes assertions not supported by any evidence that are prejudicial to the opposite party, there is clearly error. *Walker* v. *State,* 138 Ark. 517, 212 S.W. 319; *McElroy* v. *State,* 106 Ark. 131, 152 S.W. 1019; *Willyard* v. *State,* 72 Ark. 138, 78 S.W. 765; *Fakes* v. *State,* 112 Ark. 589, 166 S.W. 963.

When objection is made, the presiding judge should ap-

propriately reprimand counsel and instruct the jury not to consider the statement, and in short, do everything possible to see that the verdict of the jury is neither produced nor influenced by such argument. *Walker* v. *State,* supra. The failure to sustain a proper objection to argument of matters not disclosed by the record is serious error, because it gives the appearance that the improper argument has not only the sanction but the endorsement of the court. *Miller* v. *State,* 120 Ark. 492, 179 S.W. 1001; *Hays* v. *State,* 169 Ark. 1173, 278 S.W. 15; *Elder* v. *State,* 69 Ark. 648, 65 S.W. 938. It has even been said that the overruling of a proper objection to a statement amounting to a declaration of law is tantamount to the giving of an instruction to that effect. *Autrey* v. *State,* 155 Ark. 546, 244 S.W. 711. It is true that the trial judge has a wide latitude of discretion in the control of arguments to the jury, but it is not unlimited. *Holcomb* v. *State,* 203 Ark. 640, 158 S.W. 2d 471; *Todd* v. *State,* 202 Ark. 287, 150 S.W. 2d 46. It has been said that this court will always reverse where counsel goes beyond the record to state facts that are prejudicial to the opposite party unless the trial court has by its ruling removed the prejudice. *Adams* v. *State,* 176 Ark. 916, 5 S.W. 2d 946. We have also said that failure of the trial court to interfere calls for a reversal. *Hays* v. *State,* supra.

We have carefully considered the record in an effort to determine whether this error could be said to be harmless, because the guilt of appellant seems rather clear. When we consider, however, that in this case, the jury, which could have meted out punishment ranging from a fine of $50 to 15 years' imprisonment, fixed the sentence at seven years, we cannot say that the prestige of the prosecuting attorney who made the statement enhanced by the prestige of the circuit judge, did not make the error prejudicial to appellant.

For this reason, the judgment is reversed and the cause remanded for a new trial.

ALUMINUM COMPANY OF AMERICA
v. Virgil D. McCLENDON

75-318 535 S.W. 2d 832

Opinion delivered May 3, 1976

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

Hardin & Rickard, by: *Robert N. Hardin,* for appellee.

J. FRED JONES, Justice. This is a workmen's compensa-

tion case in which the self-insured employer, Aluminum Company of America, appeals from a circuit court judgment which affirmed a Commission award of compensation to the appellee, Virgil D. McClendon, on a finding that Mr. McClendon was totally and permanently disabled because of a back injury.

Mr. McClendon was 62 years of age and was contemplating retirement when he injured his back in attempting to lift a heavy piece of machinery in the course of his employment as a mechanic. The appellant and appellee agree that the only question on this appeal is whether there was any substantial evidence to support the Commission's finding that Mr. McClendon was permanently and 100% or totally disabled because of his injury and we conclude that there was not.

The recorded evidence consists of the testimony of the appellee-claimant; the letter reports and testimony by deposition of two medical specialists, Dr. Thomas M. Fletcher, a neurosurgeon, and Dr. Walter G. Selakovich, an orthopedic surgeon. We shall discuss the medical evidence first.

According to Dr. Fletcher, he first saw Mr. McClendon on May 10, 1973, at which time Mr. McClendon complained of low back pain with radiation into the right hip and leg following an accident which occurred on the previous day when Mr. McClendon's foot slipped while he was lifting a heavy object and "he jerked his back and hip." X-rays showed some degenerative changes in the spine with a narrowing of the L-5 S-1 interspace and Dr. Fletcher suspected a ruptured disc. Mr. McClendon showed gradual improvement under conservative treatment by Dr. Fletcher and on July 31, 1973, Dr. Fletcher reported that Mr. McClendon had shown slow but definite improvement, but that he still complained of some pain with activity and exhibited a slight limp while walking. In this report Dr. Fletcher reported a moderate limitation in back motion but deep tendon and motor functions as normal. He reported that since Mr. McClendon's work activity included climbing ladders, stairways, squatting, etc., he would require a longer recovery period before

returning to work and stated he would re-examine Mr. McClendon at the end of one month.

Dr. Fletcher re-examined Mr. McClendon on August 2, 1973, after which he reported that Mr. McClendon was still having difficulty from back pain, stiffness and limitation of motion, and that nerve root irritation in the right lower extremity continued to persist. He advised Mr. McClendon to enter the hospital for physical therapy and that if he did not show improvement within a reasonable period of time after conservative treatment, he would recommend the performance of a myelogram in contemplation of surgery.

On September 19, 1973, Dr. Fletcher reported that Mr. McClendon had shown good improvement following physical therapy in the hospital for approximately eight days and was able to greatly increase his activity, but that on the previous Tuesday he bent over while engaged in some slight activity and experienced the recurrence of his back pain. On this examination Dr. Fletcher found paraspinal muscle and other symptoms normally associated with a disc lesion and he discussed with Mr. McClendon the probable necessity of a myelogram. Mr. McClendon advised Dr. Fletcher that he had had a myelogram about 12 years previously and that he had experienced considerable attending pain and was reluctant to have a myelogram done unless absolutely necessary. Dr. Fletcher expressed doubt that Mr. McClendon would be able to return to regular work activity without surgery and expressed an opinion that Mr. McClendon would eventually have to have a myelogram to completely evaluate the problem.

Dr. Fletcher last saw Mr. McClendon on February 5, 1974, at which time he diagnosed the condition as lumbar disc disease with disc protrusion and he concluded his report as follows:

> This patient has degenerative lumbar disc disease and disc protrusion and he states that he can remain relatively free of pain as long as he remains inactive but with even significant degree of walking and any bending, lifting or stooping he gets recurrence of pain. I

> would estimate that he has a permanent partial disability of approximately 10 percent of the body as a whole as regards his lower back problem and I think that his problem is a permanent one which will prevent him from returning to regular work activity.

On February 20 and March 3, 1974, apparently in response to inquiries from the employer, Dr. Fletcher expressed the opinion that Mr. McClendon reached the end of his healing period as of January 1, 1974, with a permanent partial disability estimated at ten per cent to the body as a whole and expressed the opinion that Mr. McClendon's problem would prevent him from returning to regular work activity at the same occupation he had prior to injury.

On September 20, 1974, over seven months after he was last seen by Dr. Fletcher, Mr. McClendon was referred by the referee to Dr. Selakovich for orthopedic evaluation of his low back complaints. Dr. Selakovich reported that Mr. McClendon gave a history of having had a myelogram performed some 14 years previously in connection with a similar type injury and in this connection with the old injury, Dr. Selakovich said:

> His acute symptoms at the initial injury persisted for a number of weeks, however, he gradually returned to his usual activities and has worked the intervening time without apparent difficulties. Relates he has a work record at Alcoa of at least 20 years. It has been some months since Dr. Tom Fletcher has seen this man.

Dr. Selakovich then reported as to his own findings and recommendations as follows:

> Today's examination reveals recurrent low back pain complaints aggravated by posture patterns, carrying or any type of back bending movements or moderately strenuous work. He relates some referral of pain into the left buttocks but does not specifically relate paraesthesias or weakness referable to the lower extremities. Although movements are slow and deliberate they are at least 80% of normal. Straight leg raising is

slow and deliberate also with 80% on the right and 70% on the left. Laseques, Bragard's and Fabers testing and sciatic nerve stretch test are considered negative. Neuromuscular examination is considered normal except for a slight decrease in the left achilles reflex which is improved with reinforcement. There is no sensory deficit. A full lumbosacral series was obtained and a review of these films reveal: There is an obvious decrease in the intravertebral disc space at the L5S1 level and this is associated with sclerosis of the contigious bony surfaces about the disc space. There is also irregularity and degenerative changes about the facets in this area. There also appears to be degenerative disc disease at the L1L2 levels with definite narrowing and degenerative arthritic changes being present. There is no evidence of a list or straightening of the normal lumbar lordosis. The sacroiliac joints and hip joints are normal.

Apparently there has been some general improvement in regard to the objective findings since this man was last seen by Dr. Thomas Fletcher. At this time I do not feel the myelogram is warranted but will concur with Mr. McClendon that a 10% permanent partial physical impairment to the back as a whole does not justify the persistent disability that he has. Also, it is felt that should he obtain a lumbosacral support in addition to continued conservative non surgical management of his problem that he would probably have less symptoms and be able to carry on light type of activities. It is felt that he cannot return to the strenuous type of work that he had been doing at Alcoa. A permanent partial physical impairment of 25% to the back as a whole appears proper. It is recommended that Mr. McClendon obtain the above mentioned support.

Dr. Fletcher's testimony by deposition did not add a great deal to his previous medical reports. Under his deposition Dr. Fletcher said that when he last saw Mr. McClendon he was definitely of the opinion he had a protruding disc that could be relieved by surgery, but that prior to recommending surgery in Mr. McClendon's case, he would desire confirmation by myelogram. However, Mr. McClendon definitely

resisted the performance of a myelogram because of pain he had experienced 10 or 12 years previously following a myelogram. He said it was his opinion that Mr. McClendon had at least a fifty-fifty chance of being returned to practically normal employment following surgical removal of the offending disc and, as to Mr. McClendon's condition when Dr. Fletcher last saw him, he stated as follows:

> I felt after seeing him initially that he had degenerative changes in the lumbar spine and that he had a lumbar disc protrusion or ruptured disc. Under treatment for this he reached a point where he was more or less in a static phase in that as long as he limited activities he didn't have symptoms of much severity, but he wasn't able to return to activities that would be strenuous or even of a moderate type which would involve his work activity, of course.

The substance of Dr. Selakovich's testimony by deposition was to the effect that Mr. McClendon did have a narrow disc space at L-5 S-1 but that the roentgenograms indicated an old disc problem antedating Mr. McClendon's last injury. He said that Mr. McClendon had apparently improved considerably since he was last seen by Dr. Fletcher and Dr. Selakovich was of the opinion a myelogram or surgery was not indicated at the time he saw Mr. McClendon. In this connection Dr. Selakovich said:

> A. . . . I'm saying I don't think that this man has the acute symptoms and findings to warrant performing a major operation on his back because I don't think he has enough findings there that that is necessary.
> * * *
> Q. Do I understand that it's your opinion that he doesn't have a protruded disc but that he just has degenerative disc disease of long standing?
> A. Well, actually it amounts to two things. I think he has disc disease as a basic underlying problem. I don't feel that at the present time of my examination that the protrusion is such as to produce the symptoms which

would warrant doing a myelogram. You see when you do a myelogram, like I mentioned earlier, it prepares the surgeon for a better appreciation of the problem. When he takes the disc out he takes it out because it's got pressure on the nerve sufficient to cause the nerve not to function properly. Now Mr. McClendon's nerve to my mind appears to be functioning properly. In other words, he doesn't have the symptoms of acute pressure on the nerve root and it's for that reason that you do protruded disc removal. You take away this disc that's popped out and eliminate the pressure on the nerve.

* * *

A. He doesn't have those symptoms now as far as the nerve pressure to indicate he needs that. And like I said earlier, I'd like to know if in fact Dr. Fletcher has checked him in the recent past to state that he still feels the same way. You told me it's February. Well, you know a ruptured disc, a lot of people get well without surgery.

Q. Well, then I take it that you feel that if Mr. McClendon back in February was showing neurological signs which caused Dr. Fletcher to recommend the myelogram and possible surgery, that you didn't find those same neurological signs in September?

A. That's correct.

* * *

Q. But you now say he has improved. Do you feel that he is capable of being a productive individual?

A. I think he can do light type of work that doesn't necessitate a lot of heavy lifting, carrying; a job that doesn't require him to do a lot of back-bending movements, awkward lifting, things like that. Now a light type of job — and I told him to use his support which would assist in that — I think he can do that kind of work.

* * *

A. . . . I think in his own mind too he knows that there has been some change, improvement, and really you could take my examination or you could get an examination of somebody else and I venture to say that with the findings that I noticed on the 20th of September I doubt if anybody would recommend a myelogram.

* * *

Q. Now you came up with a permanent partial impairment of 25 percent to the back, although you state he had improved over the condition apparently that he had back in February when he was examined by Dr. Fletcher, and Dr. Fletcher had assessed only a 10 percent disability.
A. I gave that physical impairment because there is obvious evidence as far as I'm concerned on roentgenograms that he's got the type of back that will not permit him to do things that I've outlined, that he's got a back that will not tolerate strenuous work. He's got evidence of disc problems at three levels. This man's worked for 20 years at one establishment. I have to assume that he's probably incurred that whole thing there to begin with. But irregardless he's had enough changes there that he's got a back that will not tolerate strenuous type of work anymore.
* * *
A. . . . If he can get a light job where he's not constantly bending and picking up and carrying things, heavy type work, awkward lifting, I think he'll function with his support quite well.

On cross-examination Dr. Selakovich testified as follows:

Q. Doctor, how long will it be necessary for him to wear this back brace that you've recommended for him?
A. Off and on it might be from now on. It could be. He could get to the point where he felt real good and then wean himself from it and just use it for those times when he would give himself some stress. They're going to drive to Dallas or some long trip, or go out fishing, what have you, things like that. I think he's the king of guy that shouldn't ride, for instance, farm equipment with a lot of bouncing and jerking. He ought to use it if they go hunting or something, go across some rough country roads. Because he just doesn't have that shock absorber effect of a normal disc.

The claimant-appellee, Mr. McClendon, testified that he was 62 years of age and was a maintenance mechanic for the appellant and had worked at that employment for around 22 years. He said that prior to when he went to work for the appellant he had done automobile mechanic work, and in this connection he testified as follows:

> A. Well, I done mechanic work for several years back prior to that.
> Q. Is that similar to the mechanic work you were doing for Alcoa?
> A. Yes. Similar to it. Only in a way. It's the same name, but otherwise it's not hard work. Alcoa had a heap harder work. Heavy lifting.
> Q. I take it when you are talking about your earlier years employment, you are talking about auto mechanic?
> A. Auto mechanics. Yes, sir.
> Q. And when you talk about mechanic work for Alcoa, that is not auto mechanics, is it?
> A. No, sir.
> Q. And you say the work for Alcoa was lighter type work than the auto mechanic work?
> A. No, sir. It was a heap more times heavier.
> Q. I didn't understand you. Which one was lighter?
> A. Car mechanic is lighter.
> Q. Is lighter than the work you were doing for Alcoa?
> A. Yes. Alcoa work, say, like I had a lot of machinery pumps, heavy machinery pumps, heavy motors, this, that, and the other, lifting and prizing, this, that, and the other, that they work on. So, it's a heap harder work than the work on a car, you know. On a car, you use a jack to jack them up and you are working underneath them or on top of them. Ain't no heavy lifting to it like there are over there.
> Q. Is that about the only line of occupation you have ever followed during your lifetime?
> A. Yes, sir. Back the years before when I was home before I was married, I done farm work.

Mr. McClendon said he had a tenth grade education; that he had lived in and around Benton all of his life; that he

owned and lived on a farm of about 50 acres near Benton where he would keep about 50 head of cattle, but he had sold the cattle because he was not able to attend to them in that he was not able to cut, bale and carry hay in feeding them. He said that prior to his injury on May 19, 1973, he was in good health and able to work. He said he made a garden at his home prior to his injury but that since his injury he had not been able to make a garden like he used to do it. He said he had a garden tractor and that climbing up and down on the garden tractor made his back and head hurt, and that he is unable to push a lawn mower to do any good since his injury. As to making a garden, he said his wife makes most of it. He said his wife does about all the mowing of their lawn but that it is necessary for him to hire someone to fix his fences. He said that prior to his injury he enjoyed fishing and hunting some but that he is unable to fish now like he did. He said he just couldn't work and get out around or lift anything. He then testified as follows:

> Q. Can you tell us using specific instances of your day to day activities of how this has affected you? Things that you cannot do now that you did before?
> A. Well, just a lot of times my back and hip hurts. It hurts maybe two or three days' time. I can hardly get around, limp around on it. Maybe clear up and get by pretty good on it. . . .

Mr. McClendon said he takes aspirin for pain at night but the pain interferes with his sleep quite often. He then testified as follows:

> Q. Now, Mr. McClendon, have you attempted to seek out any type of new employment?
> A. No. I wouldn't be able to. I'm just not able to.
> Q. All right. I'll ask you that question then. Why have you not sought other employment?
> A. Well, because, like I say, I ain't able to do a day's work for anybody. Can't even hold up to do a day's work.
> Q. I take it you discussed with Doctor Fletcher your possibilities of going back to your job at the plant, did you not?

A. Yes.
Q. And he has indicated or he has said very plainly in his reports that you are unable to go back to that work?
A. Yes. That's what he told me.
Q. And since him telling you that, you have not tried to get other employment?
A. No, sir, I haven't. Sure haven't.
Q. My question is, why have you not tried to get other employment?
A. I just ain't able to do a day's work. Ain't able to do work. I don't believe there's any use in trying to go out and get a job when I ain't able to do it, can't do it. Can't do my work around the place there even.

On cross-examination Mr. McClendon said that he had worked as an automobile mechanic for several years before he went to work for the appellant. He said he had worked as an automobile mechanic for Mr. Wickman, George Stroud and then at the Pontiac place in Benton. He said at times he had owned his own garage and had employees working under him. He said he injured the right side of his back about 12 or 14 years ago while helping to lift a large pump and carry it up some stairs. He said he was hospitalized on that occasion and was given a myelogram which was very painful. He said he was fitted with a brace on that occasion and was off work for quite awhile but finally became able to go back to work. He said that after he became able to return to work on that occasion, he was able to continue, and did continue, whatever work was assigned to him. He said that after he went back to work following his previous injury, his back hurt part of the time but that it hurt worse now since he has sustained the injury to the other side of his back. Mr. McClendon then testified on cross-examination as follows:

Q. You haven't made any effort to look around and see what work might be available for you that you could do even though your back hurts you?
A. I don't know of anything. Like I say, I wouldn't want to go out hired — Alcoa won't give me a job back and that's where I worked. Why don't they give me a job back where I can go back to work if I'm able to work. If they won't take me nowhere and do what I can and

> what I'm able to do, just set a pencil in my hand writing down a number or something, I'll be glad to do it, but as far as getting out there lifting, doing hard work, I ain't able to, and I won't go out on a job unless I'm able to.
> Q. But you consider yourself capable of doing work where you write down numbers with a pencil, is that it?
> A. I could do that, yes, sir.
> Q. And anybody who has a job that's — Any employer who has work that involves sitting, keeping records or keeping time records or anything, you could do that, couldn't you?
> A. Yes, sir, I could. Yes, sir.

At the conclusion of the testimony the appellant's attorney suggested that Mr. McClendon be returned to Dr. Fletcher for a current examination for a determination of whether he was better or worse than when Dr. Fletcher last saw him, and whether he would now recommend surgical intervention. As an alternative the appellant's counsel expressed the desire to take Dr. Fletcher's deposition. The appellee's counsel objected to further delay in the matter and argued that in the light of the doctors' reports and a previous statement by the appellant's counsel, that he did not desire to cross-examine Dr. Fletcher, that the right to orally examine Dr. Fletcher had been waived by the appellant. The referee permitted the taking of Dr. Fletcher's deposition and in doing so stated:

> I'm going to do that without requiring another examination. I don't think that would gain anything. Doctor Fletcher knows as much about Mr. McClendon's condition as he's ever going to know at this point. I will give each of you a chance. The Respondents can ask him what he thinks one way or the other, and you can point out the Claimant's age and everything else and make sure that he fully considers it.

"Disability" within the Workmen's Compensation Law means incapacity because of injury to earn, in the same or any other employment, the wages which the employee was receiving at the time of the injury. Ark. Stat. Ann. § 81-1302 (e) (Repl. 1960). Whether or not a claimant in a workmen's

compensation case has sustained such injury and the extent thereof, are questions of fact to be determined by the Commission from the competent evidence and courts do not disturb the Commission's findings if the evidence on which they are based is substantial. But the question as to whether such evidence is substantial is a question of law.

Substantial evidence has been defined as "evidence that is of sufficient force and character that it will, with reasonable and material certainty and precision, compel a conclusion one way or the other. It must force or induce the mind to pass beyond a suspicion or conjecture." Ford on Evidence, vol. 4, § 549, page 2760. Substantial evidence has also been defined as "evidence furnishing a substantial basis of fact from which the fact in issue can reasonably be inferred; and the test is not satisfied by evidence which merely creates a suspicion or which amounts to no more than a scintilla or which gives equal support to inconsistent inferences." Wigmore on Evidence, vol IX, 3rd ed. § 2494, footnote at page 300. See also *Tigue* v. *Caddo Minerals Co.,* 253 Ark. 1140, 491 S.W. 2d 574; *Goza* v. *Central Ark. Dev. Council,* 254 Ark. 694, 496 S.W. 2d 388.

Apparently Dr. Fletcher in the case at bar considered Mr. McClendon a likely candidate for the surgical removal of a protruding disc and considered that his symptomatic pain could be eliminated or greatly reduced by such procedure, and that there would be at least a fifty-fifty chance that Mr. McClendon would be able to return to his regular employment. Mr. McClendon resisted such procedure because of prior pain he had experienced from a myelogram which Dr. Fletcher also recommended for the purpose of confirming his opinion as to the extent and exact location of the suspected protruding disc prior to surgery. Dr. Fletcher found that Mr. McClendon's condition was improving up to his last examination of him.

Ark. Stat. Ann. § 81-1311 (Supp. 1975) provides as follows:

> . . . where an injured person unreasonably refuses to submit to a surgical operation which had been advised

> by at least two (2) qualified physicians and where such recommended operation does not reasonably involve risk of life or additional serious physical impairment the Commission may, in fixing the amount of compensation take into consideration such refusal to submit to the advised operation.

Of course, in the case at bar only two qualified physicians examined Mr. McClendon and Dr. Selakovich found that his condition had greatly improved over what it evidently was when Dr. Fletcher last saw him.

Ark. Stat. Ann. § 81-1319 (i) (Supp. 1975) provides as follows:

> The Commission may upon its own initiative at any time where compensation payments are being made without an award, and shall in any case where the right to compensation has been controverted or where payments of compensation have been suspended, or where an employer seeks to suspend payments made under an award, or on application of an interested party, make such investigation, cause such medical examination to be made, hold such hearings, and take such further action as the Commission deems proper for the protection of the rights of all parties.

The Commission referee did send Mr. McClendon to Dr. Selakovich whose findings are above set out in some detail and will not be summarized here. Dr. Selakovich, in explaining the difference of his estimate of permanent partial disability and that of Dr. Fletcher, in the light of Mr. McClendon's apparent improvement, testified that he went beyond the strict functional disability and considered to some extent the types of work Mr. McClendon had done and was capable of doing. From the entire record it would appear that the evidence pertaining to the extent of permanent disability in this case falls somewhere between that submitted in *Wilson & Co.* v. *Christman,* 244 Ark. 132, 424 S.W. 2d 863 (1968), and the evidence submitted in *Ray* v. *Shelnutt Nursing Home,* 246 Ark. 575, 439 S.W. 2d 41. We deem it unnecessary to review the evidence submitted in those two cases. In *Christman* the highest medical estimate of permanent partial disability was

30% and we affirmed the Commission's award of 60%. In that case there was other evidence beside medical and Christman's own testimony pertaining to his unemployable status. In *Ray* v. *Shelnutt Nursing Home* Mrs. Ray had undergone the removal of a ruptured disc and had spinal fusion. She was younger than the appellee in the case at bar but like Mr. McClendon she had experience in lighter types of work than she was doing at the time of her injury. While Mrs. Ray did not testify as to things she was unable to do, she did testify that she had not done any work or attempted to work since her injury, whereas, Mr. McClendon testified that he was unable to lift bales of hay in feeding his cattle; that he was unable to work his garden or mow his lawn as well as he did prior to his injury. He testified that he would be able to hold a job such as timekeeper and also testified that he was an experienced automobile mechanic and had owned and operated his own business as such. He said auto mechanic work was many times lighter than the work he was doing when he was injured. Like Mrs. Ray, Mr. McClendon had sought no other employment. The medical estimate of permanent partial disability in *Ray* v. *Shelnutt* was 20%; the Commission awarded 40% and we sustained the trial court's reversal as to the additional 20%. We only cite the *Christman* and *Ray* cases for comparison of the evidence and we in no sense suggest that Mr. McClendon's permanent disability is somewhere between the 20% awarded Mrs. Ray and the 60% awarded Christman. Neither do we suggest that we would not have affirmed a greater award than 60% in *Christman,* or that we would not have affirmed such award as the Commission may have made in *Ray* if there had been substantial evidence to support it. In other words, we make it perfectly clear that we do not suggest the extent of Mr. McClendon's permanent disability. We only say that we find no substantial evidence to support the Commission's finding that Mr. McClendon was 100% disabled and the Commission's award of *permanent total* disability.

The judgment is reversed and this cause remanded to the circuit court with directions to remand to the Commission for further procedure and consideration not inconsistent with this opinion.

Reversed and remanded.

AFFILIATED FOOD STORES, INC., Oral W. EDWARDS and NATIONAL SURETY CORPORATION *v.* BANK OF NORTHEAST ARKANSAS

75-240 536 S.W. 2d 693

Opinion delivered May 3, 1976
[Rehearing denied June 14, 1976.]

Smith, Williams, Friday, Eldridge & Clark, by: *Joe D. Bell,* for appellants.

Parker & Henry, for appellee.

CONLEY BYRD, Justice. Appellee Bank of Northeast Arkansas, as a secured creditor of one William T. Lawson, brought this replevin suit against appellants, Affiliated Food Stores, Inc. and Oral W. Edwards, for the recovery of the secured property which had an alleged value of $54,525.30. Appellant National Surety Corporation became the surety upon the redelivery bond, Ark. Stat. Ann. § 34-2109 (Repl. 1962), executed by Affiliated and Edwards. From a judgment giving possession of the property to appellee and awarding damages against appellants in the amount of $55,105.00 comes this appeal.

The record shows that William T. Lawson, in purchasing the grocery store known as Lawson's Thriftway from appellant Affiliated Food Stores Inc., borrowed part of the purchase price from appellee and executed a security agreement upon the equipment and fixtures to cover his indebtedness. The unpaid balance of Lawson's note at the time of filing the replevin action was $66,012.33, plus accrued interest of $1,207.45. After appellee was granted its security interest, Lawson, who became financially embarrassed, assigned his interest to Shur-Value Stamps, Inc. In turn Shur-Value Stamps, Inc. leased the store premises and equipment to appellant Affiliated who subleased to appellant Edwards. Neither appellants Affiliated or Edwards were personally liable to appellee. Appellants at first denied that appellee was entitled to possession of the property and executed a

redelivery bond with appellant National Surety Corporation as surety. On May 3, 1974, appellants wrote a letter to appellee stating that they intended to surrender the equipment and fixtures to appellee on May 19, 1974. On May 10, 1974, appellants amended their answer by pleading a tender of the equipment to appellee. A hearing was held on May 16, 1974, at which time appellants stated to the trial court that they were making a tender of the equipment and fixtures and that the surety would remain liable on the redelivery bond for any damages due. The trial court at that time held that after the execution of the redelivery bond appellants were not entitled to make a tender of the property in a replevin suit.

Subsequently, the trial court ruled that appellants were not entitled to show the tender and that they were liable for damages and loss of use of the property from February 19, 1974, to the date of trial. In this the trial court erred. Chief Justice English in *Norman* v. *Rogers,* 29 Ark. 365 (1874), in distinguishing an action for conversion from replevin states the rule as follows:

> "Where the suit is for the property itself, as in replevin or detinue, an offer to surrender the property before suit is a defense. . . ."

The statement in *Norman* v. *Rogers, supra,* is only a recognition of the general rule "that one cannot recover damages flowing from consequences that he might reasonably have avoided," *Lake Village Implement Co.* v. *Cox,* 252 Ark. 224, 478 S.W. 2d 36 (1972).

Appellee does not really take issue with the foregoing statement of the law but instead contends that the tender made at the May 16th hearing was only a conditional tender — *i.e.* (1) it was conditional upon relieving appellants of liability for damages for detention; (2) the tender made did not recognize appellee's rights to dispose of the property on the debtor's premises pursuant to Ark. Stat. Ann. § 85-9-503 (Supp. 1975); and (3) appellants did not tender all of the items listed in the order of delivery. We find no merit to appellee's contentions.

The assertion of appellee that the tender at the May 16th hearing was conditional upon exoneration of appellants from liability is not sustained by the abstract of the record. In fact, the record establishes that, on numerous occasions during the hearing on the tender, appellants admitted that their redelivery bond would remain liable for any damages.

Even if we should assume that appellee could have exercised the right to dispose of the equipment on appellants' premises, it is estopped under the facts in this record from relying upon that alleged right since it did not raise the issue until after the equipment had been dismantled and removed from the premises by the appellants. Furthermore, there is nothing in the record to show that disposal of the equipment on the premises was commercially reasonable for a sale of the collateral as between the rights of appellee and appellants.

The third suggestion of appellee that the tender was insufficient since it did not encompass all of the property listed on the delivery order ignores the provisions of Ark. Stat. Ann. § 34-2103 (Repl. 1962), which provides:

> "Where the delivery of several articles of property is claimed, the affidavit must state the value of each."

Appellants were entitled to credit for the articles tendered and to be charged on execution for the value of the balance together with any damages to the articles delivered. See *Harris* v. *Harris,* 43 Ark. 535 (1884), where we stated:

> "It was held in *Hauf* v. *Ford,* 37 Ark. 544, that the finding of the value was important with reference to this judgment. If a delivery cannot, for any cause, be had, and several articles are sued for, the defendant may be credited for what is actually delivered, and charged on execution with the rest. It is, therefore, important that each article be valued separately."

We agree with appellants that the trial court should have struck the valuation testimony of William Mercer. The record shows that after qualifying as an expert on equipment values he gave a total before value of $54,525.30 and an after

value of $12,665.00. But on cross-examination he was unable to tell the age of the equipment. With respect to a sanitary meat slicer having a new cost of $445.00 in 1967, he assigned a value, as of February 1974, of $550.00 and a value as of date of trial of $100.00. Another example of his incompetence is that the 1967 new price of a 12 foot Warren frozen meat case was $1,390.00. Yet, Mr. Mercer, without knowing that it was 12 years old, assigned it a value in February 1974 of $1,400.00 and a value at time of trial of $100.00, because he could not tell whether it worked. Another example of the inadequacy of Mr. Mercer's valuation can be seen in connection with some shelving which he gave a before value of $5,552.00. His after value of $1,700.00 was arrived at because he did not know how many feet of shelving was stored and he did not take the time to determine the number of feet. As pointed out in *Ark. State Highway Commission* v. *Jensen,* 256 Ark. 478, 508 S.W. 2d 737 (1974), an "expert's valuation, upon cross-examination must demonstrate a foundation in fact or a reasonable and fair basis" for his opinion or the same will be stricken when it can be determined that no such basis exists. The cross-examination of Mr. Mercer demonstrates that he had no reasonable and fair basis for making his before and after valuations. It follows that his valuations should have been stricken.

Appellants, having executed a redelivery bond in gross and not to particular items, are now estopped to contend that they did not have possession of certain items, *Hester* v. *Finigan,* 223 Ark. 927, 269 S.W. 2d 698 (1954).

In view of Ark. Stat. Ann. § 85-9-504 (Supp. 1975), we find no merit in appellant's contention that appellee's damages as a secured party should be limited to the legal rate of interest only. That provision of the UCC permits the secured party after default to both sell or lease the collateral in any commercially reasonable manner.

Appellants also contend that they are entitled to recover both moving and storage expenses after May 19, 1974. We find no merit in the moving expenses since the tender by appellants on May 16th was premised on the basis of moving the equipment to a storage place designated by

appellee. However, since we are holding that the subsequent tender of the equipment was proper it follows that appellants are entitled to the reasonable costs of storage.

In instructing the jury in determining fair market value of the equipment and fixtures the trial court correctly gave AMI 2d 2220. Appellant does not abstract any other objection to the instruction given.

Appellants contend that the ownership of the gas incinerator, the Doerr air compresssor, the sanitary computer scale and the National adding machine should not have been submitted to the jury under the evidence. Based upon the testimony of Lawson and George Spaeth, we find that there was substantial evidence to go to the jury on those issues.

The other points argued in the briefs are not apt to arise upon a new trial.

Reversed and remanded.

BANK OF NORTHEAST ARKANSAS *v.* NATIONAL SURETY CORPORATION

75-244 536 S.W. 2d 696

Opinion delivered May 3, 1976

Parker & Henry, for appellant.

Smith, Williams, Friday, Eldridge & Clark, by: *Joe D. Bell,*

for appellee.

CONLEY BYRD, Justice. This appeal is a companion case to *Affiliated Food Stores Inc., et al* v. *Bank of Northeast Arkansas,* #75-240, handed down this date. On this appeal, Appellant Bank of Northeast Arkansas contends that appellee National Surety Corporation did not file its notice of appeal in case #75-240, supra, in the time permitted by Ark. Stat. Ann. § 27-2106.1 (Repl. 1962). The appellee, on the other hand, contends that the filing of a motion for a new trial by its principals, Affiliated Food Stores Inc. and Oral W. Edwards, extended the time for it to file its notice of appeal pursuant to Ark. Stat. Ann. § 27-2106.3 through § 27-2106.6 (Supp. 1975). We agree with National Surety Corporation that, at least as to a party whose liability stands or falls upon the granting or denying of a motion for new trial, the time for filing of a notice of appeal is determined by Ark. Stat. Ann. § 27-2106.3 through § 27-2106.6.

Affirmed.

William Chester WARD *v.* CONSOLIDATED UNDERWRITERS and MEDALLION INSURANCE COMPANY

75-305 535 S.W. 2d 830

Opinion delivered May 3, 1976

Eubanks, Files & Hurley, by: *Hugh F. Spinks,* for appellant.

Plegge, Lowe & Whitmore, by: *Perry V. Whitmore,* for appellees.

FRANK HOLT, Justice. Appellee Consolidated Underwriters issued to appellant an automobile liability insurance policy which included an uninsured motorist provision as required by Ark. Stat. Ann. § 66-4003 (Repl. 1966). Appellee Medallion Insurance Company assumed the policy coverage. The policy included coverage for injuries caused by a "hit-and-run automobile" which was defined thusly: "Hit-and-run automobile means an automobile which causes bodily injury to an insured arising out of physical contact of such automobile with the insured or with an automobile which the insured is occupying at the time of the accident, provided: (1) there cannot be ascertained the identity of either the operator or owner of such "hit-and-run automobile. . . ."

Appellant suffered physical injuries when he was forced off the road by an unknown driver of a vehicle. Appellant invoked the uninsured motorist coverage of his policy. Appellee Medallion denied coverage on the ground that there was no physical contact between appellant's vehicle and the unidentified car that allegedly ran him off the road. Appellant brought suit for a declaratory judgment asking that the

physical contact limitation be declared void as against public policy of the State of Arkansas. The trial court held that "since this [the hit-and-run policy provision] is greater coverage than the pertinent statute required, **** the 'impact provision' is contractual and valid." Appellant's sole contention on appeal is that the trial court erred in failing to find that the physical impact provision of the Medallion policy of insurance was void as against the public policy of the state.

Appellant argues that since the uninsured motorist statute is remedial in nature, the court should construe the act liberally to accomplish its remedial purpose. Appellant acknowledges that we have held that the burden of showing the other vehicle is uninsured is on the plaintiff. *South. Farm Bur. Cas. Ins.* v. *Gottsponer,* 245 Ark. 735, 434 S.W. 2d 280 (1968). In the case at bar, however, appellant argues that although this may be a proper requirement as to the burden of proof when the driver is known and can be identified, it should not be required where, as here, the driver and vehicle are unknown.

§ 66-4003, which requires uninsured motorist coverage, reads in pertinent part:

> No automobile liability insurance **** shall be delivered or issued for delivery in this state **** unless coverage is provided therein or supplemental thereto **** for the protection of persons insured thereunder who are legally entitled to recover damages from the owners or operators of uninsured motor vehicles. . . .

Plainly, the statute only requires that coverage be provided for the protection of persons who are legally entitled to recover damages from the owners of *uninsured motor vehicles.* As indicated, we have interpreted this statute as requiring that the plaintiff has the burden of showing that the other vehicle is uninsured. *South. Farm Bur. Cas. Ins.* v. *Gottsponer, supra.* Here the policy does not require this burden of proof when there is physical contact and "the operator or owner of such 'hit-and-run automobile' " cannot be ascertained. Therefore, it appears the policy in question is a liberalization of the

coverage required by our statute. See *Amidzich* v. *Charter Oak Fire Insurance Co.,* 170 N.W. 2d 813 (Wis. 1969); *Phelphs* v. *Twin City Fire Insurance Company,* 476 S.W. 2d 419 (Tex. Ct. App. 1972); and *Ward* v. *Allstate Insurance Company,* 514 S.W. 2d 576 (Mo. 1974). In the case at bar, in our view, the physical impact provision in the policy is valid and does not contravene public policy. Appellant recognizes that if the physical contact requirement of the policy is not against the public policy, it is a legitimate objective and contractually binding.

Affirmed.

Mrs. Mike KARRAZ *v.* H. A. TAYLOR, Judge

75-383 535 S.W. 2d 840

Opinion delivered May 3, 1976

Brockman, Brockman & Gunti, by: *E. W. Brockman Jr.,* for petitioner.

Wayne Matthews, Prosecuting Attorney, 11th Judicial Circuit, for respondent.

ELSIJANE T. ROY, Justice. The City of Pine Bluff (hereafter City) filed a complaint in chancery court alleging ownership of certain real property. Mrs. Mike Karraz, appellee in that action and appellant/petitioner herein, answered claiming ownership of the contested property based upon adverse possession. The City appealed from a decree favorable to Mrs. Karraz, but the case has not yet reached this court.

The City then filed an eminent domain action in the circuit court alleging appellant/petitioner was the "apparent owner" of the contested property and that the City needed immediate possession of this property to avoid interruption in its street improvement and construction program. In addition to possession the complaint sought alternative relief, requesting that if the Arkansas Supreme Court reversed the chancellor's holding in favor of Mrs. Karraz and vested title in the City, then that the money deposited in the circuit court proceeding be returned to the City.

The circuit court decided the issues in favor of the City, and its order authorizing entry on the lands in pertinent part stated:

> It is considered, ordered and adjudged that immediate possession of the tracts of land designated and described in the Complaint filed herein should be given to the plaintiff upon the *deposit by the plaintiff in the Registry of this Court an amount adequate for the purposes of making compensation and paying any damages which may be assessed against the municipality*. . . .
> (Italics supplied.)

The court approved a deposit in the registry of the court as follows:

> Property herein described, Mrs. Mike Karraz apparent owner and Unknown Owners, $525.00. Said sum to remain in the deposit of the Court until such time as a final adjudication of this cause be had upon appeal to the Arkansas Supreme Court, and a final determination be made as to the interest of the parties in said property

and the entitlement to such sum.

Petitioner filed an answer and motion asking that the complaint of plaintiff be dismissed, and also filed a demurrer raising the question of jurisdiction. The court overruled both the motion and the demurrer. Mrs. Karraz then filed a petition for writ of prohibition which is before us now.

Appellant cites several cases in support of her contention that a condemnor, by initiating condemnation proceedings, admits ownership in the condemnee. We find no fault with the law expressed in those cases, but do not find them controlling as to the peculiar factual situation here. One of appellant's cited cases is *Ark. State Highway Comm.* v. *Roberts,* 248 Ark. 1005, 455 S.W. 2d 125 (1970), which is not pertinent as it involved the intervention of remaindermen excluded from the terms of a condemnation settlement.

Neither can appellant find help in the cited case of *City of Englewood* v. *Reffel,* 173 Colo. 203, 477 P. 2d 361 (1970), as there was no allegation in the complaint which put in issue the ownership of the property sought to be condemned. The complaint alleged unqualified ownership in the condemnee, not "apparent ownership" as we have in the case at bar.

Appellant also cites Nichols on Eminent Domain, § 5.2, Vol. 2, pp. 37-38, which notes:

> . . .[T]he petitioner may be estopped from showing that title is in the public or in itself, by dedication, prescription or otherwise, *if it has alleged in its petition that the respondent is the owner.* * * * (Italics supplied.)

However, here the City has alleged in its complaint that the respondent is the "apparent" owner and has not pled that the unqualified title is in the appellant/petitioner. The court considered not only the need of the City for the property, but by its order has protected the property owner and no unreasonable delay can result since the appeal from chancery court to this court is already in process.

Neither do we perceive the City's action to be an effort to

circumvent the appeal from the chancery court. The condemnor by its complaint in a different tribunal was merely seeking immediate access to the condemned land. No determination as to title was even requested in the circuit court proceeding. A bond was deposited in the court registry to protect appellant's potential interest. We find pertinent the following quotation from Nichols, *supra,* § 5.2, Vol. 2, p. 39:

> * * * The petitioner is not barred from denying title of a claimant by the fact that it has made him a party respondent, *if it is alleged in the petition that his title is doubtful or disputed.* * * * The question of title is theoretically preliminary to the assessment of damages, but the petitioner is not obliged to delay condemnation until a final decision upon the title. . . (Italics supplied.)

Here, a delay could work considerable harm to the City's construction timetable, as indicated by the circuit judge.

Further, Ark. Stat. Ann § 35-906 (Repl. 1962) states in pertinent part:

> * * * No delay in making an assessment of compensation or in taking possession shall be occasioned by any doubt which may arise as to ownership of the property, or any part thereof, or as to the interest of the respective owners; but in such cases the Court shall require deposit of the money allowed as compensation for the whole property in dispute; and, in all cases, as soon as a corporation shall have paid the compensation assessed, or secured the payment by deposit of money under the order of the Court, possession of the property may be taken and the public work or improvement progress.

The action of the trial court is in accord with and effectuated the intent of the Legislature as embodied in Ark. Stat. Ann. § 35-906.

Furtheremore, a writ of prohibition is "an extraordinary and discretionary writ, used cautiously [citations omitted]. It is never granted unless the applicant therefor is clearly en-

titled to the relief and the tribunal against which it is sought is wholly without jurisdiction." *Roberts, supra.*

We find the court's action here in allowing the entry and in granting the alternative relief to be well within the bounds of its authority to hear eminent domain proceedings.

Writ denied.

BYRD, J., dissents.

George SMITH *v.* STATE of Arkansas

CR 75-167 536 S.W. 2d 289

Opinion delivered May 3, 1976
[Rehearing denied June 7, 1976.]

Harold L. Hall, Public Defender, by: *Robert Lowery,* Dep. Public Defender, for appellant.

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

ELSIJANE T. ROY, Justice. On July 8, 1974, David Powell, a desk clerk employed by the Rose Motel, was shot in the abdomen while on duty. Two persons outside the motel, hearing the gunshot, observed two black males running out of the motel lobby and saw one throw a sawed-off shotgun in the hedges on the side of the motel. One of the witnesses noted the license number of the vehicle which pulled away. The police were notified, and appellant and two other persons found at the address indicated by the license registration form were arrested. After his arrest appellant signed a rights form and confession which stated that though he was in the motel office at the time of the shooting a companion was responsible for the shooting. Appellant was found guilty by a jury and sentenced to life imprisonment in the state penitentiary. This appeal follows the conviction.

Appellant first contends that the court should dismiss the information because Act 438 of 1973 is unconstitutional. We previously have considered and found this argument without merit since we had occasion to consider similar allegations of constitutional defect regarding Act 438 in *Collins* v. *State,* 259 Ark. 8, 531 S.W. 2d 13 (1975), and *Neal* v. *State,* 259 Ark. 27, 531 S.W. 2d 17 (1975).

Appellant next argues error in admitting as res gestae hearsay testimony concerning the victim's statements after the offense was committed. Two witnesses entering the motel

immediately after hearing the gunshot testified that as they walked in Powell exclaimed, "They didn't get the money!" Approximately five minutes thereafter Officer Thomas Bernard arrived to investigate the incident. He questioned the witnesses, then entered the motel and asked the severely injured night attendant, "What happened?" Powell stated two black males had tried to rob him.[1]

The res gestae doctrine suspends the normal caution attending hearsay statements based on the reliability of observation generated by emotion not the product of reflection and reason. When such an exception is sought to be introduced relevant factors to be considered are the time interval which has elapsed between the event and the comment, the gravity of the exciting event and the continuing potential for the event to exert influence over the declarant. In support of his position appellant cites *Liberty Cash Grocers, Inc.* v. *Clements,* 193 Ark. 808, 102 S.W. 2d 836 (1937), and *Nelson* v. *State,* 257 Ark. 1, 513 S.W. 2d 496 (1974). Both are distinguishable from the case at bar.

In *Liberty* the statement sought to be introduced under the res gestae exception was the comment of an uninjured motorist, and the court found that the declarant was narrating the act, rather than reacting to the act itself. In *Nelson* the comment sought to be introduced under this exception was that of a witness to a shooting rather than that of a victim of a shooting. A bystanding witness, as in *Nelson,* involved only peripherally with the violence done, is far different from the witness-victim in this appeal, whose testimony was under more immediate compulsion since he was still speaking while under the influence of the occurrence.

We are of the opinion the doctrine enunciated in the following Arkansas cases clearly supports the admissibility of the questioned statements here.

In *Kansas City Southern Railway Co.* v. *Morris,* 80 Ark. 528, 98 S.W. 363 (1906), the decedent had died as a result of being struck by a train. Before his death *he responded to a question* ask-

[1]The record is not clear as to the exact time lapse between the shot and this statement, but the officer testified it would have been about 13 minutes.

ed by someone rushing up to aid him after his accident. This court held his statement admissible as an excited utterance, and said:

> * * * It (the statement) was made within a few feet of where he had been mortally injured, and four or five minutes after the accident occurred, and while the excitement caused by the injury was unabated and in all probability controlled and dominated his mind. *The injury was overwhelming and appalling, and sufficient at the time to drive from his mind all hope of surviving many hours — to bring him in the presence of immediate dissolution — and to drive from his mind any intention or desire to manufacture evidence for his benefit, and to force him to speak the truth, and to make his statement an emanation of the accident, "so connected with the cause of his injuries as to preclude any idea that it was the product of calculated policy." The statement was admissible.* (citations omitted) (emphasis supplied)

In *Ft. Smith Oil Co.* v. *Slover,* 58 Ark. 168, 24 S.W. 2d 106 (1893), the statement, being made about thirty minutes after the occurrence and the victim having been moved from the scene, was held inadmissible, but quoting Wharton on Evidence the court said:

> The *res gestae* may be defined as those circumstances, which are the undesigned incidents of particular litigated acts, and are admissible when illustrative of such acts. *These incidents may be separated from the act by lapse of time more or less appreciable.* (emphasis supplied) Their sole distinguishing feature is that they should be necessary incidents of the litigated act; necessary in this sense, that they are part of the immediate preparations for, or emanations from, such act, *and are not produced by the calculated policy of the actors. In other words, they must stand in immediate causal relation to the act, a relation not broken by individual wariness seeking to manufacture evidence for itself.* (emphasis supplied) * * *

In the case of *Public Utilities Corp. of Ark.* v. *Cordell,* 184 Ark. 878, 43 S.W. 2d 746 (1931), the court held where one fatally burned in an explosion was asked in the ambulance on

the way to the hospital what happened his response was admissible as part of the res gestae. In reaching its decision on this issue the court declared:

> * * * When we consider the severity of his burns *and the condition under which he answered the question,* it is practically certain that there *was no time or thought of manufacturing evidence,* nor was there any element of a device or afterthought. * * * (emphasis supplied)

And, speaking of the question asked, the court said:

> * * * In an *excited manner, she asked him how the accident occurred, and it is reasonably certain that his answer was made with the excited feeling which had lasted from the moment of the accident until the question was asked him.* * * * (emphasis supplied)

Dr. Kent Westbrook testified that Powell's wound was about ten inches in diameter, that the spleen was destroyed and the large intestine was shot in half and about one-third of the liver had to be removed. The details of the injury leave little doubt that the decedent ten minutes or so after suffering the wound would be incapable of considered deliberation in recounting preceding events. Officer Bernard testified that Powell was "laying in behind the counter on the floor with his intestines exposed, bulging out, and him trying to hold them in", indicating that the victim's comments were still under the influence of the traumatic episode at the time he answered Officer Bernard's question. Having found the statement to Officer Bernard admissible under the res gestae doctrine, indubitably the remark made to the two witnesses immediately after the gunshot wound is admissible.

Appellant also contends the court erred in giving the State's instructions on felony murder alone and in refusing to give appellant's instructions on malice and lesser included offenses. The court properly refused to instruct on the lesser degrees of homicide. See *Murray* v. *State,* 249 Ark. 887, 462 S.W. 2d 438 (1971), and *Johnson* v. *State,* 252 Ark. 1113, 482 S.W. 2d 600 (1972). The evidence here clearly supports the felony murder charge under which appellant was convicted. In *Clark* v. *State,* 169 Ark. 717, 276 S.W. 849 (1925), we said:

> This court has repeatedly held that where the indictment charges murder in the first degree and the undisputed evidence shows that the accused, if guilty at all, is guilty of murder in the first degree, then it is not error for the court to refuse to give instructions authorizing the jury to return a verdict of guilty of one of the lower degrees of homicide. * * *

Appellant also raised other objections during the trial that he did not argue on this appeal; however, having considered every objection and assignment of error as we are required to do by Ark. Stat. Ann. § 43-2725 (Supp. 1975), we find no error requiring reversal.

Affirmed.

BYRD, J., dissents.

CONLEY BYRD, Justice, dissenting. Like most criminal cases it is difficult to find a good hat for the appellant. If I should accept the evidence most favorable to the jury's verdict, it is sufficient to sustain a death sentence. If I should accept the evidence in the light most favorable to the testimony given in court by appellant, his conduct is still subject to criticism. However, since this nation's constitution has been founded on the principle that it is a nation of laws and not of men, I believe that we are depriving appellant of a fair trial by declaring the statements made by the victim in response to the policeman's interrogations to be part of the *res gestae*.

The term *res gestae*, as an exception to the hearsay evidence rule, has historically been defined as *the act talking for itself, not what people say when talking about the act.* Typical of our holdings on the subject is *Rogers v. State,* 88 Ark. 451, 115 S.W. 156 (1908), where the trial court permitted the chief of police to testify: "I asked Fielder who robbed him; he said a white man and a negro; that he did not know who the white man was, but they called the negro Ben Rogers." In holding the admission of such evidence to be reversible error, we there said:

> "The Attorney General seeks to sustain the admission of these statements as a part of the *res gestae.* Mr. Wharton's definition and explanation of *res gestae,* quoted in *Little Rock Traction & Electric Co.* v. *Nelson,* 66 Ark. 494, has often been approved by this court. He says: 'Their sole distinguishing feature is that they must be the automatic and necessary incidents of the litigated act; necessary in this sense, that they are part of the immediate preparations for, or emanations of, such act, and are not produced by the calculated policy of the actors. They are the act talking for itself, not what people say when talking about the act.' In this case the evidence is what the person said when talking about the act, and was not the voluntary emanation of the act itself."

From reading the majority opinion one could gather that the narration to the policeman by the victim should have been admitted as a dying declaration. However, when the trial court made such a suggestion, the State readily conceded that it was unable to make the requisite showing of a foundation for its admission as a dying declaration.

One of our fundamental concepts guaranteed by the Bill of Rights in both the State and Federal Constitutions is that an accused must be confronted by the witnesses against him. Yet, the majority, by fudging a little on the *res gestae* rule, here have permitted appellant to be convicted on the testimony of the victim without appellant having been confronted by the victim. While the result of a little fudging on the *res gestae* rule here may be justifiable because of the appellant's conduct; yet, as pointed out in *Byler* v. *State,* 210 Ark. 790, 197 S.W. 2d 748 (1946):

> "It may be unfortunate that the case will have to be retried, but we think it better that a single case should be retried than to approve an improper precedent for the trial of future cases."

For the reasons stated, I respectfully dissent.

EDUCATORS AND PROFESSIONAL LIFE INSURANCE COMPANY et al *v.* Robert C. JORDAN

75-329 536 S.W. 2d 124

Opinion delivered May 10, 1976

Davidson, Plastiras & Horne, Ltd., by: *Cyril Hollingsworth*, for appellants.

Guy H. Jones, Phil Stratton and *Guy Jones Jr.*, for appellee.

CARLETON HARRIS, Chief Justice. This appeal comes before the court on stipulated facts and presents solely a question of law: Does an incontestable clause in a disability insurance policy prevent the insurer from denying liability on the ground that the disability resulted from a disease antedating the issuance of the policy, when the policy ex-

pressly excludes coverage of disabilities resulting from such pre-existing ailments?

The stipulation and the pleadings reflect that appellee, Robert C. Jordan, suffered a 25 per cent permanent partial disability to his right arm in 1959, as a result of osteomyelitis. In May, 1970, Jordan purchased a motor vehicle from a Conway dealership, and simultaneously obtained a policy of credit life and disability insurance for the financing of the purchase. That policy, issued by appellant Educators and Professional Life Insurance Company, and reinsured by appellant American Pioneer Life Insurance Company, contains the following relevant provisions:

> "This policy shall be incontestable after it has been in force during the lifetime of the insured for a period of one year from the date of policy.
>
> * * *
>
> "TOTAL DISABILITY BENEFITS PROVISIONS
>
> * * *
>
> . . . . the insurance afforded by this policy does not cover any disability caused by:
>
> * * *
>
> (4) Any pre-existing illness, disease or physical condition contracted prior to the effective date of the policy as to the insured."

It was further stipulated that appellee has been totally disabled since April 19, 1972, "as a culmination of his illness and disease of osteomyelitis." Appellants have denied liability solely on the basis that "[t]he policy does not purport to cover any disability caused by any pre-existing illness, disease or physical condition contracted prior to the effective date of the policy." The trial court ruled, however, that "the incontestable clause is applicable to the disability provision of the policy," and that "[t]here is no limiting or qualifying

language in the incontestable clause," and accordingly found that appellants were liable on the policy.

On appeal from the judgment so entered, appellants simply argue that the trial court committed an error of law in its holding.

We agree with appellants, and the great weight of authority is to that effect. Annotation, 13 ALR 3d, pp. 1392 - 1397. A leading case, which clearly recites the reasons for the conclusion reached, is *John Hancock Mutual Life Ins. Company* v. *Hicks,* 43 Ohio App. 242, 183 N.E 93. There the court said:

> "It is incumbent upon the plaintiff, in seeking to recover upon an insurance contract such as we have under consideration, to establish that the disease from which the permanent and total disability results was the subject of the contract, namely, that it was covered by the policy. The clause in question defining the subject-matter insured against reads as follows: 'If * * * the insured * * * shall become wholly and permanently disabled by * * * disease * * * contracted after the date hereof, so that thereby he will be wholly, continuously and permanently prevented from the pursuit of any form of mental or manual labor for compensation,' etc., 'the payments provided will be made.'
>
> "We are of the opinion that only permanent and total disability from diseases contracted after the date of the issuing of the policies is the subject of insurance in this contract. The incontestable clause does not have the effect of enlarging the diseases or bodily injuries for which the company agrees to compensate the insured or his beneficiary. Had this policy named the specific diseases and injuries the suffering of which would have been compensated, it would not be claimed that any other disease or injury would obligate the company to any liability under the policy. The incontestable clause only prevents the contest by the company respecting any liability incurred by it by the terms of the contract, and does not relieve the plaintiff in the first instance of establishing its right to recover under the specific

language of the policy. The incontestable clause would have prevented the company from contesting any answer made by the insured in his application to the effect that he was free from any mental disease, although he then knew that he was so afflicted, unless the claim was asserted by the company during the period in which the incontestable clause was not to be affected; but this would not affect that part of the policy setting forth the nature and extent of the coverage. The clause of indemnity relates to the policy or contract. When it is established by the claimants that the hazard against which the company has insured has been suffered by the insured, then the policy by its terms in that respect is effective and cannot be contested. However, until such proof is made the plaintiff has not established a substantive right to recover. In other words, the company by the incontestable clause has not waived the necessity of allegation and proof that the injury, loss, or risk claimed is the subject of the contract. It was incumbent upon the plaintiff to plead and prove that the insured was at the time of the filing of the petitions suffering from a disease contracted after the date of the issuing of the policies. And the defendant company had the right without respect to the incontestable clause to put the plaintiff upon such proof."

Likewise, in *Apter* v. *Home Life Ins. Co.,* 266 N.Y. 333, 194 N.E. 846, frequently cited, the court said:

" 'The provision that a policy shall be incontestable after it has been in force during the lifetime of the insured for a period of two years is not a mandate as to coverage, a definition of the hazards to be borne by the insurer. It means only this, that within the limits of the coverage, the policy shall stand, unaffected by any defense that it was invalid in its inception, or thereafter became invalid by reason of a condition broken.' Matter of Metropolitan Life Ins. Co. v. Conway, 252 N.Y. 449, 452, 169 N.E. 642. From the inception of the policies the defendant excluded from its coverage disability which originated before the policies became effective. The plaintiff never acquired any insurance against such dis-

ability. The provision that after one year the policy shall be incontestable is in effect a stipulation that after one year, fraud or other source of invalidity or forfeiture was waived by the defendant. From that time the presumption that the policies were effective from their inception became conclusive."

Our own court, in *Petty* v. *Metropolitan Life Ins. Company,* 204 Ark. 1054, 166 S.W. 2d 1034, is in complete accord.[1]

Here, there is no contention that fraud was committed by appellee in obtaining the policy. Rather, the sole defense is that Jordan was afflicted with osteomyelitis before the policy was obtained, and thus, was not covered for that particular disease under policy provisions. There is no dispute but that the disease antedated the policy, was the sole cause of his total disability, and it follows that the court erred in holding to the contrary.

Reversed and dismissed.

[1]Arkansas, in the Annotation previously referred to, is shown, on the basis of this opinion, as one of the states adhering to the view under discussion.

BULK TRANSPORT, INC. et al *v.*
Odie C. JONES

76-2 536 S.W. 2d 134

Opinion delivered May 10, 1976

[redacted]

Tackett, Moore, Dowd & Harrelson, for appellants.

Wilson, Gunter & Walker, P.A., by: *Charles M. Walker* and *Garnet E. Norwood,* for appellee.

GEORGE ROSE SMITH, Justice. The appellee brought this action for personal injuries suffered in a traffic collision. Comparative negligence was an issue at the trial. In response to interrogatories the jury originally attributed 25% of the total negligence to the plaintiff and fixed his damages at $90,000. After some interrogation by the court and further deliberations by the jury, the foreman of the jury finally informed the court that "we are in complete agreement . . . If we are supposed to have a sum down that is a total of 100 per cent, it should be $120,000, and the $90,000 that we arrived at was with the 25 per cent of Mr. Jones' responsibility already taken away." Upon that unanimous statement of the jurors' intention the court entered judgment for $90,000. For

reversal the appellants argue that the trial judge should have acted upon the original responses to the interrogatories by entering judgment for only 75% of $90,000.

The trial judge was right. In the words of Judge Frank G. Smith: "The verdicts of a jury should in any and all cases reflect the true and correct and final conclusions of the jury, and if before discharging the jury it was made known to the court that the jury had misunderstood the instructions, no error is committed in permitting the jury to further consider their verdict, after the instructions have been explained." *Clift* v. *Jordan,* 207 Ark. 66, 178 S.W. 2d 1009 (1944). More recently we have said that it is the right and duty of the trial judge to see that the verdict is amended to correctly express the intention of the jury. *Miller* v. *Garner,* 241 Ark. 715, 409 S.W. 2d 336 (1966).

Here the basic error lay not with the jurors but with the rival attorneys and the trial judge. Apparently by agreement of counsel, and certainly without objection, the court gave a comparative negligence instruction, AMI Civil 2d, 2102 (1974), which told the jury to reduce Jones's judgment in proportion to his negligence. Although the Note on Use to that AMI instruction states, "Do not use this instruction when the case is submitted on interrogatories," that directive was disregarded by everyone. The jurors were required to answer the interrogatories set out in AMI 2402. The jurors were understandably confused, because they were told on the one hand to reduce the damages in proportion to Jones's negligence and on the other hand to determine the amount of Jones's damages, presumably without reduction.

When the jury returned its $90,000 response to the interrogatory, a juror indicated that the 25% deduction for Jones's negligence had already been made. The trial judge at once expressed his belief that both the comparative negligence instruction and the interrogatories should not have been submitted. The judge quite properly corrected the mistake by ascertaining the jury's true intention and entering judgment accordingly.

Affirmed.

Josef V. HOBSON *v.* Honorable Maupin CUMMINGS

75-369 536 S.W. 2d 132

Opinion delivered May 10, 1976

Sam Sexton, Jr., for petitioner.

Jim Guy Tucker, Atty. Gen., by: *Lonnie Powers,* Dep. Atty. Gen., for respondent.

JOHN A. FOGLEMAN, Justice. Petitioner Josef V. Hobson, a member of the bar of this court, and the attorney of record for Brenda Dianne Jeko, Administratrix of the Estate of Gregory Britt Jeko, Deceased, in a cause of action in the Circuit Court of Washington County vs. Lois Stratton, Administratrix, Civ.-75-767, filed his petition for prohibition in this court. He prayed that this court prohibit the Circuit Judge, Hon. Maupin Cummings, from requiring him to appear at any contempt proceedings before Judge Cummings and from conducting any contempt proceedings on a charge based upon a petition by Hobson's client that he be cited for contempt of the Circuit Court of Washington County. The charge was based upon an allegation that Hopson had received a portion of a recovery from Lois Stratton, as Ad-

ministratrix of the Estate of Dayton Frank Stratton, Deceased, under an order of the circuit court approving a compromise settlement of the above-styled cause of action, but had failed and refused to return the sum received by him into the registry of the court. It was asserted that this constituted a failure to comply with an order of the court setting aside the order approving the settlement.

On November 21, 1975, Judge Cummings disqualified himself from further participation in the case, and certified his disqualification to the Chief Justice, who, on November 24, 1975, appointed the Hon. Joe Villines, Circuit Judge in the Fourteenth Judicial District, to preside in the cause. The order of assignment contained this provision:

> This assignment includes all ancillary proceedings which may arise in connection with said cause and proceedings subsequent thereto. The hearing of said cause and proceedings subsequent thereto shall be held at such time or times as shall be directed and ordered by Judge Joe Villines.

The order to petitioner Hobson to appear to show cause why he should not be held in contempt of court was issued by Judge Cummings on December 2, 1975. It required Hobson to appear before the court on December 23, 1975.

Respondent takes the position that disqualification did not affect his power to enforce the order made prior to his disqualification. The petition for citation was filed and the order thereon entered in the proceeding in which Judge Cummings disqualified. This was certainly an ancillary proceeding which arose in connection with the cause in which the assignment was made. Whatever the cause of the disqualification, the assignment of Judge Villines included this proceeding. No further proceedings should be taken by Judge Cummings in the contempt proceeding.

The writ of prohibition lies to a court, not a judge. *Dunbar* v. *Bourland,* 88 Ark. 153, 114 S.W. 467; *Reese* v. *Steel,* 73 Ark. 66, 83 S.W. 335, on rehearing, 83 S.W. 1136. While we have recognized in the cited cases that there may be excep-

tional cases where the writ would lie to a judge acting in chambers, this is not such a case. Insofar as further action by Judge Cummings is concerned prohibition does not apply. However, petitioner has asked in his brief that we prohibit the Circuit Court of Washington County from proceeding against him in any contempt proceeding arising out of the case. This is premature and the contentions argued here by petitioner should be first presented to the trial court. Furthermore, this relief was not sought in the petition filed here.

This does not mean that there is no relief available to petitioner. We have usually looked to substance rather than form in such instances. See, e.g., *Howell* v. *Howell,* 213 Ark. 298, 208 S.W. 2d 22; *State ex rel Purcell* v. *Nelson,* 246 Ark. 210, 438 S.W. 2d 33. The response filed, even though by amicus curiae, and respondent's brief clearly indicate to us that Judge Cummings expects and intends to conduct the hearing on the citation for contempt. A conviction would be reviewed on certiorari, not appeal. Respondent's argument that petitioner's remedy on appeal would be adequate is not appropriate.

We have utilized the writ of mandamus to cause a circuit judge who was disqualified to refrain from further presiding in the cases in question there. See *Copeland* v. *Huff,* 222 Ark. 420, 261 S.W. 2d 2. We did so because the duty of the judge to withdraw from further participation was only a ministerial act, since ineligibility was clear, as a matter of law, on the undisputed facts. This is such a case, even though the factual background is dissimilar. The disqualification and the order of assignment make the judge's duty in this case fall within the ambit of our holding in *Copeland.*

Petitioner's pleading here is treated as a petition for mandamus to Judge Cummings to refrain from presiding in proceedings pertaining to charges of contempt of court against petitioner arising from actions or omissions in regard to proceedings in the case of Brenda Dianne Jeko, Administratrix v. Lois Stratton, Administratrix, No. Civ. 75-767, in the Circuit Court of Washington County and, as such, is granted.

The Chief Justice did not participate in the consideration or decision of this case.

Kenneth Ray CUSICK *v.* STATE of Arkansas

CR 75-191 536 S.W. 2d 119

Opinion delivered May 10, 1976

Wiggins & Christian, for appellant.

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

JOHN A. FOGLEMAN, Justice. Kenneth Ray Cusick entered a plea of nolo contendere to a charge of possession of stolen property and received a sentence of 21 years, with 6 years suspended upon condition of good behavior. He had the assistance of counsel at the time. In January, 1975, he filed a petition for post-conviction relief under Criminal Procedure Rule 1. On August 5, 1975, this petition was denied by the trial court without a hearing on the basis of the transcript of the plea, docket entries, and the sentencing proceedings. Hence, this appeal.

Appointed counsel filed a motion to withdraw as counsel, accompanied by a brief, which is a copy of appellant's petition with a prayer that his sentence be reduced to that of codefendant's. Both appointed counsel and the Attorney General submit that this is a non-meritorious appeal. Appointed counsel has complied with the requirements of *Anders* v. *California,* 386 U.S. 738, 87 S. Ct. 1396, 18 L. Ed. 2d 943 (1967) and his motion to be permitted to withdraw is granted. But we do not agree that there is no merit in the appeal insofar as the denial of a hearing is concerned.

Appellant alleged that the trial court failed to determine the voluntariness of his plea as required by *Boykin* v. *Alabama,* 395 U.S. 238, 89 S. Ct. 1709, 23 L. Ed. 2d 274 (1969), and failed to advise appellant of the consequences of his plea. He alleged specifically that no one explained to him the elements of the offense or the range of punishment. We have considered the effect of such omissions where there was a guilty plea in *Byler* v. *State,* 257 Ark. 15, 513 S.W. 2d 801. Insofar as the questions raised here are concerned, we perceive no reason why constitutional standards should be less rigid for a plea of nolo contendere than for a guilty plea. The potential sentencing consequences are no different and both pleas constitute a waiver of jury trial.

The principal basis for denial of a hearing on the post-conviction petition was a written Plea Statement Nolo

Contendere, signed by appellant. That statement appears to be a form utilized by the Circuit Court of Sebastian County to assure that an accused entering such a plea is advised as to the potential consequences. It begins with a statement that, when the accused answers the judge, he *must* understand certain things. The accused is admonished to ask his lawyer what sentence he could receive, if he does not already know. He is also advised of his right to a jury trial, and that his plea would be accepted only if his answer to each of six questions therein was "yes." These questions were:

> 1. Do you fully understand what you are charged with having done?
> 2. Do you understand the penalty the law provides?
> 3. Have you discussed your case fully with your attorney and are you satisfied with his services and advice?
> 4. Has your lawyer explained what a plea of nolo contendere means and do you fully understand what can happen if you enter this plea?
> 5. Are you entering your plea of nolo contendere on your own free will and accord without anyone causing you to do so on account of any promises or threats?
> 6. If you plead nolo contendere do you understand that your attorney and the prosecuting attorney have agreed to recommend that you will be sentenced to _____?

The accused is further admonished that he should sign the statement if he fully understands everything in it after having talked to his lawyer about any doubts or questions in his mind. Appellant signed the statement which certified that he understood what was being told him, what his rights were, and the questions that had been asked. He also certified that his answer to each of the questions was "yes" and that his plea was entered knowingly and voluntarily.

In *Byler,* we pointed out that the "Standards Relating to Pleas of Guilty" (1968) promulgated by the American Bar Association cautioned that a court should not accept a plea of guilty without first addressing the defendant personally and, after determining that he understands the nature of the charge, informing him that his plea of guilty or nolo con-

tendere was a waiver of his right to trial by jury and of the maximum possible sentence on the charge. We held in *Byler* that a simple affirmative answer in open court to inquiries as to whether the defendant understood the elements of the charge and his waiving jury trial by entering a plea of guilty was not sufficient to meet *Boykin* requirements, at least when no statement or explanation of the minimum or maximum penalty had been made.

We do not see how a writing singed by a defendant which does not explain the nature of the charge, state the possible punishment or specifically mention that the plea is a waiver of the defendant's right to jury trial differs in the respects we found the record deficient in *Byler*. It is true that the certificate of the attorney appointed to represent the defendant contains a statement that appellant understood all of that "paper" and the meaning and effect of his plea of nolo contendere and that defendant had been advised that the information correctly stated the charges and that the judge would find him guilty upon a plea of nolo contendere. The record discloses that the trial judge did state the nature of the charge and ascertained from the defendant that he understood. There is nothing whatever to indicate that appellant knew the range of possible punishment.

It certainly is likely that the appointed attorney did advise Cusick of the nature of the charge and the range of punishment and explained that he was waiving the right to jury trial, but this does not sufficiently appear from the files and records in the case to show *conclusively* that appellant was entitled to no relief, as required for the denial of an evidentiary hearing under Criminal Procedure Rule 1 (now Rule 37.3 a, Rules of Criminal Procedure).

We reverse the order of the circuit court and remand the case for an evidentiary hearing.

The Chief Justice and Byrd, J., dissent.

Willie A. JOHNSON *v.* HOUSTON GENERAL INSURANCE COMPANY

75-236 536 S.W. 2d 121

Opinion delivered May 10, 1976

Whetstone & Whetstone, for appellant.

Wright, Lindsey & Jennings, for appellee.

J. FRED JONES, Justice. This is an appeal by Willie A. Johnson from a circuit court order dismissing his complaint against the appellee Houston General Insurance Company for failure to state a cause of action against the defendant.

The background facts appear as follows: On March 14, 1974, the appellant sustained an industrial injury in the course of his employment by Western Meat Packers, Inc. He filed a workmen's compensation claim and on January 22, 1975, the Commission awarded temporary total benefits through October 21, 1974, payable in one lump sum. Apparently the plaintiff experienced some difficulty in collecting the award of the Commission so on March 19, 1975, he filed a complaint in the circuit court against the compensation insurance carrier, Houston General Insurance Company, setting out the award by the Commission and alleging that he had made repeated requests for the payment under the award without success. He then alleged and prayed as follows:

> The reason and purpose for the delay and withholding of payment by the defendant is for the purpose of harassment, vexation and torment of this plaintiff and is an extension of a pattern of conduct consistently pursued by the defendant since shortly after the time of plaintiff's injury to hamper, delay, harass and torment him.
>
> The conduct of defendant is also retaliatory and spiteful in relation to the claim which this plaintiff has made against the defendant in the Workmen's Compensation proceeding heretofore referred to.
>
> Plaintiff has been caused substantial mental anguish, injury, and damages as a result of all this behavior on the part of the defendant to the extent of $1,000.00.
>
> Moreover, plaintiff is entitled to have $5,000.00 punitive damages assessed against the defendant and in his favor on account of the deliberate, spiteful, and wanton disregard to the consequences exhibited by the defendant and its agents and employees as set out.
>
> WHEREFORE, premises considered, plaintiff prays judgment against the defendant, Houston General Insurance Company, for compensatory damages in the amount of $1,000.00; and plaintiff prays judgment against the said defendant for punitive damages in the

> amount of an additional $5,000.00; and plaintiff prays for his costs herein expended and for all other proper relief whether specifically prayed for herein or not.

On March 26, 1975, the appellee filed motion to dismiss, the pertinent portion of the motion being as follows:

> Part of this claim was accepted as compensable and part was controverted by Houston General Insurance Company at a hearing on July 10, 1974. Awards of compensation to the claimant were made by the Arkansas Workmen's Compensation Commission on January 22, 1975, and March 17, 1975. All sums due and payable under these awards have been paid by the defendant.
>
> The Arkansas Workmen's Compensation Act is the plaintiff's exclusive remedy against this defendant and any claim for additional benefits should be made through the Arkansas Workmen's Compensation Commission.
>
> The Complaint does not state a cause of action against this defendant.

On June 4, 1975, the circuit court granted the appellee's motion and dismissed the complaint because it failed to state a cause of action against the defendant.

Under the points he relies on for reversal the appellant first contends that the motion to dismiss should have been treated as a demurrer, but he made no request that the motion be so treated and made no effort to amend his complaint. We find no merit to this contention.

The appellant next contends that as against a demurrer, allegations of a complaint should be liberally construed. We find no merit in this contention Even if the motion to dismiss should be treated as a demurrer in this case, under a liberal construction of the allegations in the complaint, it only stated general conclusions of law rather than specific facts constituting elements of actionable damage. See Ark. Stat. Ann. § 27-1113 (Repl. 1962); *Wilson* v. *Overturf,* 157 Ark. 385, 248

S.W. 898, and *Wood* v. *Drainage Dist. No. 2,* 110 Ark. 416, 161 S.W. 1057.

The appellant next contends that the exclusive remedy under the Workmen's Compensation Act contemplates that the injury be both accidental and in the course of employment and does not contemplate intentional and malicious mental injuries by an employer-respondent upon an employee. This contention is without merit for the reasons already stated.

Appellant next contends that "retaliatory action on the part of employer-respondent for filing a workmen's compensation claim is actionable in a court of law." We do not reach this point in the case at bar for the reasons already stated. The appellant next contends "Arkansas tort law recognizes intentional infliction of severe mental distress without physical injury as a cause of action." We also consider it unnecessary to discuss this point for the reasons already stated.

The rights and remedies provided in the Workmen's Compensation Act, Ark. Stat. Ann. §§ 81-1301 — 81-1349 (Repl. 1960), are exclusive of all other rights and remedies as to injury or death suffered by employees under the Act. Ark. Stat. Ann. § 81-1304 (Repl. 1960). In addition to the 20% penalty and interest for late payment provided in § 81-1319 (f) (g), the Commission may require bond from the employer under § 81-1319 (j) to insure prompt payment. Most pertinent, however, to the situation involved in the case at bar, § 81-1325 (c) provides as follows:

> (c) If any employer fails to comply with a final compensation order or award, any beneficiary of such order or award, or the Commission, may file a certified copy of the said order or award in the office of the circuit clerk of any county in this State where any property of the employer may be found, whereupon the circuit clerk shall enter the said order or award in the judgment record of said county and the said order or award so recorded shall be a judgment and lien as are judgments of the circuit court, and enforceable as such.

We are of the opinion that the trial court did not err in dismissing the complaint.

The judgment is affirmed.

MOHAWK TIRE and RUBBER COMPANY and TRAVELERS INSURANCE COMPANY *v.* E. T. BRIDER

75-359 536 S.W. 2d 126

Opinion delivered May 10, 1976

Wright, Lindsey & Jennings, for appellants.

Mike J. Etoch Jr., for appellee.

ELSIJANE T. ROY, Justice. This appeal results from a decision of the Workmen's Compensation Commission, affirmed by the Circuit Court, denying credit for payments

made by an employer under a disability insurance plan during a period of temporary total disability following an injury to its employee, E. T. Brider.

In April, 1969, Brider developed a debilitating pulmonary disorder and applied for benefits available from a disability insurance policy furnished by Mohawk Tire and Rubber Company (hereafter Mohawk) to cover all employees. This policy was intended to cover accident or sickness not compensable under workmen's compensation and provided that the concurrent receipt of workmen's compensation benefits would result in the deduction of the amount of those benefits from the disability payments. The co-appellant, Travelers Insurance Company, is both the insurer in the disability policy and the compensation carrier for Mohawk. Appellee's claim for payments under the disability policy was granted by Travelers, and he received weekly payments of $85 for a total period of 66.4 weeks until expiration of eligibility in January, 1972.

In April, 1972, appellee filed for workmen's compensation benefits contending that his disability was work related. This claim was controverted by appellants based upon their contention that the condition was unrelated to appellee's employment and, in any event, appellee was barred by the statute of limitations, Ark. Stat. Ann. § 81-1318(b) (Supp. 1973), from proceeding because more than two years had elapsed since the condition occurred. These contentions were rejected by the Workmen's Compensation Commission, and appellee was awarded $49 per week for the entire period.[1] This Court affirmed in *Mohawk Tire & Rubber Co.* v. *Brider,* 257 Ark. 587, 518 S.W. 2d 499 (1975). We specifically found appellee's condition was work related and the statute of limitations was tolled by payment of either income or medical benefits. The payment of compensation in the form of medical benefits was not controverted by the employer. See *Brooks* v. *Ark. Best Freight System, Inc.,* 247 Ark. 61, 444 S.W. 2d 246 (1969).

[1]This award basically provided for payments of $49 per week from April 22, 1969, to an including February 7, 1973, and an additional period of benefits for 22 1/2 weeks after February 7, 1973, plus reasonable medical expenses.

Nevertheless, after this decision appellants tendered only partial payment of the amount awarded by the Workmen's Compensation Commission, deducting credit for the amount paid during the 66.4 weeks appellee received payments under the disability policy. Appellee refused this tender, and the matter was again set for hearing by the Workmen's Compensation Commission. After the hearing the Commission, in an order filed on August 13, 1975, stated that in its original opinion dated May 15, 1974, this very same issue seeking credits had been raised and was denied. The Commission correctly concluded that since on appeal to this Court the case was affirmed the matter was res judicata. The full Commission additionally assessed a 20% penalty against appellants pursuant to Ark. Stat. Ann. § 81-1319(f) (Repl. 1960) for failure to pay the award within 15 days after it became due.

Appellants argue for reversal that the denial of a credit for $3,254.68 paid under the "accident and sickness" policy is contrary to the law. This contention is without merit as the right of appellants to a credit was foreclosed in their first appeal and cannot be relitigated here.

The Arkansas Workmen's Compensation Law covering credit for compensation or wages paid is found in Ark. Stat. Ann. § 81-1319(m) (Repl. 1960), which reads as follows:

> Credit for compensation or wages paid. If the employer has made *advance payments of compensation* he shall be entitled to be reimbursed out of any unpaid installment or installments of compensation due. * * * (emphasis supplied)

The Commission held that because the earlier payments were not for work associated accident or illness they were not "advance payments of compensation" and no credit was allowable. Appellants did not appeal to the Supreme Court on the issue of whether a credit should be allowed.

Since this issue was submitted to and decided adversely to appellants by the Commission the bar of res judicata is invoked as effectively as if the issue had been presented to this Court.

In *Hollis* v. *Piggott Junior Chamber of Commerce,* 248 Ark. 725, 453 S.W. 2d 410 (1970), quoting from an earlier Arkansas decision, it was stated that:

> * * * *After judgment on the merits,* a party cannot afterwards litigate the same question in another action, although some argument might have been urged on the first trial that would have led to a different result. (emphasis the Court's)

The rationale behind holding an issue to be res judicata in a subsequent proceeding is to ". . . end litigation by preventing a party who has had one fair trial of a question of fact from again drawing it into controversy, ... " *Ted Saum & Co.* v. *Swaffer,* 237 Ark. 971, 377 S.W. 2d 606 (1964).

Appellants' second contention that the 20% penalty should not be imposed upon the entire amount of the award is equally without merit. After the decision by this court in *Mohawk, supra,* upholding the decision of the Workmen's Compensation Commission granting benefits to appellee, appellants arbitrarily withheld the sum of $5,645.71 from the amount due under the Commission's award and also reduced the payment of attorney's fee accordingly.[2]

Appellee was not required to accept appellants' tender of approximately 50% of what was due under the mandate of the Arkansas Supreme Court affirming the award of the Commission and expose himself to the peril of appellants' possible argument that acceptance of the lesser amount constituted accord and satisfaction. Accordingly we find the failure of appellants to comply with the award of the Commission, affirmed by this Court, exposes them to the sanction of § 81-1319(f) and a 20% penalty on the entire amount of the award was properly applied herein.

Affirmed.

JONES and BYRD, JJ., dissent.

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[2]After a hearing before the Administrative Law Judge appellants later reduced the amount claimed as a credit to $3,254.68, computed by multiplying the $49 per week award by 66.4 weeks.

J. FRED JONES, Justice, dissenting. I do not agree with the majority opinion in this case. The facts relative to insurance coverage are slightly unusual in that the same carrier had both the group and compensation coverage and the coverages overlapped. It is my opinion the group coverage simply supplemented the compensation coverage where compensation covered disability was involved.

The group coverage provided for the payment of $85.00 per week and the coverage included disability "due to accident or *occupational illness.*" Brider's disability was not only caused by a series of accidents (inhalation of smoke and chemical fumes) within the meaning of the Workmen's Compensation Law, it was also caused by "occupational *illness*" in the sense that the occupation caused the illness which resulted in the disability.

No serious effort was made by anyone to determine whether Brider's disability was occupational within the workmen's compensation coverage until the payments under his group policy were exhausted and he filed claim for workmen's compensation benefits. This is understandable because the weekly benefits were greater under the group policy and Brider had no reason to complain or make inquiry. The employer or its insurance carrier did not question Brider's disability and his entitlement under the group policy and really had no reason to do so until the benefits under the group coverage expired and Brider filed claim for compensation. The compensation and group carrier was paying greater benefits under the group policy than were payable under the compensation coverage and, until the benefits under the group policy were exhausted, it was all the same in dollars and cents to the appellants because the group policy contained a provision as follows:

> 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.

As it turned out, Brider should have been receiving workmen's compensation benefits all the time from the beginning of his disability. Instead, he did receive full benefits under the group coverage without deduction for compensation payments. The compensability for his disability under the Workmen's Compensation Law was not finally determined until we affirmed the circuit court and Commission in our previous decision in this case. *Mohawk Tire & Rubber Co., et al.* v. *Brider,* 257 Ark. 587, 518 S.W. 2d 499.

Now, if the appellants had recognized Brider's disability as compensable under the Act and had made payments accordingly, there is no question that such payments should have been credited against the larger weekly amount payable under the group policy. It is my view that the appellant-carrier is still entitled to such credit. It is clear to me that the group policy did not contemplate double coverage but only supplemental coverage where compensation coverage applied.

It is quite true that the appellant-employer and carrier controverted the appellee's claim for compensation benefits, except medical, and contended that his disability was not related to his employment but was only covered under the time limited group policy. We did not agree with that contention and in affirming the circuit court judgment which affirmed the Commission's award, we held in effect that Brider was entitled to compensation benefits which should have been paid from the inception of his disability. It could only follow, as I view this case, that as a matter of right as well as a matter of law, the appellants are entitled to credit for the overpayments they made under the group coverage to the extent of the amounts they should have paid under the compensation coverage.

It is true that in the original request for review of the referee's findings by the full Commission, the appellants asserted that the referee had failed to allow credit for payment under the group policy but, of course, at that point the

appellants were still contending that Brider's disability was unrelated to his work and was, therefore, not compensable at all under the Workmen's Compensation Act. The appellants never did question their full liability for medical and compensation benefits under the group policy which covered both occupational and nonoccupational, illness and injuries and on appeal from the referee's award to the full Commission on the compensability of the claim as work related, it would have been slightly inconsistent for the appellants to have pursued a claim for credit for compensation it was contending it did not owe. In any event, neither the referee nor the full Commission granted, denied or even mentioned credit for compensation against the amounts paid under the group policy.

It is true, as stated by the referee in the case at bar, we did state in our original opinion ". . . 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." This quote was a statement of Mohawk's *contention* in support of its plea of the statute of limitations and was not a statement of this court's opinion. This contention by Mohawk was based upon its primary contention most vigorously advanced, that Brider's disability was not occupational at all and, being nonoccupational in nature, could fall only under the group coverage. We did not agree with the appellants on either co ntion.

I do not consider our original opinion res judicata as to the question now before us. As I interpret our original opinion, in affirming the circuit court judgment, we affirmed the findings and award the Commission *did make* and our opinion was in no wise res judicata as to any question that was or may have been presented to the Commission and never passed on or mentioned by the Commission in its opinion.

The appellants never did concede that Brider's disability was occupational and compensable under the compensation coverage. The appellants controverted the entire claim, except medical, at the risk of paying attorney's fee in addition to compensation as they had a perfect right to do. The appellants nor the appellee nor anyone else, including the

Commission and any one member of this court, knew that Brider's disability was compensable under the Workmen's Compensation Law until that question was finally determined by this court. The appellants are bound by the decision of this court whether they agree with that decision or not, but in my opinion the appellants are certainly not bound to their former contentions under their prior ineffective defense which was never adjudicated by the referee, or the Commission, or the circuit court, or this court on appeal.

The only issues before the referee in the original case were whether the claimant had sustained an accidental injury; whether his condition arose out of or in the course of his employment, and whether the claim was barred by the statute of limitations. In his findings of fact the referee found as follows:

> 2. Claimant's healing period ended on February 7, 1973.
> 3. The claimant has sustained a permanent partial disability of 5% to the body as a whole resulting from his lung disease.
> 4. The respondents are liable for payment of temporary total disability benefits from April 22, 1969, to February 7, 1973. The respondents shall receive credit for wages paid the claimant during this period.
> 5. The respondents are liable for the reasonable medical services rendered to the claimant as a result of the aforementioned compensable lung disease.
> 6. The respondents have controverted this claim except for the medical treatment which was paid for by the respondent prior to the date of the hearing.

The referee's award appeared as follows:

> The respondents are ordered and directed to pay the claimant temporary total disability benefits at the rate of $49.00 per week from April 22, 1969, to Feb. 7, 1973, except for the days that the claimant actually worked for the respondent during that period of time. The respondents shall pay the reasonable medical expenses resulting from the claimant's industrially caused lung disorder. The respondents are further ordered and

> directed to pay permanent partial disability benefits in the amount of 5% to the claimant beginning February 7, 1973, and all permanent partial disability benefits due and owing are to be paid in one lump sum without discount. Claimant's attorney herewith is awarded the maximum attorney's fees provided by law.

In the appellants' memorandum brief on appeal to the full Commission they stated as follows:

> The following points are asserted as grounds for reversing the decision of the Referee and will be discussed in the same order in the brief:
>
> 1. The claimant has failed to establish by a preponderance of the evidence that his lung disorder was caused by his employment.
> 2. The claimant has failed to establish by a preponderance of the evidence that his lung disorder was temporarily or permanently disabling.
> 3. Respondents were not given credit for health and accident benefits paid to the claimant from January 18, 1970 through January 18, 1972.
> 4. Part or all of the claim is barred by the statute of limitations.

And, as a part of their argument in support of their contention No. 3, the appellants argued as follows:

> It is undisputed that claimant applied for and received disability benefits at the rate of $85.00 per week from January, 1970 through January 18, 1972 and also had paid in his behalf $6,784.66 in medical expense. These benefits were paid on the assumption that Brider's condition was unrelated to his employment. Such benefits are not payable or, are payable only on a limited basis in the event of a compensable workmen's compensation claim. The claimant is not entitled to be unjustly enriched by reason of a payment from the health and accident policy and a separate payment for the same period of disability and medical expense as a workmen's compensation claim. In the event that this claim is held to be

> compensable in whole or in part, respondents are entitled to credit for those sums paid by the health and accident policy for temporary total disability benefits or medical expense.

In the opinion of the full Commission the Commission recited, in its statement of the case, as follows:

> For reversal, the respondent states that the claimant failed to establish by a preponderance of the evidence that his lung disorder was caused by his employment; that the claimant failed to establish by a preponderance of the evidence that his lung disorder was temporarily or permanently disabling; that the respondents were not given credit for health and accidents benefits paid to the claimant from January 18, 1970, through January 18, 1972; and that part or all of the claim was barred by the Statute of Limitations.

The Commission in its opinion then made no further reference whatever to the appellants' third contention. In its findings of fact the Commission simply found that the claimant sustained an accidental injury arising out of and in the course of his employment; that he was earning sufficient wages to entitle him to the maximum compensation of $49 per week; that his healing period ended on February 7, 1973; that the claim was not barred by the statute of limitations; that the claimant sustained permanent partial disability of 5% to the body as a whole; that the appellants were liable for payment of temporary total disability benefits from April 22, 1969, to February 7, 1973, with a right to receive credit for wages paid the claimant during the period; that the appellants were liable for reasonable medical services incurred as a result of the compensable injury, and that the appellants had controverted the claim in its entirety except for medical treatment which had been paid prior to the date of hearing.

In its conclusions, the Commission stated 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.

The Commission then made the following award:

The respondents shall pay to the claimant temporary total disability benefits at the rate of $49.00 per week beginning April 22, 1969, to and including February 7, 1973, except for those days that the claimant received wages.

Beginning February 7, 1973, and continuing for a period of 22½ weeks, respondents shall pay the claimant permanent partial disability benefits in the amount of $49.00 per week representing a five per cent permanent partial disability, and all permanent partial disability benefits heretofore not paid, shall be paid in one lump sum without discount.

The respondents shall pay for the reasonable medical expenses resulting from the claimant's injury and receive credit for amounts heretofore expended.

Claimant's attorney, Mr. Mike J. Etoch, Jr., shall be paid a maximum attorney's fee, and the same shall be based on the controverted portion of this award.

On appeal to this court in the original case the appellants designated the points they relied on for reversal as follows:

The court erred in affirming the decision of the Commis-

sion because:

I

There is no substantial evidence in the record that appellee sustained an accidental injury arising out of and in the course of his employment.

II

There is no substantial evidence in the record that appellee sustained any temporary or permanent disability.

III

Appellee's claim is barred by the statute of limitations.

The statute of limitations was tolled in this case by the payment of compensation in the form of medical benefits not even controverted. The medical benefits were also paid under the group policy coverage. Certainly no one would suggest they should be paid again under the compensation coverage.

The appellants very properly paid Mr. Brider the full benefits under the group policy without deducting the compensation benefits they did not know they owed until final determination by this court and it is my view, that as a matter of right and as a matter of law, the appellants are still entitled to deduct the compensation benefits they actually paid even though they made the payments under the erroneous theory that they were for nonoccupational disability.

I would reverse and remand this case for proper credit which, of course, would also eliminate the 20% penalty for late payment.

BYRD, J., joins this dissent.

Jacob VAN MARION et ux *v.*
L. A. MOSELEY et ux

75-294 536 S.W. 2d 697

Petition for Rehearing
denied May 10, 1976

PER CURIAM

Following our affirmance of the chancery court's decree pursuant to Rule 9 (e) (2), appellants moved for permission for their attorney to reprint a substituted brief, at their attorney's expense, to now conform to Rule 9 (d) by including in the abstract photographic copies of all exhibits introduced in evidence, pointing out that appellees did not contend that the abstract was deficient.

At the outset, we point out that motions by an appellee to dismiss for insufficiency of appellant's abstract are no longer recognized. Under Rule 9 (e) (2), this court determines, on its own motion, when the case is submitted on its

merits and not thereafter, whether the judgment or decree should be affirmed for non-compliance with the rule or whether appellant's attorney may be allowed time to reprint his brief. That decision was made in this case and our per curiam order affirming the decree pointed out, in considerable detail, the reasons why many of the omissions were critical. Therefore, we determined that an affirmance rather than a reprinting of the brief was appropriate. We pointed out that appellants had not moved for a waiver of the requirement that maps, plats, and photographs be reproduced as a part of their abstract.

As appellees point out in response to appellants' motion, appellants moved for an extension of time for filing their brief. The basis of that motion was their attorney's inability to get the manuscripts to the printer within the time allotted. Extensions totalling 22 days were granted. In spite of the difficulty in preparing the manuscript containing the abstract of the voluminous record, appellants at no time intimated that any impracticability of reproduction or abstracting of exhibits was involved.

We took pains a little more than six years ago to emphasize the importance of that part of Rule 9 (d) relating to the reproduction of exhibits which must be examined for a clear understanding of the testimony and the risk involved when there is a possibility that we may find compliance to have been mandatory. See *Williams* v. *Owen,* 247 Ark. 42, 444 S.W. 2d 237.

We had considered appellants' motion as a petition for rehearing and were prepared to deny it, as such, when appellants filed a petition for rehearing, asserting that they had actually complied with Rule 9 by abstracting only such material parts of the pleadings and exhibits as were necessary for clear understanding of the questions presented for decision, saying that the only plat material to the issues had been photostatted, indexed and inserted in their brief, and that the descriptions contained in the various conveyances exhibited had been superimposed on this reproduction of the plat.

This did not seem adequate to appellants when they

briefed this case. We were referred in the brief to exhibits which were not reproduced or abstracted in the following instances:

Brief Page	Exhibit	Transcript Reference
121	- See Defendant's Exhibit 4	Tr. 366
	- Also Orton & Wingo surveys	Tr. 369
122	- Defendant's Exhibit 4	Tr. 367
	- See Defendant's Exhibit 11	Tr. 374
	- Defendant's Exhibit 2	Tr. 365
123	- Defendant's Exhibit 14	Tr. 375
128	- See Orton-Bourland plat	Tr. 369 & 384
131	- See official plats	Tr. 367
136	- "as shown on Orton-Bourland plat"	Tr. 369

These references made for the purpose of enabling us to understand the arguments being made do not include many references to aerial photographs, which may have been difficult to reproduce. If these exhibits were not necessary for this court's clear understanding of the issues, why were these references made in the brief?

In our Per Curiam opinion affirming the decree, there was not any suggestion that any unnecessary parts of exhibits be reproduced or abstracted. We do not make such a suggestion now. We find no basis for granting a rehearing in this case, so it is denied.

HARRIS, C.J., concurs in the result because he adheres to the position he took when the original per curiam order was issued. He would affirm the decree on the merits.

In the Matter of Abstracting the
Record in Indigent Criminal Cases

May 10, 1976

PER CURIAM. This brief order is directed to counsel for indigent appellants in criminal cases. The court has perhaps been too lenient in overlooking clear-cut violations of Rule 9 on the part of such attorneys. Contrary to our practice in other criminal cases and in civil cases, we have condoned deficiencies ranging from the submission of briefs with almost no abstracts of the record to the submission of briefs with abstracts amounting almost to a reprint of the transcript.

In the future, compliance with Rule 9 will be required. Indigent appellants are entitled to effective representation by their attorneys. The court is entitled to abstracts and briefs prepared in compliance with its rules. Hereafter counsel submitting defective abstracts will be required to re-abstract the record without compensation and, in flagrant cases, at their own expense.

Floyd Estelle LINDSEY *v.*
CITY OF FORREST CITY

75-345 536 S.W. 2d 305

Opinion delivered May 17, 1976

Butler, Hickey & Jones, for appellants.

Knox Kinney, City Atty., for appellee.

GEORGE ROSE SMITH, Justice. In 1971 the City of Forrest City, with a population of more than 12,000, made plans for the expansion and improvement of its sewer system. The project included the creation of a 160-acre oxidation pond, in which sewage would be treated with chemicals and by exposure to the air. This eminent domain proceeding was brought by the city to condemn 121.12 acres out of the appellants' 696-acre farm, to be used as a site for part of the oxidation pond. At the trial the city offered only one valuation witness, James Montgomery, who testified that just compensation to the landowners would be $42,392, which Montgomery arrived at by valuing the 121.12 acres at $350 an acre. That was the precise amount of the jury's verdict. For reversal the appellants contend that the trial court should have stricken Montgomery's valuation, because he did not consider the effect of the taking upon the before and after value of the landowners' entire farm.

We agree with the appellants, that Montgomery did not use a permissible method of fixing just compensation. There

is ample proof that the oxidation pond will give off an offensive odor. Moreover, health department regulations prohibit the construction of dwelling houses within 600 feet of such a pond, with the result that 72.72 acres of the landowners' remaining property will not be available for residential use.

Montgomery candidly and unequivocally admitted, upon his original cross-examination, that he had determined just compensation solely by valuing the tract being taken at $350 an acre. He said that he did not consider the rest of the 696-acre tract, "because I wasn't appraising the other land." When asked if he had put a value on the whole farm, he replied: "There's no way that you could do that. . . I did not appraise highway frontage. I was not asked to appraise highway frontage." He explained that he had not determined the value of the whole farm before the taking: "I wasn't interested in that."

The trial judge took the landowners' motion to strike under advisement, to allow Montgomery to be questioned further upon redirect examination. Counsel for the city tried to rehabilitate the witness's testimony, but the effort failed. Montgomery simply had not considered the effect of the taking upon the rest of the 696-acre farm. In saying that he had indeed considered the effect of the oxidation pond he expressed the opinion that the presence of the pond would improve the farm as a whole. He was unaware of the 600-foot restriction. He insisted that the 696-acre tract was worth $350 an acre before the taking and $350 an acre afterwards. Needless to say, his method of valuation was not a proper way to fix just compensation, because the constitutional prohibition against the taking of property without just compensation "extends, not only to the property actually taken, but to the damage, if any, done to the property not taken." *State Life Ins. Co. of Indianapolis* v. *Ark. State Highway Commn.,* 202 Ark. 12, 148 S.W. 2d 671 (1941). Thus Montgomery's estimate was demonstrably wrong and unfair to the landowners, but it was undeniably the basis for the jury's verdict.

Although the point was not made in the trial court and is not raised in the briefs here, it was suggested at our conference that the trial judge's ultimate conclusion was right and

should be affirmed, because the landowners asked that the court "strike the testimony of Mr. James Montgomery." It is said that the motion was properly denied, because part of the testimony was admissible. *Young* v. *Ark. State Highway Commn.*, 242 Ark. 812, 415 S.W. 2d 575 (1967).

The cited rule is sound in certain circumstances, but it should not control this case. When the bare motion to strike is made, with no elaboration, and the trial court simply denies it, his action should be affirmed if part of the testimony is admissible, as in *Ark. Sate Highway Commn.* v. *Bowers,* 248 Ark. 388, 451 S.W. 2d 728 (1970). But here the naked motion did not stand alone. Counsel for the landowners fully explained his objection to Montgomery's testimony. The trial judge agreed, saying that "the statement which he made, if it stands as such, is not a proper appraisal." The city's attorney did not question the wording of the motion; instead, he insisted that the witness should be allowed to clarify his position upon redirect examination. The court afforded counsel that opportunity and, after Montgomery's ineffective effort to explain his position, denied the motion to strike, on the ground that the witness's testimony was "substantially in compliance" with the rules of evidence. In the circumstances the attorney's objection was clearly sufficient, for it met the statutory requirement that he state the grounds for his objection and make known the action which he desired the court to take. Ark. Stat. Ann. § 27-1762 (Repl. 1962); *Bell* v. *Kroger Co.,* 230 Ark. 384, 323 S.W. 2d 424 (1959).

Reversed.

FOGLEMAN, J., dissents.

JOHN A. FOGLEMAN, Justice, dissenting. I would affirm the judgment in this case. I would point out that there was only one point for reversal. It was stated thus:

> THE TRIAL COURT ERRED IN DENYING THE MOTION OF APPELLANTS TO STRIKE THE TESTIMONY OF JAMES MONTGOMERY, EXPERT WITNESS FOR THE APPELLEE.

Since this is the case, the question of the sufficiency of the evidence to support the verdict is not for our consideration. We may only consider this one point. I submit that there was no reversible error and that the court has invented both a procedure heretofore unknown, not only in eminent domain cases, but in any other, and a new rule of evidence.

I think the majority's error arises from a faulty premise, i.e., that the function of the expert witness is to fix the amount of just compensation. This is not the case. This is what the expert witness cannot do. This is solely the function of the jury, in the exercise of its own fair and independent judgment. *Ark. State Hwy. Comm.* v. *Schanbeck,* 240 Ark. 277, 398 S.W. 2d 897. Expert witnesses do not decide disputed questions of fact, but only give opinions upon the matters upon which their opinion is sought, to enable the jury to determine the question. *St. Louis I.M. & S. Ry. Co.* v. *Williams,* 108 Ark. 387, 158 S.W. 494.

The place of expert opinion evidence in a trial was articulated clearly in *American Bauxite Co.* v. *Dunn,* 120 Ark. 1, 178 S.W. 934, Ann. Cas. 1917 C 625, thus:

> Experts are allowed to give testimony by way of opinion because they are presumed to have acquired more skill and knowledge and are more capable of forming a correct opinion as to the subject matter of the question under discussion, and their opinions are admitted in evidence for the purpose of aiding the jury to understand questions which inexperienced persons are not likely to decide correctly without such assistance. But the testimony of experts may receive only such consideration by the jury as the testimony may appear to the jury to deserve.

The market value of real estate is a matter of opinion. The objective in a trial to determine just compensation is to give the jury all possible information bearing upon the question. The opinions of witnesses who are sufficiently well informed on the subject are admitted, as an exception to the general rule, as an aid to the jury. *Ark. State Hwy. Comm.* v. *Schanbeck,* supra; *Little Rock Junction Ry.* v. *Woodruff,* 49 Ark.

381, 5 S.W. 792, 4 Am. St. Rep. 51; *Ft. Smith & Van Buren Bridge Dist.* v. *Scott,* 103 Ark. 405, 147 S.W. 440. This sort of testimony is advisory only. *Ark. State Hwy. Comm* v. *Schanbeck,* supra. The opinion of such a witness goes to the jury for what it is worth in the jury's eyes. *St. Louis, Ark. & Texas Rr.* v. *Anderson,* 39 Ark. 167. It is to be considered in connection with related facts upon which it is based. *Ark. State Hwy. Comm.* v. *Warnock,* 241 Ark. 998, 411 S.W. 2d 283. It is for the jury to determine the weight to be given to the opinions of these witnesses, depending to some extent on the interest, candor, demeanor, experience, intelligence and knowledge of the witness and the reasonableness of his testimony. *Ft. Smith & Van Buren Bridge Dist.* v. *Scott,* supra; *Bridgman* v. *Baxter County,* 202 Ark. 15, 148 S.W. 2d 673; *Ark. State Hwy. Comm.* v. *Schanbeck,* supra.

The rules governing the determination of just compensation in eminent domain cases have been long and firmly established in this state. The elements which enter into estimation of damages to ascertain the amount of compensation due a landowner for the taking of a right of way across his land are the market value of the land actually appropriated *and* the injury to the remaining land. *St. Louis, Ark. & Texas Rr.* v. *Anderson,* supra. Testimony in cases involving the taking of lands for right of way should be directed *first* to the actual value of the land taken *and then* to the damage resulting to the remainder of the tract. *Springfield & Memphis Ry.* v. *Rhea,* 44 Ark. 258. The measure of damages allowed for the taking of land for right of way is the market value of the land taken *and* the damage resulting to the owner's remaining land from the construction of the improvement. *Pine Bluff & W. Ry. Co.* v. *Kelly,* 78 Ark. 83, 93 S.W. 562; *Texas Illinois Natural Gas Pipeline Co.* v. *Lawhon,* 220 Ark. 932, 251 S.W. 2d 477. *Arkansas Power & Light Co.* v. *Morris,* 221 Ark. 576, 254 S.W. 2d 684. It has been said that the correct measure of "damages" in highway partial taking cases is the market value of the land taken *plus* the damages, if any, to the owner's remaining land not taken, less the special benefits, if any, by reason of the construction of the highway. *Ross* v. *Clark County,* 185 Ark. 1, 45 S.W. 2d 31; *Hempstead County* v. *Huddleston,* 182 Ark. 276, 31 S.W. 2d 300. We reiterated this statement of the correct measure of damages in *Clark County* v. *Mitchell,* 223 Ark. 404,

266 S.W. 2d 831, saying that in arriving at the damages it is proper *to take into consideration* the differences in the market value of the property before and after the taking.

We have approved an instruction telling the jury that a landowner was entitled to a verdict for the value of the land taken *and* damages, if any, to the balance of his tract of land and that, in arriving at the amount of the landowner's damages, it should allow him the fair market value of the land actually taken for right of way *together* with the amount of damages to the balance of the tract, if any, owned by the landowners and crossed by the right of way. *Ft. Smith Light & Traction Co.* v. *Schulte,* 109 Ark. 575, 160 S.W. 855. We have also approved an instruction in a partial taking case that a jury is to take into consideration the fair market value, if any, of the quantity of land embraced in the right of way, along with elements of damage to the residue. *Herndon* v. *Pulaski County,* 196 Ark. 284, 117 S.W. 2d 1051; *Texas Illinois Natural Gas Pipeline Co.* v. *Lawhon,* supra.

In a partial taking case, the value of the land taken is a recoverable element. *Herndon* v. *Pulaski County,* supra; *Texas Illinois Natural Pipeline Co.* v. *Lawhon,* supra. Evidence of the value of the land taken as a separate item of element of compensation has been given and considered in many cases, and held competent in some of them. see, *Ft. Smith Light & Traction Co.* v. *Schulte,* supra; *Herndon* v. *Pulaski County,* supra; *Board of Directors, St. Francis Levee District* v. *Morledge,* 231 Ark. 815, 332 S.W. 2d 822 (where the court measured damages as the value of the land before the construction, less the value of the portion remaining after construction); *Black* v. *Arkanaas Power & Light Co,* 236 Ark. 447, 366 S.W. 2d 899. We have also sustained awards of compensation where the value of the land taken was fixed separately from the fixing of damages to the remainder. *Board of Directors* v. *Morledge,* supra; *Black* v. *Arkansas Power & Light Co,* supra; *Miller Levee Dist. No. 2* v. *Wright,* 195 Ark. 295, 111 S.W. 2d 469.

We did not depart from any of our previous approaches to the matter in *Young* v. *Ark. State Hwy. Comm.,* 242 Ark. 812, 415 S.W. 2d 575. We said that because the value of the part taken plus damages to the remainder rule and the before and

after rule were alternatives, it would not be proper to instruct the jury as to both. But we said: "This does not mean that evidence of the value of the land taken plus damages to the remainder is not admissible." And in *Arkansas Power & Light Co.* v. *Mayo,* 244 Ark. 435, 425 S.W. 2d 531, we expressed a *preference* for an instruction based on the fair market value of the lands in a right of way taken together with the difference, if any, in the fair market value of the remainder before and after the taking. The experts agree that this approach is the usual formula or method adopted by the courts in partial taking cases. 1 Orgel on Valuation under Eminent Domain 234, § 50 (1953); Jahr, Eminent Domain, Valuation & Procedure 135, § 98 (1957).

We clearly upheld the jury's right to consider evidence on the different elements *separately* in *Ark. State Hwy. Comm.* v. *McAlister,* 247 Ark. 757, 447 S.W. 2d 649. There we said:

> We have long recognized that one approach to determination of just compensation is a formula consisting basically of two elements, i.e., (1) value of the lands taken and (2) damage resulting to the remainder of the tract, usually referred to as severance damages. *Springfield and Memphis Railway Co.* v. *Rhea,* 44 Ark. 258; *Young* v. *Arkansas State Highway Comm.,* 242 Ark. 812, 415 S.W. 2d 575; *Stuttgart and R.B.R. Co.* v. *Kocourek,* 101 Ark. 47, 141 S.W. 511; *A.P.&L. Co.* v. *Mayo,* 244 Ark. 435, 425 S.W. 2d 531; *Clark County* v. *Mitchell,* 223 Ark. 404, 266 S.W. 2d 831. We have said that in partial taking cases the testimony should be first directed to the value of the lands taken and then to the damage resulting to the remainder of the tract. *Springfield and Memphis Railway* v. *Rhea,* supra. We have recognized that evidence of the value of lands taken plus damages to the remainder is not only admissible but that these two elements are appropriately considered by many appraisers as guides for determining "before and after values." *Young* v. *Arkansas State Highway Commission,* supra. In *Young,* we held that even though the court's instructions to the jury required a verdict reflecting the difference between "before and after values" rather than value of the lands taken plus severance damages, the landowner might present to the jury a resume of

testimony, relating to one of the elements, which, in that case, was severance damages. Certainly, it could only have been anticipated that the jury might take the same approach. In so doing, they are accorded great latitude on the consideration of testimony and are not restricted to values of, or estimates of damage to, real estate fixed by the opinion of one or more witnesses. *Griffin* v. *Searcy County,* 150 Ark. 423, 234 S.W. 270. In the case last cited, we sustained a verdict for an amount of total compensation not only less than that which could be arrived at from the testimony of any witness but also less than the lowest estimate of severance damages alone. We said that the jury might well have considered that the only damage in that case was the value of the land actually taken plus the cost of constructing a road crossing. We also said that in testing the evidence supporting a verdict for sufficiency, we would consider it in the light most favorable to the appellee.

When we do this here, we find that according to the testimony of the landowner, the 13.65 acres taken would have had a value of $4,095 or $545 more than Pearce assigned to them. The range of estimated damages to the remaining lands was from $2,900 by Pearce to $1,-450 by one of the appellant's expert appraisers. Thus, the result reached by the jury was well within the range of testimony offered on the two critical elements of damage, when they are considered separately.

This approach is in harmony with our decisions in partial taking cases such as *Arkansas State Highway Commission* v. *Wilmans,* 236 Ark. 945, 370 S.W. 2d 802, and *Arkansas State Highway Commission* v. *Russell,* 240 Ark. 21, 398 S.W. 2d 201. In the former, we held that a motion to strike only the "before values" given by a witness should have been granted because it included an improper element of damages. In the latter we rejected the argument that when a witness' "after values" are stricken, his "before values" should also be stricken because the two are so closely related that one may be misleading without the other. Of course, "before values" relate to lands taken as much as they do to remaining lands.

> We consider here only the particular situation existing in this case, i.e., when there is testimony which could be related separately to values of lands taken and to damages to remaining lands. We do not reach the situation which would be involved if all testimony related to "before and after" values only, and the verdict exceeded the greatest difference in values stated by any witness.

It is quite clear that evidence of the value of the lands physically taken by eminent domain has always been admissible in partial taking cases separate and apart from evidence of damages to the landowner's remaining lands. I am totally baffled by the majority's reliance on *State Life Ins. Co. of Indianapolis* v. *Ark. State Highway Comm.*, 202 Ark. 12, 148 S.W. 2d 671. There the county judge rejected, out of hand, without any hearing, the possibility of damage to the remaining lands of a landowner through whose property a highway right of way was being taken. The question of admissibility of evidence was not remotely involved.

A closer analysis of Montgomery's testimony will reveal that it was admissible in evidence. The tract taken consisted of 121.12 acres, which he valued at $350 per acre, or a total of $42,392.00. No objection was made to this testimony. On cross-examination, Montgomery was asked if he put any value on the whole tract. He replied that he did not because he was only appraising the land taken and that, while he did consider the surrounding area, he did not put a value on the whole farm either before or after the taking. During cross-examination, appellants' attorney, not appellee's, introduced Montgomery's written appraisal report which showed clearly that he fixed his value of the 121.12 acres at $350 per acre. No objection was made until the cross-examination was completed. This motion was then made:

> We move to strike the testimony of Mr. James Montgomery, who is supposed to be an expert witness for the City of Forrest City in that on the date of his appraisal he did not take into consideration the full value for the entire Lindsey farm just immediately before the taking and an after value for the entire Lindsey farm

> after the taking to determine just compensation, and that he stated while being examined that he just appraised the 121.12 acres and that was all of it. He put a value on that and that is not competent testimony.

After a recess, there was further redirect examination. It was brought out that Montgomery did not think that the 121-acre tract was worth $350 per acre, but that, considering the whole tract of land of which it was a part to have a value of $350 per acre, he valued this portion at that figure. This approach to valuation of the land taken was proper. In a partial taking, the land taken cannot properly be considered as an isolated tract. It must be considered in its relationship to the whole. 4A Nichols on Eminent Domain 14-100, § 14.231; 1 Orgel on Valuation under Eminent Domain 239, § 52. It is fair to say that further cross-examination revealed that Montgomery did not consider damages to the remainder of the tract sufficiently to give him a fair and reasonable basis for an opinion. Be that as it may, Montgomery's testimony was admissible in evidence, at least in part, and the motion to strike was general, so it was properly overruled. *St. Louis I.M. & S. Ry. Co.* v. *Taylor,* 87 Ark. 331, 112 S.W. 745. The point raised by appellee in the trial court is immaterial. The points raised by appellants in the trial court and here are material. Neither have merit.

I have been unable to find any authority for the majority's bald assertion that determination of error in denying a motion to strike turns upon whether there is an elaboration upon the motion by statement of grounds. The question is whether the testimony was subject to being stricken. The trial court correctly held that it was in substantial compliance with the rules of evidence.

It was permissible for appellee to offer evidence on elements of damage separately. Even when the "before and after" rule is being strictly applied, it is not necessary that each witness give a before and after value of the property. 27 Am. Jur. 2d 321, Eminent Domain, § 425.

It is well established that when any part of a witness's testimony is competent, it is proper to refuse a motion to ex-

clude his entire testimony. *Urban Renewal Agency* v. *Hefley,* 237 Ark. 39, 371 S.W. 2d 141. *Young* v. *Ark. State Hwy. Comm.,* 242 Ark. 812, 415 S.W. 2d 575; *Ark. State Hwy. Comm.* v. *Maus,* 245 Ark. 357, 432 S.W. 2d 478 (where Maus' testimony included some errors made in mental calculations while on the stand); *Ark. State Hwy. Comm.* v. *Darling,* 243 Ark. 386, 420 S.W. 2d 94; *Ark. State Hwy. Comm.* v. *Carpenter,* 237 Ark. 46, 371 S.W. 2d 535 (wherein a part of the witness's testimony related to the cost of staying in motel while the home was put back into a livable condition); *Ark. State Hwy. Comm.* v. *Bowman,* 237 Ark. 51, 371 S.W. 2d 138 (wherein, in testimony to establish before and after values, the witness mentioned specific items of damages but was not clear as to whether he had simply subtracted them from the total or not); *Ark. State Hwy. Comm.* v. *Jackson County Gin Co.,* 237 Ark. 761, 376 S.W. 2d 553; *Ark. State Hwy. Comm.* v. *Wilmans,* 236 Ark. 945, 370 S.W. 2d 802 (wherein the witness took into consideration business profits in the valuation of one of two tracts).

It must be remembered that even though the landowner is a defendant, to be entitled to more than nominal damages, the burden of proving the amount of just compensation rests on him, not the condemnor, especially where damages to remaining lands are claimed. 5 Nichols on Eminent Domain 18-249, § 18.5; 27 Am. Jur. 2d 308, § 419; *Howell* v. *United States,* 442 F. 2d 265 (7 Cir., 1971). See also, *Kimball Laundry Co.* v. *United States,* 338 U.S. 1, 69 S. Ct. 1434; 93 L. Ed. 1765 (1949). There is no requirement that the condemnor introduce evidence on all elements of damage or any evidence at all. It could simply rely upon the weakness of the landowner's evidence and argue that it was incredible or that it was entitled to little or no weight.

Furthermore, evidence may be, and often is, admitted, not as a measure of damages to remaining lands, or even as an element of damages, but as an aid to the jury in determining just compensation. See, e.g., *Arkansas State Hwy. Comm.* v. *Ptak,* 236 Ark. 105, 364 S.W. 2d 794; *Arkansas State Hwy. Comm.* v. *Speck,* 230 Ark. 712, 324 S.W. 2d 796; *Kirk* v. *Pulaski Road Imp. Dist.,* 172 Ark. 1031, 291 S.W. 793.

From whatever perspective Montgomery's testimony is

viewed, it was admissible, at least in part, and the trial judge committed no reversible error. As against the only point urged for reversal, the judgment should be affirmed.

Bobby J. NORRIS *v.* STATE of Arkansas

CR 75-199 536 S.W. 2d 298

Opinion delivered May 17, 1976

Robert L. Shaw, for appellant.

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

J. FRED JONES, Justice. Bobby J. Norris was convicted at a jury trial in the Polk County Circuit Court for the crime of delivering a controlled substance, marijuana, and was sentenced to the Arkansas Department of Correction for a period of ten years and was fined $4,000.

On appeal to this court he has designated the following points on which he relies for reversal and we shall discuss the points in the order designated:

I

The court erred in allowing the consideration of evidence which was improperly obtained.

This assignment pertains to the introduction into evidence of two marked $20 bills and a marked $10 bill and requires some discussion of the background facts as gathered from the testimony.

One Michael Pharr, who had served a sentence under the Controlled Substances Act and who was a longtime acquaintance of appellant Norris, became an informer in connection with the drug traffic in Polk County. According to his testimony he had previously purchased controlled substances, including marijuana, from Norris and on January 3

Norris advised him he had one-half pound of marijuana he would sell for $75. He said Norris later advised that he only had about 15 ounces of marijuana which he would sell for $50. He said he advised state Trooper Combs of the offer and arrangements were made for him to make the purchase under surveillance of the police officers. He said Officer Combs and Sheriff Hadaway then furnished him with $50 in marked money with which to make the purchase and that the officers explained the procedure he was to follow in indicating to them when the purchase was completed. He said he then went to Norris's house with the marked money which consisted of two $20 and one $10 bill; that Norris came out in his yard and after talking a few minutes, they walked to Norris's pickup truck where he handed Norris the marked money and Norris handed him a Buglar tobacco can containing the marijuana which he obtained from his pickup truck. He said he knew the police officers were watching the transaction and after he made the purchase he crossed the street and shrugged his shoulders as a signal by prior arrangement indicating that he had made the purchase.

Mr. Pharr said he looked back as he walked down the street and saw Norris walking toward his doorstep as the officers approached him, but he did not see whether Norris entered his house or not. He said by prearrangement he took the marijuana to Ray's Market where he delivered it to Rodney Combs, one of the police officers who came to Ray's Market to pick him up. He said he received no money from the officers for his services but that he made the purchase at their request for "personal reasons."

State Trooper Rodney Combs testified that he participated in the arrest of Norris. He said the money furnished to Mr. Pharr with which to purchase the marijuana was two $20 bills and a $10 bill marked with the sheriff's initials in ultraviolet pencil marking not visible to the naked eye, but which would show up under ultraviolet light. He said that after arranging with Mr. Pharr to make the purchase, he and the sheriff stationed themselves at a point near the Norris residence and that he observed the entire transaction through binoculars. He said he saw Mr. Norris and Pharr walk from Norris's porch to Norris's pickup truck parked in the yard

and saw Norris hand the tobacco can containing the marijuana to Pharr and saw Pharr hand the money to Norris. He said that after this transaction Mr. Pharr crossed the street and shrugged his shoulders as per prearranged signal and that Norris walked back upon his porch and stood there for a moment. He said other police units were stationed in the area so that the transaction could be observed from different directions, and that by prearranged radio signal they went to the Norris residence after the transaction was completed. He said that as they appraoched the Norris residence, Mr. Norris stepped off the north side of the porch into some shrubbery. He said Norris was not arrested at that point but was informed by the sheriff that he had a search warrant for the house. He said that while in Norris's bedroom they examined the money he had in his possession and they did not find the marked money. He said he then went back outside to the north side of the porch where he had seen Norris step off into the shrubbery and there he found the wadded up bills which proved to be the two $20 bills and one $10 bill originally furnished to Mr. Pharr.

Sheriff Hadaway corroborated the testimony of Trooper Combs except he said he did not have binoculars and could not determine exactly what objects were exchanged between Pharr and Norris. He said he saw Norris walk back up onto his porch after the transaction but was unable to determine from his own point of observation whether Norris went into the house. He said he then gave the radio signal to the other officers and that he went to the front door of Norris's house. He said Norris's mother answered the door and upon his inquiry for Norris, told him he was not there, indicating he was not inside the house. He said about that time Mr. Norris stepped out of some shrubbery up onto the porch behind him.

On voir dire examination the sheriff testified he had informed Norris he was under arrest for possession of controlled substances before he searched his person in the bedroom, and that he had formally arrested Norris before the marked money was subsequently found in the yard.

The sheriff had obtained a search warrant for the search of the appellant's house and apparently had obtained from

inside the house other items the state proposed to offer in evidence. The record, as abstracted, is not perfectly clear on the point but apparently the items from inside the house were found during a separate search subsequent to finding the marked money in the shrubbery at the side of the porch. At the in-chambers hearing prior to trial on motion to suppress evidence obtained under the search warrant the record, as abstracted, appears as follows:

> THE COURT: Gentlemen, since we are in chambers I am confident the defense is concerned that no evidence should be presented on this charge concerning the subsequent search of the defendant's premises and the substances found as a result of the search.
>
> MR. BOYD TACKETT, SR.: Right.
>
> THE COURT: Of course, that can't be used, gentlemen, and the state is admonished not to mention it. I wish you would go into the witness room and tell the state's witnesses not to mention the subsequent search. Appellant's argument in this connection is simply that the search of a premises for any purpose was not based upon a lawful search warrant, that warrant having been quashed by the Court. Therefore, it would follow that any arrest of the appellant in connection with things obtained as a result of the unlawful search warrant would be void and insufficient to make further search of the premises as being incidental to that arrest.

The appellant argues under his first point that the trial court erred in failing to grant the appellant's motion to suppress the three marked bills as exhibits in evidence because they too, were obtained under the invalid search warrant. We are of the opinion that the marked bills were not obtained under the search warrant. The search warrant, exhibit "A" in the record, was for marijuana concealed in the house occupied by Norris and the return enumerated various items found in the house which were excluded from evidence. The three marked bills were found outside the house following Norris's lawful arrest, and were found where the officers saw Norris go after receiving the marked bills and as the officers

approached him just prior to his arrest. It is true that under the testimony of the sheriff he advised Norris that he was under arrest for the *possession* of marijuana rather than for the sale of it for which he was subsequently charged and convicted. But under the evidence in this case, the sheriff had a right to arrest Norris for possession of the marijuana he saw him sell and deliver to Pharr. When the officers failed to find the marked money on Norris's person when they searched him incidental to his arrest, they would have been derelict in their duty had they not looked for the marked money at the only place they saw Norris go between the time they saw him receive the money and the time of his arrest. The Fourth Amendment to the Constitution only protects against *unreasonable* searches and seizures. *Bedell* v. *State,* 257 Ark. 895, 521 S.W. 2d 200, and the appellant's first point actually turns on the reasonableness of the search here involved. See *Ker* v. *California,* 374 U.S. 23 (1963), as later limited to some extent in *Chimel* v. *California,* 395 U.S. 752 (1969). We conclude, however, that the exigency of the circumstances added to the reasonableness of the search for the marked money under the totality of the evidence in the case at bar. The warrantless search of automobiles to prevent the loss or destruction of incriminating evidence as approved in *Chambers* v. *Maroney,* 399 U.S. 42 (1970) and many federal and state cases since then has been extended to other objects where probable cause exists and the opportunity to search is fleeting. Such search was held reasonable as applied to a suitcase in *United States* v. *Mehciz,* 437 F. 2d 145 (1971), and as applied to ladies' handbags in *United States* v. *Hand,* 516 F. 2d 472 (1975). The case at bar, however, is more in point with the California case of *People* v. *Martinez,* 64 Cal. Rpt. 666, where the police officers saw the appellant glance in the direction of their slowly moving police vehicle in line of traffic and then throw a paper bag out of the automobile window. The officers stopped the appellant; returned to the paper bag and searched it, where they found marijuana which was accepted in evidence over appellant's objection that it was obtained without a search warrant. It is abundantly clear from the evidence in the case at bar that Norris simply rid himself of the incriminating money as the police officers converged upon him immediately following their observation of the illegal sale of marijuana. We hold that the search for the marked money was

reasonable under the contingency of all the circumstances in this case, and that the trial court did not err in admitting the marked money into evidence with the attending testimony in relation thereto.

II

The court erred in refusing to allow a defense witness to testify.

We are forced to the conclusion that the judgment must be reversed under this point. It appears from the evidence in the record that one Vickie Whisenhunt was a disinterested spectator who attended the trial. At a recess in the proceedings on the second day of trial, the appellant's attorneys received information that Miss Whisenhunt had said that during the trial on the previous day, she was sitting in the courtroom next to the prosecuting witness, Mr. Pharr, and that Pharr told her he thought the appellant had "set him up" and helped send him to prison and that he was setting the appellant up in the trial then in progress.[1] The defense called Miss Whisenhunt as a witness and the state objected to her testifying because the defense had requested sequestration of the witnesses, which request was granted, and Miss Whisenhunt had been sitting in the courtroom throughout the entire trial. This court addressed the question here involved in *Williams* v. *State,* 258 Ark. 207, 523 S.W. 2d 377 (1975), and in that case we said:

> The rule consistently applied by this court is that a violation by a witness of the rule of sequestration of witnesses, through no fault of, or complicity with, the party calling him, should go to the credibility, rather than the competency of the witness. *Harris* v. *State,* 171 Ark. 658, 285 S.W. 367; *Hellems* v. *State,* 22 Ark. 207; *Golden* v. *State,* 19 Ark. 590; *Pleasant* v. *State,* 15 Ark. 624. The power to exclude the testimony of a witness who has violated the rule should be rarely exercised. We have been unable to find any case in which this court has sustained the action of a trial court excluding the testimony of such a witness. While the witness is subject

[1]It must be remembered that Pharr said he cooperated with the police for "personal reasons."

> to punishment for contempt and the adverse party is free in argument to the jury, to raise an issue as to his credibility by reason of his conduct, the party, who is innocent of the rule's violation, should not ordinarily be deprived of his testimony. *Harris* v. *State, supra; Aden* v. *State,* 237 Ark. 789, 376 S.W. 2d 277; *Mobley* v. *State,* 251 Ark. 448, 473 S.W. 2d 176.
>
> Although the trial court has some discretion in the matter, its discretion is very narrow and more readily abused by exclusion of the testimony than by admitting it. *Harris* v. *State, supra.* It has even been held that failure to make a formal proffer of the testimony of a witness excluded upon no basis other than his violation of a sequestration order, without the knowledge, procurement or consent of defendant or defense counsel cannot be used to deprive the accused of his constitutional right to compulsory attendance of witnesses in his behalf. See *Braswell* v. *Wainwright,* 463 F. 2d 1148 (5 Cir. 1972). See Art. 2, § 10, Constitution of Arkansas.

The facts in *Mobley* v. *State,* 251 Ark. 448, 473 S.W. 2d 176 (1971), were very similar to those in the case at bar. The facts in that case were stated as follows:

> After the state completed its evidence in chief and rested, the court was recessed for lunch. When the court reconvened, appellant's attorney called Otis Green to the witness stand, and the circuit judge observed that he had been in the courtroom all morning. Appellant's attorney replied that he had caused a subpoena to be issued for this witness during the noon recess. When the witness admitted that he had been in the courtroom all morning, and had heard all the testimony in the case, the judge ruled that he could not testify.
>
> * * *
>
> Appellant's attorney stated that he was not aware of Green's presence in the courtroom or his identity until the noon recess. His statement went unchallenged.

We held that the trial court erred in refusing to allow Green to testify.

III

The court erred in allowing highly prejudicial testimony by a state's witness in rebuttal concerning unrelated, alleged unlawful conduct remote in time to the offense charged.

The appellant Norris had testified on cross-examination that he had never sold marijuana to Larry Lein. Mr. Lein was called as a witness for the state in rebuttal and his testimony was first objected to for the reason that his name was not endorsed by the information. It appears that Mr. Lein had been subpoenaed the previous day. At a hearing in chambers it appears that Mr. Lein would testify that he had purchased marijuana from the appellant approximately 18 months prior to the trial. His testimony was further objected to by the appellant as being too remote in time. After considerable colloquy between the court and defense attorney as to the remoteness of the transaction to which Lein would testify, the attorney for the appellant stated that the court had made a previous applicable ruling pertaining to the remoteness of some of the activity of the prosecuting witness Pharr and the record then appears as follows:

> THE COURT: No, sir, Mr. Tackett, I didn't rule that.
>
> MR. BOYD TACKETT, SR.: I thought you did. At any rate, Larry Lein has been in the penitentiary himself, *and I want to hear him testify.*
>
> THE COURT: Well, gentlemen, with that statement, let's return to the courtroom. (Our emphasis.)

It is apparent that the defendant waived his objection to Mr. Lein's testimony and we find this assignment without merit. In light of a new trial, however, see *Randall* v. *State,* 239 Ark. 312, 389 S.W. 2d 229 (1965); *Spence* v. *State,* 184 Ark. 139, 40 S.W. 2d 986 (1931), and *Fulwider* v. *Woods,* 249 Ark. 776, 461 S.W. 2d 581 (1971).

IV

The court erred in refusing defendant's requested instructions Nos. 1 and 2 and refusing to allow defendant to present evidence concerning entrapment.

The proffered instructions referred to under this point had to do with entrapment. We consider it unlikely that the alleged error under this point will arise again in the same context at a new trial so we deem it unnecessary to discuss this point.

V

The court erred in construing the jury verdict and in sentencing the defendant to punishment in excess of the verdict.

The jury verdict as actually returned by the jury fixed the appellant's punishment as "confinement in the state penitentiary for 10 years and/or by a fine of $4,000.00." The clerk read the verdict in open court as "confinement in the state penitentiary for 10 years, and by a fine of $4,000.00." It is obvious that such "and/or" verdict is at least confusing. Apparently the confusion arose here from the "and/or" form of the verdict furnished to the jury. In any event, we shall not pursue the matter further in this opinion for the reason that the question is not likely to arise again at a new trial.

VI

The court erred in denying defendant's motion for new trial.

This assignment is now moot. The judgment is reversed and this cause remanded for a new trial.

Reversed and remanded.

Mrs. Matthew STINE *v.* Pat SCOTT

75-317 536 S.W. 2d 304

Opinion delivered May 17, 1976

Brockman, Brockman & Gunti, by: *E. W. Brockman, Jr.,* for appellant.

Owens & Fikes, for appellee.

CONLEY BYRD, Justice. The trial court in ousting appellant Mrs. Matthew Stine from possession of Lots 10-14, Block 13, Eureka Heights Addition No. 4 to the City of Pine Bluff relied upon hearsay testimony to show that the original entry of appellant and her husband was with permission of the then owners of the property.

The record shows that Matthew Stine was a half brother of one Joe Scott, the original owner of the property in question, and that, following the death of Joe Scott in 1945, Matthew Stine lived on and claimed the property until his death some five years ago. Appellant married Stine in 1951, and she and Stine have lived on the property continuously since that time paying the taxes, making improvements and claiming it as their own.

To avoid the obvious showing of adverse possession by appellant, appellee Pat Scott testified that his mother, Elsie Reed, and his father, Joe Scott, got married by clapping their hands. There were three children born of that marriage — *i.e.*, Harriet Scott, Georgie Scott and himself —, and Harriet and Georgie had died without issue. He stated that he was not able to go to his father's funeral but that Georgie Scott did go. When Georgie Scott returned from the funeral, Georgie stated that permission had been given to Matthew Stine to take possession of the property and to keep up the taxes.

The trial court in a written opinion readily recognized that the foregoing testimony was hearsay but ruled that it was competent evidence to show that Matthew Stine entered into possession of the property with permission, thereby defeating a claim for adverse possession by appellant. In holding that the evidence was competent, the trial court relied upon 31A C.J.S. *Evidence* § 210 (1964). When the cases cited as authority in C.J.S., *supra,* are considered, it at once becomes obvious that the author was there concerned with whether the admission of hearsay evidence before a chancellor is reversible error — not whether such hearsay is competent evidence. An example of the authorities relied upon in 31A C.J.S. *Evidence* § 210 is *Carmen, et al* v. *State,* 208 Ind. 297, 196 N.E. 78 (1934), where the court stated:

> "... The petition for a writ of error coram nobis is heard by the court without a jury, the same as a motion for a new trial is heard. Counter affidavits may be filed and the strict rule of excluding hearsay evidence is not adhered to so closely as in the trial of a cause. 22 Corpus Juris 185. If it be granted that some of the statements in the affidavits were hearsay, this alone would not be reversible error if such statements were not harmful to the appellants and the finding of the court did not depend on the incompetent evidence for its support."

From the foregoing it can be readily seen that the authorities do not recognize any greater ability in trial judges to weigh and consider incompetent evidence than that given to a jury.

To sustain the action of the chancellor, appellee relies upon *Dial* v. *Armstrong,* 195 Ark. 621, 113 S.W. 2d 503 (1938) and *Crawford* v. *Center,* 193 Ark. 287, 100 S.W. 2d 83 (1936). No hearsay was involved in *Dial* v. *Armstrong, supra,* as the witnesses there testified to being present and hearing the agreement between Dial and Armstrong. Nor can appellee find any relief in *Crawford* v. *Center, supra,* which permits an exception to the hearsay rule in a wrongful death action for the purpose of showing the intent of a deceased child to support a parent for the purpose of proving the parent's expectation for receiving pecuniary aid from the child.

In the absence of any evidence showing a permissive entry, it follows that the trial court erroneously entered a decree in favor of appellee. This disposition makes it unnecessary for us to consider the other issues raised in the briefs.

Reversed and remanded for entry of a decree not inconsistent herewith.

BELVEDERE SAND & GRAVEL COMPANY
v. Richard HEATH, Director of Department
of Finance and Administration of the
State of Arkansas

75-390 536 S.W. 2d 312

Opinion delivered May 17, 1976

House, Holmes & Jewell, by: *Paul W. Stanfield,* for appellant.

James R. Cooper, Robert G. Brockman, James R. Eads Jr., Jack East III and *Harlin R. Hodnett,* for appellee.

ELSIJANE T. ROY, Justice. This case involves the validity of a deficiency gross receipts (sales) tax assessment levied by the Arkansas Department of Finance and Administration against appellant Belvedere Sand & Gravel Company. The alleged deficiency was on charges for hauling of sand and gravel for which appellant did not collect and remit the sales tax to the State.

Following an administrative hearing affirming the deficiency assessment, suit was filed in chancery court pray-

ing that the assessment be declared null and void. The chancery court held that the hauling charges involved were part of the total amount of the consideration for the sale of sand and gravel by appellant and such charges constituting a part of the gross receipts or gross proceeds were subject to the tax. From that decree appellant brings this appeal.

Belvedere handles sand and gravel, but owns no trucks. If the customer did not have any means of transportation, then Belvedere would provide independent haulers to deliver its product to the purchaser at the point designated. In the event an independent hauler was used Belvedere would add, as a separate item, the charge of this hauler to the total bill, but would charge no sales tax on this item. The purchaser would remit the total invoice price to Belvedere, who in turn would pay the hauler.

The pertinent statutes are:

> Ark. Stat. Ann. § 84-1902 (c) (Supp. 1973) Sale: The term "sale" is hereby declared to mean the transfer of either the title or possession, except in the case of leases or rentals, for a valuable consideration of tangible personal property, regardless of the manner, method, instrumentality, or device by which such transfer is accomplished . . . . The term "sale" shall not include the furnishing or rendering of service or services, except as herein otherwise provided.

> Ark. Stat. Ann. § 84-1902 (d) (Supp. 1973) Gross Receipts - Gross Proceeds, the term "gross receipts" or "gross proceeds" means the *total amount of consideration* for the sale of tangible personal property and such services as are herein specifically provided for, whether the consideration is in money or otherwise, *without any deduction therefrom on account of the cost of the property sold, labor service performed, interest paid, losses or other expenses whatsoever.* (Italics supplied.)

In connection with freight charges the following Regulation was promulgated:

> Rules and Regulations. Article 15. Freight. No deductions may be taken on charges for freight in the delivery of merchandise to consumers and users and a *tax must be collected on the full consideration of delivery price of the property at the point of delivery.* (Italics supplied.)
>
> In instances where delivery is made f.o.b. point of origin and the freight charges are billed direct to the purchaser by the carrier, such charges do not constitute gross receipts or gross proceeds.

Appellant contends that Article 15 is void as being an exercise of legislative function which is beyond the powers delegated by the legislature to the Department of Finance and Administration.

Appellant also contends that since the Department of Finance and Administration cannot collect a tax on freight charges, and because furnishing of hauling services is not tangible personal property, this assessment is illegal.

These contentions have no merit since the regulation almost tracks the wording of the statute and carries out the obvious intent of the legislature. Accordingly the promulgation of the regulation was within the scope of delegated authority and it is a valid regulation. Furthermore, appellant seems to ignore the fact that Ark. Stat. Ann. § 84-1902 (d) defines gross receipts or gross proceeds as *the total amount of consideration* for the sale of tangible personal property without any deduction therefrom on account of the cost of the property sold, labor service performed, interest paid, losses or any expenses whatsoever. Appellee herein is not attempting to assess a sales tax on "hauling charges" as such but upon the total consideration received by appellant for the sale of tangible personal property, that being sand or gravel *delivered* to a certain point designated by the purchaser.

Appellant next contends that it is in substantial compliance with the regulation and statutes. Appellant urges that since the hauling charge on each invoice is billed separately and since Belvedere at no time has in its possession the amount paid for hauling more than 30 days, it merely serves

as a conduit for payment of the charges and accordingly no tax is due. Thus appellant's position is that this is the same as a sale made at the point of origin.

Contrary to appellant's contentions, the testimony adduced at trial revealed that appellant's contract for delivery was an f.o.b. destination contract — one which required appellant to deliver the crushed rock or sand to a place designated by the purchaser. This was an added service being performed by Belvedere — a business practice provided to accommodate its customers. Appellant hired the independent haulers, was responsible for paying them for their services and had not completed its agreement with the purchaser until the product was actually delivered at the designated point.

The Uniform Commercial Code, in Ark. Stat. Ann. § 85-2-319 (1) (b) (Add. 1961) states that when the term f.o.b. the place of destination is used the seller must at his own expense and risk transport the goods to the destination and there tender delivery of them in the manner provided by the statute. The Gross Receipts Tax Act also clearly provides that the amount deemed to be "gross proceeds or gross receipts" means the total amount of consideration derived from the sale of the sand and gravel at the point of delivery without any deduction therefrom on account of expense of transportation. Article 15, *supra,* specifically states no deduction can be taken for freight and the tax must be collected on the full delivery price, unless the freight charge is billed direct to the purchaser by the carrier. This, of course, was not done in the case at bar.

Furthermore, one claiming an exemption or deduction from taxation bears the burden of proving clearly that he is entitled to it since both are privileges allowed merely as matters of legislative grace. *Skelton* v. *B. C. Land Co,* 256 Ark. 961, 513 S.W. 2d 919 (1974), and numerous cases cited therein.

In the case of *Select Base Materials, Inc.* v. *Board of Equalization,* 51 Cal. 2d 640, 335 P. 2d 672 (1959), the court held that where the taxpayer delivered granite to places designated by customers, and customers had no control over

independent truckers chosen by taxpayer for the hauling, and title to granite did not pass until delivery, transportation charges properly were included as part of taxpayer's "gross receipts" for computation of the sales tax.

Appellant also contends appellee is estopped from collecting the deficiency because for at least five years prior to the deficiency assessment Belvedere had been noting deduction of the hauling expense on its sales tax returns, and appellee had not advised appellant the procedure was improper.

The record reflects the Commissioner of Revenues did not inform the taxpayer that his procedure was improper because he could not make this determination from the monthly reports alone. It was only after an audit was made of the taxpayer's books that the erroneous procedure was discovered. We do not find these facts sufficient to support the argument that the Commissioner is estopped from assessing the tax. See *Williams* v. *Davis,* 211 Ark. 725, 202 S.W. 2d 205 (1947); *Bowlin* v. *Keifer,* 246 Ark. 693, 440 S.W. 2d 232 (1969).

Accordingly the decree of the chancellor is affirmed.

Floyd JOHNSON and Bill KEELING
v. STATE of Arkansas

CR 76-6 536 S.W. 2d 704

Opinion delivered May 24, 1976

McMillan, Turner & McCorkle, by: *Toney D. McMillan,* for appellant Johnson; *Travis Mathis,* for appellant Keeling.

Jim Guy Tucker, Atty. Gen., by: *B. J. McCoy,* Asst. Atty. Gen., for appellee.

JOHN A. FOGLEMAN, Justice. Appellants Floyd Johnson and Bill Keeling were convicted of killing hogs belonging to Alvin Dwiggins with intent to steal them in violation of Ark. Stat. Ann. § 41-3917 (Repl. 1964). At about 7:15 a.m. on the morning of January 14, 1975, Alvin Dwiggins arrived at his hog barn on his farm some four miles east of Amity, Arkansas. He found a station wagon with a dead sow behind it and found another dead sow in the hallway of the barn. Both had been shot. Defendant Bill Keeling was lying down in the front seat of the station wagon, and another man with a toboggan over his face was hiding behind the vehicle. The second man fired a pistol, and Dwiggins left the scene and called the Clark County Sheriff's office.

The Sheriff's officers arrived at the scene at about 7:55

a.m. on January 14, 1975. At that time Keeling was arrested and taken to jail. A Bench Warrant was issued for Floyd Johnson on March 28, 1975, and Floyd Johnson was arrested on March 31, 1975. Both defendants were tried together on July 28, 1975, and the jury found them guilty as charged and fixed their punishment at two years each.

No useful purpose would be served by an elaborate statement of the evidence. We find it sufficient to sustain the jury verdict as to both defendants, unless we find error in other respects. Otherwise, insofar as Johnson is concerned, the question is one of sufficiency of identification. While the testimony of the prosecuting witness was not as convincing as might be desired, it was sufficient if it was given full credit by the jury. See *Yelvington* v. *State,* 169 Ark. 359, 275 S.W. 701.

Appellant Johnson raised two points, other than those questioning the sufficiency of the evidence. The first is his contention that the court erred in admitting into evidence a drawing by Arkansas State Police Sergeant Ursery made from a description given him by Dwiggins. Dwiggins had testified and positively identified Keeling as the person he had seen lying in the station wagon. He had related that the other man, wearing a toboggan and a heavy jacket, had been hiding behind the station wagon. Dwiggins said this man fired a pistol, while shielding his face with his left arm. Dwiggins did not see this man in a fully erect position or get a full facial view of him but did describe him as being of average height, over 30 years of age, with a distraught look. He said that he knew at the time that this man was someone he had seen before and that his eyes corresponded with Johnson's and his lower jaw with Johnson's lower jaw and facial parts. He had seen Johnson in an automobile with a police officer, Louis Dorsey, about 3:00 p.m. on the day he found these men at his barn. Dwiggins testified on redirect examination, without objection, that he had told Sgt. Ursery of the man's facial makeup and that Ursery had made a "composite" drawing during the following week. Johnson's first objection was made when Dwiggins was presented with the actual drawing by the prosecuting attorney.

On cross-examination Dwiggins had said that he and

Johnson had gone to school together from the first grade through high school. He admitted that he had told the officers who came to his barn that he could not positively identify this man, that he had not been sure of his identity, and that he did not identify Johnson when he saw him at 3:00 p.m. He denied telling the officers or Joe Lair that this man was larger than Keeling, Officer Dorsey or himself. The "composite" drawing was identified by Dwiggins over appellant's objection that the state's counsel had stated that they did not intend to introduce it. It was not then introduced in evidence. A deputy sheriff contradicted Dwiggins by saying that Dwiggins had described the second man as being larger than Keeling.

Later Sgt. Ursery testified that he had prepared the drawing from Dwiggins' description. The drawing was admitted in evidence over Johnson's objection. The objection by Johnson's attorney, both at the time of the identification of the drawing by Dwiggins and its introduction in evidence was a plea of surprise. The following exchange took place when the drawing was offered through Ursery:

> Your Honor, I was told by the State this morning that they were not going to introduce that and I would like to plead surprise on it. I have not had an opportunity to investigate this alleged composite, how it was done and under what circumstances or anything.

The State replied:

> It was not the intention of the State to introduce this until and unless it was brought out in cross-examination by the defense. This was the only time that it was brought out and the State proceeded with the matter.

After the circuit judge overruled the objection, the drawing was introduced. No motion for continuance was ever made.

There was no reversible error in this respect. It was always held that surprise by evidence introduced was not, standing alone, a ground for new trial, and that the proper remedy when evidence is admitted to the surprise of a party

in a criminal case is by application for a postponement or continuance so the party surprised can meet the testimony *Nickens* v. *State,* 55 Ark. 567, 18 S.W. 1045; *Overton* v. *State,* 57 Ark. 60, 20 S.W. 590. See also, *Mode* v. *State,* 169 Ark. 356, 275 S.W. 700; *Adams* v. *State,* 100 Ark. 203, 139 S.W. 1116. See also, *Sellers* v. *Harvey,* 220 Ark. 541, 249 S.W. 2d 120. Even though a motion for new trial is no longer essential to the raising of a point on appeal, the rule still applies insofar as it relates to the remedy for surprise. A judgment will not ordinarily be reversed on appeal because of surprise by evidence ruled admissible on trial, in the absence of a request for continuance and a showing of inability to meet the situation. *Macumber* v. *Gillett,* 138 Neb. 714, 294 N.W. 854 (1940). We have applied this rule as to reversal even when a motion for new trial was required. *Fleming* v. *State,* 72 Ark. 140, 78 S.W. 766. There is all the more reason to apply it when a motion for new trial is not required. Usually the granting of a continuance in these matters lies within the sound judicial discretion of the trial judge. *Bascom* v. *State,* 114 Tex. Cr. 32, 24 S.W. 2d 437 (1929). Since there was no motion for continuance, the trial judge was not called upon to exercise his discretion in acting upon it. If subsequent developments in the trial had shown material prejudice to appellant, he might have raised the question by a motion for new trial. But in the absence of either motion the trial judge has never been afforded any opportunity to exercise discretion in the matter.

Johnson also complains that the trial court erred in refusing to give his requested instruction relating to the necessity for corroboration of an accomplice by which the jury would have been told that a witness, Damon Daniels, was an accomplice as a matter of law. Instead, the court gave an instruction stating that corroboration of an accomplice is required, but left the status of Daniels as an accomplice for the jury's determination as a question of fact. Appellant's argument is based, for the most part, on the fact that Daniels testified on a grant of immunity for prosecution.

Daniels testified that during the night of January 13, he went with Keeling to Johnson's house in search of Keeling's billfold, that Johnson got in Keeling's station wagon with them and they proceeded to the Dwiggins farm, where they

got out of the car and saw a hog lying in the hallway of the barn. He said that Johnson was wearing a toboggan. Daniel said that when he asked that he be taken back to town, Johnson told him not to leave, that he would probably be hurt if anything came of the incident and, at one point, threatened to kill him. He stated that, after staying around a few minutes, he left, went to the highway, caught a ride into Amity, and later discussed the situation with an attorney, who was present when he made a statement to the authorities. Daniels testified that he never intended to participate in the crime and that he was afraid of Johnson.

We do not agree that a grant of immunity, in and of itself, makes the beneficiary an accomplice of another person charged with the crime as a matter of law. An accomplice is one who could himself be convicted of the crime charged against the defendant. *DuBois* v. *State,* 254 Ark. 543, 494 S.W. 2d 700. We have pointed out that the burden is on the defendant to show that a witness is an accomplice. *Froman* v. *State,* 232 Ark. 697, 339 S.W. 2d 601. Daniels' testimony casts considerable doubt upon his status as an accomplice. We cannot be ignorant of the fact that a person on whom serious suspicion of guilt of a crime may fall is privileged to claim a constitutional right against self-incrimination and that immunity is often granted to such a person, even though there is serious doubt that he could actually be convicted of the crime.

Even strongly suspicious circumstances attached to one present at the scene of the commission of a crime are not sufficient to make him an accomplice as a matter of law. *People* v. *Howell,* 69 Cal. App. 239, 230 P. 991 (1924). At best, a grant of immunity from prosecution is only evidence tending to show that the beneficiary of the grant is an accomplice, which is to be considered with other facts and circumstances in determining whether he is an accomplice as a matter of law. The circumstances here were not sufficient to eliminate a question of fact as to Daniels' status. See, *Austin* v. *State,* 254 Ark. 496, 494 S.W. 2d 472; *Odom* v. *State,* 259 Ark. 429, 533 S.W. 2d 514. In *Odom,* we stated that ordinarily the question whether a witness is an accomplice is a mixed question of law and fact to be submitted to the jury and that the court should not instruct the jury that a certain witness is an accomplice if

there is any dispute upon that point.

Keeling's points for reversal turn upon his contention that he was not guilty, because of drunkenness, which he contends made it impossible for him to form the specific intent to steal. There was considerable evidence from which a jury might have so found. But we cannot say that reasonable minds could draw no other inference. Damon Daniels testified that he went with Keeling to look for Keeling's billfold, that Keeling drove his own station wagon, even though he was staggering drunk when the officers arrived at Dwiggins' barn. Dwiggins testified that when Keeling got out of the station wagon after the officers arrived he walked pretty straight for a drunk man.

Voluntary intoxication is not a defense to a crime. Ark. Stat. Ann. § 41-115 (Repl. 1964). The question whether Keeling was so intoxicated at the time of the commission of the crime (which the jury might have believed to have occurred before Daniels rode to the Dwiggins barn with Keeling) as to be incapable of the essential criminal intent was submitted to the jury under proper instructions. There was testimony that there were an opened pint bottle about one-fourth full of whiskey and another unopened in Keeling's station wagon. The evidence does not disclose when or how much he drank from the open bottle. The degree of his intoxication when the hogs were killed or when the offense was planned was left largely to inferences to be drawn from the testimony. We have said that the determination whether an accused is so intoxicated as to be incapable of forming the required specific intent to commit a crime is solely within the province of the jury. *Stevens* v. *State,* 246 Ark. 1200, 441 S.W. 2d 451. Even if we thought that a preponderance of the evidence sustained this defense, we would not be at liberty to set aside this conviction. This was primarily a matter for the jury. It might have been a question for the trial judge on motion for new trial addressed to him on this ground, but there was no such motion.

The judgment is affirmed.

Alfreddie JACKSON *v.* STATE of Arkansas

CR 76-24 536 S.W. 2d 716

Opinion delivered May 24, 1976

James L. Hall Jr., for appellant.

Jim Guy Tucker, Atty. Gen., by: *Jackson Jones*, Asst. Atty. Gen., for appellee.

JOHN A. FOGLEMAN, Justice. Alfreddie Jackson was found guilty of possession of marijuana with intent to deliver it in violation of Ark. Stat. Ann. § 82-2617 (a) (1) (ii). It was charged that he had possession of more than one ounce with intent to sell. He states the case thus:

> On August 25, 1974, Officer Gaylon M. Barton of the Warren Police Dept. received word that Alfreddie Jackson had some marijuana in his possession. Officer Barton and Officer Randy Peek, also an officer with the Warren Police Dept., then rode around looking for Appellant Jackson. They spotted him at a local gas station at around noon and pulled in to confront him with the information. Appellant denied having any marijuana and consented for the officers to search his car. Appellant got in his car, unlocked the glove box as requested, then suddenly started his car and took off at a high rate of speed from the service station.
>
> The officers then jumped into their cars and pursued him at relatively high speeds over a meandering course of ten to twelve blocks. Towards the end of the chase Officer Peek fired several warning shots, the Appellant failed to negotiate a corner, ran into a ditch and the chase was ended.
>
> Upon arresting the Appellant the officers found a bag beside the Appellant's car. The bag contained six individual baggies of vegetable substance which tested out positive as marijuana, the total weight of which was 2.05 ounces.

Appellant asserts two points for reversal. We find merit in neither and affirm the judgment. We will discuss the points in the order they are argued.

The first point challenges the admissibility into evidence of a statement of Officer Barton, on the ground that it was inadmissible hearsay. The statement questioned was "I had information that he [Jackson] had marijuana in his possession." This testimony explained the action of the officer in seeking out and confronting Jackson. For this purpose, it was admissible. *Sexton* v. *State,* 155 Ark. 441, 244 S.W. 710; *Trotter* v. *State,* 215 Ark. 121, 219 S.W. 2d 636; *Bird* v. *State,* 175 Ark. 1169, 299 S.W. 40. See also, *Powell* v. *State,* 231 Ark. 737, 332 S.W. 2d 483; *Lynn* v. *State,* 169 Ark. 880, 277 S.W. 19. It may well be that appellant would have been entitled to have the testimony limited to the purpose for which it was admitted, but he is in no position to complain that it was not, because he did not ask the court for a limiting instruction. *Amos* v. *State,* 209 Ark. 55, 189 S.W. 2d 611.

Appellant also contends that the evidence was not sufficient to support the jury's verdict against him. He argues that there is no evidence of his intent to deliver the marijuana found by the officers. Appellant testified that he knew nothing about the marijuana. There was no evidence that he had made or attempted any delivery or sale on this or any previous occasion. He says that, at best, the state's evidence shows him to be guilty of simple possession of marijuana, and that we should take judicial notice that the quantity found would equal the approximate amount used in two packages of ordinary cigarettes and that this amount is far from being inconsistent with the use by a single person. He urges that the circumstantial evidence of his intent does not exclude the reasonable hypothesis that he did possess the marijuana for his own use and left the jury to speculation and conjecture as to intent.

We do not agree with this argument. In the first place we are unwilling to extend judicial notice as far as appellant would have us do. Appellant's argument overlooks the impact of the "rebuttable presumption," actually "justifiable inference," provided by Ark. Stat. Ann. § 82-2617 (d) (Supp.

1975). We treated the question of statutory presumptions in this act in *Stone* v. *State,* 254 Ark. 1011, 498 S.W. 2d 634. In that act, the legislature made a determination somewhat contrary to the facts of which appellant urges that we take judicial notice. While heroin was the substance involved in *Stone* and the quantity stated as giving rise to the justifiable inference in charges pertaining to that drug was 100 milligrams, we have no hesitation in saying that the rationale of *Stone* is equally applicable where possession of marijuana is involved. Practices and usages in relation to marijuana are certainly not yet such a matter of common knowledge that the courts may take judicial notice of the quantities that may be more consistent with individual use than with distribution. In such a case, in the absence of evidence contradictory of the legislative declaration or showing that the legislative fact-finding was not upon a rational basis, we cannot overturn the act or refuse to apply it.

Although we have not previously addressed the application of the *Stone* precepts to marijuana, and are aware that courts of other jurisdictions have rejected similar legislative acts, we have no hesitation about the application of the *Stone* rationale where marijuana is involved, noting that other jurisdictions have also sustained such presumptions. See, e.g., *State* v. *Kaplan,* 23 N.C. App. 410, 209 S.E. 2d 325 (1974); *State* v. *Garcia,* 16 N.C. App. 344, 192 S.E. 2d 2 (1972); *State* v. *Birdwell,* 6 Wash. App. 284, 492 P. 2d 249 (1972). We do not agree with the suggestion that the statute invades the accused's right against self-incrimination. We rejected that premise in *Stone* because evidentiary rebuttal of the justifiable inference may come from testimony other than that of the accused.

This brings us to a consideration of the proper application of the justifiable inference. It cannot be stated in the statutory language in a jury instruction. *French* v. *State,* 256 Ark. 298, 506 S.W. 2d 820. We have, moreover, recognized that the justifiable inference, while sufficient basis for submitting the question of intent to the jury, may be overcome by evidence which creates a reasonable doubt that the person charged possessed a controlled substance with intent to deliver in violation of the statute. *Stone* v. *State,* supra; *French* v.

State, supra. The question of reasonable doubt, however, is always for the jury, never for the trial judge or the appellate court on review. *Abbott* v. *State,* 256 Ark. 558, 508 S.W. 2d 733; *Cox* v. *State,* 254 Ark. 1, 491 S.W. 2d 802, cert. den. 414 U.S. 923, 94 S. Ct. 230, 38 L. Ed. 2d 157 (1973). Credibility is also a matter for the jury. *King* v. *State,* 194 Ark. 157, 106 S.W. 2d 582. See also, *State* v. *Birdwell,* supra; *State* v. *Fitzpatrick,* 5 Wash. App. 661, 491 P. 2d 262 (1972). This was a case where the evidence was sufficient to submit the question of intent of the jury, particularly in view of the fact that appellant's real defense was that his possession was unwitting. See, *State* v. *Birdwell,* supra.

The judgment is affirmed.

NORTH LITTLE ROCK HUNTING CLUB
et al *v.* D. L. TOON and Nancy
Stephens TOON

76-14 536 S.W. 2d 709

Opinion delivered May 24, 1976

Wilson, Blaney & Dougherty, P.A., by: *Mike Wilson,* for appellants.

William E. Johnson, for appellees.

J. FRED JONES, Justice. This is an appeal by members of the North Little Rock Hunting Club from a chancery court decree canceling a lease on some real property in Ashley County.

The facts appear as follows: Dr. D. L. Mask and his wife owned some real property in Ashley County and on May 1, 1964, they leased a portion of it for a period of ten years with an option to renew for an additional ten year period. On March 7, 1969, the Masks again leased the property under a written lease[1] appearing as follows:

D. L. MASK AND HIS WIFE GLADYS MASK

TO

J. N. GATHRIGHT, ACTING IN PRESIDENTIAL CAPACITY AND ROY HARPER, ACTING AS SECRETARY AND TREASURER, RESPECTIVELY FOR THE NORTH LITTLE ROCK HUNTING CLUB

This lease entered into this 7 day of March 1969, by and between D. L. Mask and his wife Gladys Mask as Lessors, and J. N. Gathright, acting in presidential

[1]This lease was to the same party or parties as was the first lease.

capacity and Roy Harper, acting as secretary and treasurer, respectively, for the North Little Rock Hunting Club, designated hereinafter as lessee,

WITNESSETH:

One: That Lessors for the terms and purposes and considerations hereinafter expressed does [sic] hereby lease, let and demise unto the lessees North Little Rock Hunting Club, North Little Rock, Arkansas, for the purposes of Hunting and Recreation, all the lands contained in the Bearhouse Stock Farm, located in Ashley County, Arkansas, and more particularly described as land lying in the North West [sic] Quarter of the Southwest Quarter of Section 20, Township 15 South, Range 5 West, together with one four room frame house, and one 525 gallon butane gas tank, and all plumbing and piping, situated upon a plot of land lying in the North West [sic] Quarter of the Southwest Quarter of Section 20, Township 15 South, Range 5 West, Ashley County, Arkansas, and further described as beginning at the North West [sic] corner of the yard fence on the Dr. Mask place, thence North Four Hundred and Twenty Feet, thence one hundred and five feet East, then Four Hundred and twenty feet South to yard fence, hence one hundred and five feet along said fence to place of beginning, being a parcel of land one half acre wide East and West and two acres long North and South.

Two: The lessors do hereby lease, let and demise the said herein described lands to the lessee for the purposes of hunting and recreation and agrees [sic] to allow no other parties any hunting rights upon said land.

Three: The lessors hereby agree to lease, let and demise unto the lessees, the above described lands for a period of ten years beginning December 31, 1975, and ending December 31, 1985.

Four: The lessees agree to pay the lessors the sum of Nine Hundred Dollars, for the ten year lease upon the

said above described lands, the Nine Hundred Dollars to be paid upon the execution of this lease.

Five: The lessors agree to furnish water at the four room frame house hereinbefore mentioned from a well located on the premises, or from a well or wells located on land adjacent to said house.

Six: The lessors agree to pay the taxes on the herein described lands during the term of this lease and lessor at his option may carry insurance upon said house, and lessors further agree that this lease runs with the land for the period of time herein set forth.

Seventh: It is agreed by the lessors that the lessees shall have quite [sic] enjoyment of said lands and shall at all times have the right of ingress and egress unto and upon above described lands.

Eighth: Lessors warrant they have absolute title to the herein described lands and agree that they will during the term of this lease defend same and hold lessees harmless in its possession of the lands hereof.

Ninth: It is agreed by the lessors that lessees shall have the right to make such improvements to the herein described house as lessee may deem fit or desire, said improvements to remain and revert to lessors upon the termination of this lease if the term of the option extended herein is not exercised.

Tenth: Lessees agree to return the house and improvements herein described in good repair excepting ordinary wear and tear or loss by fire or unavoidable casualty.

Eleventh: Lessors hereby agree to extend this lease for the sum of ten dollars paid to them at the signing and execution of this lease for the option to lease said lands for another ten year period to begin December 31, 1985, and ending December 31, 1995.

> Witness our hands and seals this 7th day of March, 1969.

The copy of this lease appearing in the record appears to be a photostatic copy of the lease as filed for record in Book M-48 at page 121 of the records in Ashley County at 1:00 p.m. on March 7, 1969.

On August 19, 1970, the Masks sold 80 acres which included the lands previously leased as above set out, to the appellees Dr. D. L. Toon and his wife and transferred title to Dr. and Mrs. Toon by warranty deed, which was duly filed for record on August 19, 1970. On April 16, 1975, Dr. and Mrs. Toon filed a complaint in the chancery court against defendants designated as follows:

> North Little Rock Hunting Club, J. N. Gathright, Bill Lehman, and Ray Harper, or their successors, individually and as officers, trustees, and directors of North Little Rock Hunting Club, and all unknown members, trustees, or officers of North Little Rock Hunting Club and W ½ SW ¼ of Section 20, Township 15 South, Range 5 West, Ashley County.

Dr. and Mrs. Toon in their complaint alleged that they were the owners and entitled to possession of the property they acquired from the Masks. They alleged that Dr. and Mrs. Mask attempted to lease a part of the property to the North Little Rock Hunting Club; that the purported lease agreement was void and unenforceable as an attempt to convey real property interest to an unincorporated association which has no power to acquire property; that the lease was vague and indefinite as to the property intended to be conveyed; that the lease was oppressive and inequitable in its terms and conditions, specifically as to the rentals called for thereunder, which provision would unjustly enrich the defendants; that the language in the lease was not sufficient to convey any right or interest in and to the lands and was not legally sufficient to bind the successors and grantees of the lessors. The complaint then set out in the alternative various allegations as to breach of the lease agreement as to reasonable care in guarding the property against waste and

damage. They prayed for cancellation of the lease and that the title to the property be quieted and confirmed in them.

The appellant-defendants demurred to the complaint on the ground that it did not state a cause of action against them and the demurrer was set for hearing on June 2, 1975. On May 22, 1975, the appellant-defendants filed an answer and counterclaim. In answer they reaffirmed their demurrer and denied the allegations in the complaint by general denial. In their counterclaim they alleged that the appellee-plaintiffs had shut off their access to water in violation of the lease agreement, and had cut all the oak timber from the leased premises thereby damaging valuable hunting rights and they prayed damages and for all proper relief.

Following a reply to the counterclaim, the matter was set for trial on September 2, 1975, reset for September 4, 1975, and continued to October 14, 1975.

In answer to interrogatories propounded by appellees' attorney, the appellants' attorney stated that the North Little Rock Hunting Club was an unincorporated association and listed the officers and directors as Danny Fortner, president; Marvin Cash, vice-president; and Jimmy Hickman, secretary-treasurer.

Dr. D. L. Toon's discovery deposition was placed in evidence by the appellants' attorney after which the appellants filed a motion for summary judgment. The appellants filed a trial court brief in support of their motion for summary judgment and among other things they stated in their brief as follows:

> There is no argument, for the purpose of this motion, that the parties are properly before the court and that plaintiffs acquired the property as alleged in the Complaint. The lease agreements, which are the subject to the action, are attached to the Complaint. Paragraph 4 of the Complaint consists entirely of allegations which are purely a question of law. Paragraph 4 (a) alleges that the defendant Club is an unincorporated association which does not have the power to acquire property.

> At common law, voluntary unincorporated associations may hold real property either as donees of the legal title or as the beneficiaries of a trust. *Town of Gravette* v. *Veach,* 186 Ark. 544, 54 S.W. 2d 704.

When the case came on for hearing on October 14, 1975, the issues were disposed of as a matter of law and the record of the procedure appears as follows:

> COURT: This is in the Chancery Court of Ashley County, Arkansas, D. L. Toon and Nancy Stephens Toon, plaintiffs, v. North Little Rock Hunting Club, et al, Case No. 75-111. The plaintiffs are represented by Mr. William Johnson and the defendants by Mr. Mike Wilson, Little Rock. Are you gentlemen ready?
> MR. JOHNSON :Yes, your Honor.
> MR. WILSON: Yes, your Honor.
> COURT: Any preliminary matters now, gentlemen? I notice a motion for summary judgment here. What is your position on that at this point?
> MR. WILSON: If your Honor please, that motion was filed for the purpose of narrowing the issues and the court had indicated that such motions were not exactly looked upon with favor in this court.
> COURT: They are looked upon with favor if you can substantiate it.
> MR. WILSON: Right. And I understand that the court wished to hear the parties in person as to the testimony to be offered now. That there may be a question of law that will dispose of the case as to whether this unincorporated association may hold title to this property or as the lessee of the property and we have offered to stipulate and will stipulate that the association is unincorporated.
> COURT: How about you, Mr. Johnson?
> MR. JOHNSON: Your Honor, I am in agreement with Mr. Wilson in regard to this particular legal issue. I feel like the case may very well be disposed of on this issue alone as to whether an unincorporated association can be the lessee in this case and of course, one of the particular things alleged in the petition that was filed by Dr. and Mrs. Toon is that the lease is void for these

reasons that the hunting club is an unincorporated association.
COURT: If the court were to hold that the lease was void on that basis, Mr. Wilson, where would you be?
MR. WILSON: Your Honor, we would be in a position to appeal immediately on that question alone.
COURT: The case would be decided insofar as the issues are concerned as to you. Right? If the court were to hold that an unincorporated association could not hold a valid lease.
MR. WILSON: That's right.
COURT: As a matter of law.
MR. WILSON: Yes, sir.
COURT: Do you agree with that, Mr. Johnson?
MR. JOHNSON: Yes, sir, I do.
COURT: Well then, gentlemen, the court doesn't mind deciding that if you have got some authority for me this morning. I haven't researched the point. Now assume for a moment that the court were to hold that the association could hold a valid lease then we are ready to proceed with other issues. Is that correct?
MR. WILSON: Yes, sir.
MR. JOHNSON: Either to stand on the court's ruling and appeal or to proceed with the development of the remaining issues as to whether these have been breached.
COURT: Very well, gentlemen, let's hear you on this point then.

It was stipulated that the North Little Rock Hunting Club was an unincorporated association, and the two leases and warranty deed were stipulated into the record, after which the chancellor heard the arguments in chambers and, following a recess while the chancellor read the decisions cited, the record continues as follows:

COURT: Let this record reflect that counsel and the court have been in chambers and that the issue of the validity of the leases involved in this lawsuit have been discussed and that under the authority and direction of *Lael* v. *Crook,* 192 Ark., page 1115, this court finds as a matter of law that the two leases now in evidence, Ex-

> hibits 2 and 3, are invalid for the reason that the granting clause thereof conveys an interest in real property to an unincorporated association and the holding of the *Crook* case being that such a conveyance is invalid, it is noted by this court that the opinion in *Gravette* v. *Veach* was specifically overruled insofar as it was in conflict with the *Crook* case. * * * For that reason, gentlemen, the court is going to dismiss this case at this point. There would be no further issue remaining, would there, Mr. Wilson?
> MR. WILSON: Of course, your Honor, if the Supreme Court reverses this court's decision there will be several other issues.

We now consider, in the order designated, the points raised by the appellants for reversal.

I

> The trial court erred in holding that the leases marked Exhibits 2 and 3 are invalid for the reason that leases convey an interest in real property to an unincorporated association incapable of holding as lessee.

The appellants argue under this point that the case at bar is not controlled by *Lael* v. *Crook,* 192 Ark. 1115, 97 S.W. 2d 436 (1936), because *Lael* involved a conveyance of title to real property whereas the case at bar only involves the encumbrance of title by a lease. This argument is unsound and without merit. In *Chittim* v. *Gossett,* 148 Ark. 654, 228 S.W. 393 (1921), we said:

> A lease is properly a conveyance of a particular estate in lands, whether for life or for years or at will when reversion is left in the grantor. 2 Blackstone Comm. 367; Tiedeman on Real Property, § 772.

II

> The trial court misconstrued the terms of the lease in that the leases were signed on behalf of the North Little Rock Hunting Club by Trustees for the hunting club,

acting in a trust capacity.

The lease here involved and as above set out, is somewhat ambiguous on its face as to whether it was to the named individual officers in trust for the club, or to the club as lessee. No question as to a trust relationship was raised at the trial level but as we read the record, that question was specifically eliminated by submitting the matter to the chancellor strictly on a question of law as to whether the hunting club, as an unincorporated association, could, in its own name, acquire and hold title to real property in Arkansas. The chancellor, under authority of *Lael* v. *Crook, supra,* held that it could not and we are of the opinion the chancellor was right.

III

The trial court erred in holding that appellees were not estopped from attacking the validity of the leases.

This assignment is likewise without merit. In *American Cas. Co. of Reading, Pa.* v. *Hambleton,* 233 Ark. 942, 349 S.W. 2d 664 (1961), this court said:

> A party who by his acts, declarations or admissions, or by failure to act or speak under circumstances where he should do so, either designed or with willful disregard of interests of others, induces or misleads another to conduct or dealings which he would not have entered upon but for such misleading influence, will not be allowed, because of estoppel, afterwards to assert his right to the person so misled. *Dobbins* v. *Martin Buick Co.,* 216 Ark. 861, 227 S.W. 2d 620; *Williams* v. *Davis,* 211 Ark. 725, 202 S.W. 2d 205; *Rogers* v. *Hill,* 217 Ark. 619, 232 S.W. 2d 443.

The record in the case at bar fails to show that appellees acted or failed to act in such manner as to mislead appellants to their detriment, and we conclude that the decree must be affirmed. We note from the record, however, that the appellees tendered into the registry of the trial court a refund of the unearned portion of the lease rental paid in advance and the chancellor's decree failed to dispose of same. We are

of the opinion that such refund is equitable under the evidence in this case and the cause should be remanded for the purpose of making same.

The decree is affirmed and the cause remanded for the purpose above stated.

Eva Lotspeich ZAPPIA, as an individual and as trustee for her children *v.* Arthur F. GARNER et al

76-6 536 S.W. 2d 714

Opinion delivered May 24, 1976

Loyd Harper, for appellant.

Murphy, Blair, Post & Stroud, for appellee.

CONLEY BYRD, Justice. Appellant Eva Lotspeich Zappia, as an individual and as trustee for her children, brought this action against appellees Arthur F. Garner and Inez Gasperson to cancel a mining lease for breach of an implied warranty to search and develop the mineral rights under the lease. From a decree in favor of appellees comes this appeal.

The record shows that in 1953 appellant's mother executed a mineral lease to appellee Arthur F. Garner covering some 1100 acres. The lease gave to Garner, as lessee, a:

> "7/8 interest in and to all of the oil and gas, (1/8 barrel royalty), the iron, lead, zinc and manganese, ore mining there will be a royalty of 25 cents per long ton paid to Lessor and 5 cents a ton on all limestone produced in and under and that may be produced from . . . lands situated in Sharp County, State of Arkansas . . . "

Garner testified that in 1953 or 1954 he sunk a 20 foot shaft into the property and hired a driver to carry three or four car loads of iron ore to Williford for shipment to Birmingham, Alabama. In 1956 or 1957 he went on the property to take some limestone samples. After his conveyance to appellee Inez Gasperson and her husband, now deceased, in 1965, he referred all persons interested in the minerals to the Gaspersons. Inez Gasperson testified that she and her husband had had several people look at the property, but nothing had been done to develop the minerals.

The rule with respect to the implied warranty is set forth in *Millar* v. *Mauney,* 150 Ark. 161, 234 S.W. 498 (1921), as follows:

> ". . . In the construction of mineral leases such as is involved in this case, the authorities uniformly hold that there is an implied obligation on the part of the lessee to proceed with the search and also with the development of the land with reasonable diligence according to the

usual course of such business, and that a failure to do so amounts in effect to an abandonment and works a forfeiture of the lease.

. . .

". . . The reason for the rule is that where the lessor receives as royalty or rental a certain percentage of the output of the lands as his only compensation for their use by the lessee for exploration and development, when such work ceases, his compensation ends, and the consideration for the lease fails. In such contracts the lessee usually expressly undertakes, as was the case here, to 'diligently and faithfully prosecute the work of development,' and, if there is no express covenant to that effect, as we have seen, such a covenant will be implied from the very nature of the contract. Unless it is otherwise provided in the lease, it is always in the contemplation of the parties to such a contract that the lessee is able, financially and in every other way, to perform his undertakings in the time and manner specified in the contract. If, after a reasonable time, he fails to begin and to continue the work of development and exploration provided in the contract, but nevertheless holds possession and exercises control over the leased lands for promotion purposes or financial exploitations, he has by such conduct worked a forfeiture of his rights under the lease and may thereafter be treated as having abandoned his contract and as holding the land as a trespasser adversely to the lessor. In other words, the lessee under such a contract will not be allowed to speculate upon the chance of being able at some indefinite and unreasonable time in the future to begin and to continue the work of exploration and development required of him under the covenants of his contract."

From the foregoing authority it readily appears that the trial court erred in not holding that the appellees had forfeited and abandoned the mineral lease.

Appellees suggest that appellant is estopped by laches to

assert the forfeiture and abandonment at this late date. We find no merit to this contention because the burden of performance was upon appellees under the implied obligation.

Neither do we find any merit in appellees' suggestion that they should be given an additional period, in any event, to develop the minerals. In the first place, they showed no present ability to develop any of the minerals. Furthermore, as pointed out in *Millar* v. *Mauney, supra,* the law frowns upon the chance speculation by a lessee that in the indefinite future he may be able to begin exploration and development.

Reversed and remanded for entry of a decree not inconsistent herewith.

CANAL INSURANCE COMPANY *v.*
Mary Lou (Craig) HALL

75-379 536 S.W. 2d 702

Opinion delivered May 24, 1976

Rieves, Rieves & Shelton and *McDonald, Kuhn, Smith, Gandy, Miller & Tait,* for appellant.

Nance, Nance, Fleming & Wood, for appellee.

FRANK HOLT, Justice. In 1972 appellee suffered injuries when she was involved in an automobile accident with a vehicle driven by William Clark. Clark's vehicle, owned by him, was leased to Southern Trucking Corporation. Appellant Canal Insurance Company insured all trucks used by Southern. Appellee was awarded a $30,000 default judgment against Clark. Appellee's attorneys then notified the appellant-insurer of the default judgment and demanded payment. Upon refusal, appellee filed a direct action against appellant for the $30,000 judgment together with 12% penalty and attorney's fee. Appellant answered and denied coverage alleging, *inter alia,* the affirmative defense that the judgment was void for lack of due process. The trial court found, *inter alia,* "That plaintiff exercised that degree of diligence in determining the last known address of William Clark which was reasonably calculated to give him actual notice of the pendency of the cause of action. **** That service was obtained on William Clark under the Arkansas Long Arm Statute and the judgment obtained **** was valid, and not void ab initio." Appellant argues for reversal that appellee failed to exercise the reasonable diligence required in determining the last known address of Clark in order that the service might be reasonably calculated to afford him notice of the action and, therefore, the judgment based on the purported service is void. We must agree.

Service of process on Clark was first attempted at his Arkansas address and was returned *non est.* Subsequently, appellee petitioned the court for instructions as to the manner in which Clark should be served. It was alleged in the petition and accompanying affidavit that Clark was a domiciliary of

Arkansas at the time of the accident. However, he had since moved to the last known address of 849 N. Dunlap, Memphis, Tennessee. The court, pursuant to Ark. Stat. Ann. § 27-2501, *et seq.*, our "long arm statute," directed a mode of service at Clark's last known address but made no specific finding as to his last known address. On June 18, 1973, service of process was had on the Secretary of State. On June 19, 1973, a warning order was first published in the Evening Times of Crittenden County and was published for three consecutive weeks thereafter. On June 21, 1973, the Secretary of State wrote the defendant, with process enclosed, at 849 N. Dunlap, Memphis, Tennessee. This letter was returned marked "moved, not forwardable." On June 22, 1973, a letter was written by appellee's attorneys to Clark at this address advising him that service had been had on the Secretary of State. This letter was also returned. On June 21, 1973, the sheriff of Crittenden County mailed a copy of the complaint and summons to the defendant at this address and it was returned marked "undelivered." The envelope was marked "moved and left no address." A second copy was mailed to Clark at this same address and the receipt was signed for "by Earline Clark, agent for William Clark on July 16, 1973." Earline is a sister-in-law of William. The sheriff received a certified letter from Frank Clark, William's brother, containing the original letter mailed to William at the Memphis address. There was a handwritten note by Frank stating "the said party [William Clark] no longer lives at this address." Without any further attempted service or investigation, a default judgment was taken against William Clark.

Earline testified by deposition at the default judgment proceeding that the last she heard from William Clark was when he left Memphis about three years ago and moved to Arkansas. He had never resided with her or her husband at 849 N. Dunlap. She testified, however, that he had lived "[A]t the other end of Dunlap." She was not authorized by William Clark to sign for his mail. She signed the receipt because she thought that her husband would know how to contact his brother. Since her husband did not know how to reach him, they sent it back. After Earline acknowledged receipt of the letter addressed to William, neither appellee nor her attorneys contacted Earline.

An official of Southern Trucking Corporation testified that he had information in his files regarding a Memphis address of William Clark's wife and his former address in Indiana. He stated that appellee's attorneys had never contacted him with reference to the whereabouts of Clark's wife or any members of his family. One of appellee's attorneys testified that his verified petition to the court for instructions as to the proper method of service stated that Clark's last known address was at 849 N. Dunlap, Memphis, Tennessee. He acknowledged that his information, based on hearsay from an investigator, was an assumption on his part. Also, following the hearsay information that Clark was residing at 849 N. Dunlap, neither he nor anyone else to his knowledge ever went there to confirm his address. Further, appellee testified that the distance between the Memphis address and the West Memphis address of her attorneys is approximately ten miles. The assistance of appellant Canal Insurance Company was not sought as to whether it had a later address for Clark. There was evidence that Clark owned two vehicles. It was admitted that appellee's attorneys had a copy of the police report regarding the accident and were aware that Clark was listed therein as the owner of a licensed vehicle. It does not appear that any effort was made to check with the Revenue Department or any other licensing bureau to determine Clark's whereabouts or last known address. Further, none of the employees at the Southern Trucking Company were contacted in an effort to ascertain Clark's last known address. The investigator was not called as a witness nor his absence accounted for. In that situation there is the suggestion or presumption that his testimony would be unfavorable. *Jones* v. *Jones,* 227 Ark. 836, 301 S.W. 2d 737 (1957).

During the first day of trial, one of appellant's attorneys advised the court that he had received an out-of-state phone call from Clark. Appellant requested several days' continuance in order to have Clark available. After a recess until the next day, it was stipulated that if Clark were present, he would testify, *inter alia,* "that he had no knowledge of the suit pending in the original action" and "that he had never lived at 849 N. Dunlap, Memphis, Tennessee." The stipulated testimony did not admit its truthfulness.

In *Halliman* v. *Stiles,* 250 Ark. 249, 464 S.W. 2d 573 (1971), we said:

> Where, as in the case at bar, personal jurisdiction over a defendant may be founded on something less than actual notice, statutory service requirements, which are implemented in derogation of common law rights, must be strictly construed and exactly complied with [and] **** the burden is on the injured party to investigate into those facts which would normally reveal the address of the nonresident defendant.

See also *Morphew* v. *Safeco Ins. Co.,* 256 Ark. 809, 510 S.W. 2d 543 (1974).

In the case at bar, we hold, as in *Halliman* v. *Stiles, supra,* that the appellee has not demonstrated a sufficient inquiry was made in an effort to ascertain Clark's last known address and, therefore, he was deprived of "reasonable probable" actual notice which is consistent with and required by due process. Consequently, the default judgment against him is void.

We must again take this occasion to reiterate our disapproval of an attorney testifying in an action in which he is an advocate. *McWilliams & Kimes* v. *Tinder,* 256 Ark. 994, 511 S.W. 2d 480 (1974); *Watson* v. *Alford,* 255 Ark. 911, 503 S.W. 2d 897 (1974); *Montgomery* v. *1st Nat'l. Bank of Newport,* 246 Ark. 502, 439 S.W. 2d 299 (1969); *Old American Life Ins. Co.* v. *Taylor,* 244 Ark. 709, 427 S.W. 2d 23 (1968), and *Rushton* v. *First Nat'l. Bank of Magnolai,* 244 Ark. 503, 426 S.W. 2d 378 (1968).

We deem it unnecessary to discuss appellant's other contentions for reversal. The judgment is reversed and the cause remanded for proceedings not inconsistent with this opinion.

Reversed and remanded.

Arie AUSTIN *v.* STATE of Arkansas

CR 75-213 536 S.W. 2d 699

Opinion delivered May 24, 1976

Walker, Kaplan & Mays, P.A., by: *Richard L. Mays* and *Henry L. Jones Jr.*, for appellant.

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

ELSIJANE T. ROY, Justice. Appellant Arie Austin assisted her minor son, Anthony Austin, in purchasing an automobile. Because of his minority she purchased the vehicle in her name but gave him possession, and he was to make the monthly payments. On August 1, 1973, appellant purchased a 1973 Pontiac automobile from Cole Pontiac

Company in DeQueen, Arkansas, which firm negotiated the financing arrangement through the First National Bank of that same city. The financing statement provided for approximately $4500 to be paid in monthly installments of $149.09 beginning September 1, 1973, for a period of 36 months.

On March 6, 1974, the First National Bank through error advised appellant that her note had been satisfied, that her title was clear of any lien and the legal papers on the car were enclosed with the letter. On March 15, appellant transferred the certificate of title to the car to her son, who used the vehicle as security for a loan obtained later from the Pike County Bank. It was not until April 9, 1974, several weeks after appellant had transferred the title, that the mistake was discovered by First National Bank, and two of its employees contacted appellant in an effort to correct the error. Both testified appellant directed them to see her son (living in Pike County) who she said had the vehicle and title documents. Although First National Bank recovered the automobile, it later had to surrender the car to the Pike County Bank in recognition of the latter institution's lien. Both the Pontiac Company and the First National Bank are located in Sevier County.

On August 29, 1974, appellant was charged with the crime of disposing of mortgaged property with intent to defraud the lienholder. A jury found appellant guilty, and she was sentenced to six months in the State Penitentiary. From that conviction she brings this appeal.

As error appellant argues that she was entitled to a directed verdict on two grounds. First, that as a matter of law the bank consented to the transfer of the automobile. The second contention is that the evidence is insufficient to sustain the conviction due to the lack of evidence showing criminal intent on the part of appellant.

Appellant was prosecuted under Ark. Stat. Ann. § 41-1928 (Repl. 1964)[1], which provides:

[1]Repealed, Acts 1975, No. 928, § 3, effective January 1, 1976.

> It shall be unlawful for any person to sell, barter, exchange or otherwise dispose of, or to remove beyond the limits of this State or of any county in which a landlord's or laborer's lien exists, or in which a lien has been created by virtue of a mortgage or deed of trust, or to which title has been retained by the vendor, any property of any kind, character or description, upon which a lien of the kind enumerated above exists or to which title still remains in the vendor: provided, such sale, barter, exchange, removal or disposal of such property be made with the intent to defeat the holder of such lien or title in the collection of the debt secured by such mortgage, laborer's or landlord's lien or retention of title.

This statute is unequivocal in its intendment that, in order for an action to be brought pursuant to its terms, there must be a valid lien upon the property which is sold, bartered, exchanged or otherwise disposed of in the manner explained therein. It is the absence of a lien at the time of the transfer which is determinative of this appeal and which makes it unnecessary to consider appellant's assigned error except as is relative to this point. It is not denied that appellant incurred a debt for a sum in excess of $4,000. Only three installments were paid by appellant's son under the financing agreement. This, of course, did not amount to a substantial reduction of the total indebtedness.

Appellee strongly urges that even though appellant's son was making the payments, she should reasonably have known the indebtedness had not been paid so soon after assumption of the obligation. However, we are bound to a standard of review which requires not only that a criminal statute " . . . be strictly construed in favor of one accused [citation omitted]," but that "[n]othing may be left to intendment and all doubts must be resolved in favor of the defendant in construing such statutes [citations omitted]." *Hill* v. *State,* 253 Ark. 512, 487 S.W. 2d 624 (1972). See also *Burke* v. *State,* 235 Ark. 882, 362 S.W. 2d 695 (1962), cert. denied 373 U.S. 922, 83 S. Ct. 1523, 10 L. Ed. 2d 421. In related criminal statutory construction we have noted in *Lewis* v. *State,* 220 Ark. 259, 247 S.W. 2d 195 (1952), that:

> We have consistently followed the universal rule that "criminal statutes are to be strictly construed, and no case is to be brought by construction within a statute unless it is *completely* within its words . . . [citation omitted]." (Italics supplied.)

Here, albeit by erroneous administrative action, the First National Bank held no lien as contemplated by the criminal statute at the time appellant transferred title to her son. Thus the statute under which appellant was charged and convicted was improperly applied since the property transferred was not that ". . . upon which a lien of the kind enumerated above exists or to which title still remains in the vendor . . . . " This decision in no way impairs the right of First National Bank to proceed against appellant in a civil action.

For the foregoing reasons the cause is reversed.

FOGLEMAN, J., dissents.

JOHN A. FOGLEMAN, Justice, dissenting. I cannot agree that, at the time of the alleged offense, as between the First National Bank and appellant, there was no lien on the automobile. There is no question about the invalidity of the security interest as to third parties who acted in reliance upon the erroneous release. The important consideration is the status of the lien as between the bank and Mrs. Austin. Ark. Stat. Ann. § 41-1928 (Repl. 1964) was not enacted for the protection of third parties. The sole and only purpose of the statute is the protection of the secured party. 15 Am. Jur. 2d 401, Chattel Mortgages § 242. In Arkansas, we have recognized that the question of the validity of the mortgage as to third parties is of no consequence in prosecutions under the statute. Insofar as the existence of the lien or security interest is concerned, the only question is whether there is a valid, enforceable lien as between the parties. *McClaskey* v. *State,* 168 Ark. 339, 270 S.W. 498.

In this case, the evidence is quite clear that the release was made through mistake. Viewed in the light most favorable to the state, there is also cogent evidence tending to

show that appellant knew it was a mistake and knew that the debt had not been paid. The financing arrangement had been made in August 1973. The amount of the debt was $4500. The 36 monthly payments of $149.09 each commenced on September 1, 1973. The erroneous release was dated March 6, 1974, and the certificate of title on which it was endorsed mailed to appellant. Appellant received the loan papers and thereafter, on March 15, 1974, transferred the title to her son, who later gave a security interest of the automobile to an innocent third party, whose priority was recognized by the First National Bank.

On April 9, 1974, Joe Roberts, the bank's auditor and Mike Brewer, a loan administration officer of the bank called on appellant. According to Roberts, Mrs. Austin acknowledged she knew she had not "paid off the car," or "paid off the note." Brewer testified that appellant indicated that "she knew there was something there that wasn't right at the time," and that she realized that she had not paid off the loan on the car. Appellant admitted that she knew that she had not paid off the loan, but said she felt it had been paid because her son was making the payments and she "thought it could have been insurance." Of course, resolution of factual questions including appellant's intent and good faith or the lack of it was for the jury.

Any assertion that the lien was not in effect where it resulted from mistake is based upon estoppel. Where the want of record would not bar a valid lien as between the parties, the mere discharge of the mortgage by release or satisfaction on the record cannot prevent the enforcement of the lien against the mortgagor-borrower where the debt has not actually been paid or satisfied. *Lee* v. *Wagner,* 71 Wis. 191, 36 N.W. 597 (1888). The signing of a satisfaction reciting payment of a mortgage debt, when nothing was in fact paid, made through mistake is of no effect. *Linn* v. *Ziegler,* 68 Kan. 528, 75 P. 489 (1904). Of course, in Arkansas an unrecorded mortgage is valid between the parties. *Barnett* v. *State,* 65 Ark. 80, 44 S.W. 1037; *McClaskey* v. *State,* supra. Even equitable mortgages and liens some within the coverage of such statutes. *Farmer* v. *State* 18 Ga. App. 307, 89 S.E. 382 (1916); *Courtney* v. *State,* 10 Ala. App. 141, 65 So. 433 (1914); *Williams*

v. *State*, 40 Ala. App. 687, 122 So. 2d 549 (1960). See also, *Beard* v. *State*, 43 Ark. 284.

To say the very least, there is evidence of the existence of an equitable mortgage or security interest in spite of the release.

The questions of the intent and good faith of appellant were for the jury. I would affirm the judgment.

ARKANSAS ROCK & GRAVEL COMPANY
et al *v.* CHRIS-T-EMULSION
Company, Inc.

76-20 536 S.W. 2d 724

Opinion delivered June 1, 1976

Keith, Clegg & Eckert, for appellants.

Smith, Williams, Friday, Eldredge & Clark, by: *William H. Sutton* and *Joseph E. Kilpatrick Jr.,* for appellee.

GEORGE ROSE SMITH, Justice. The decision in this case turns upon the meaning of the parties' contractual reference to "the Spring of '74." The trial judge considered the phrase to be ambiguous and submitted its meaning to the jury. The verdict was for the plaintiff-appellee, in the amount sued for, which means that the jury agreed with the plaintiff's interpretation of the contract. For reversal the defendant argues that the court gave incorrect instructions and erred in other respects. We affirm the judgment on the ground that the plaintiff was entitled to recover as a matter of law, there being no issue of fact for the jury.

The plaintiff, Chris-T-Emulsion, successor to Ben M. Hogan Company, is a supplier of asphalt. The principal defendant, Arkansas Rock & Gravel, is a highway contractor. In the summer and early fall of 1973 Arkansas Rock & Gravel was planning to submit a bid to the state highway department for an extensive repair job on Interstate 40. It was too late for the work to be begun in that calendar year. Before submitting its bid Arkansas Rock & Gravel asked Hogan for a price on the asphalt that would be needed. Hogan's first quotation was not a firm offer. Upon being pressed for a firm price, to be reduced to writing, Hogan on September 29, 1973, wrote the letter-contract now in issue. That letter identified the project by job number, estimated the asphalt to be required at approximately 380,620 gallons, and quoted a

price that was essentially 14 cents a gallon plus a freight charge that varied with the three counties that were involved. Hogan's representative testified that, because asphalt prices were very unstable, he inserted a sentence that the company did not ordinarily use in such letter-contracts: "This quotation is with consideration the material will be used in the Spring of '74." Arkansas Rock & Gravel endorsed its acceptance upon a copy of the letter and returned it to Hogan. Chris-T-Emulsion succeeded Hogan as the seller.

Arkansas Rock & Gravel was the successful bidder for the repair job and began the work in 1974. Chris-T-Emulsion supplied most of the asphalt at the quoted price, but on June 24 it notified the purchaser by letter that the original quoted price was good only "through the Spring (June 20) of 1974," and that thereafter the price would be increased to 29 cents a gallon. Arkansas Rock & Gravel protested the increase and refused to pay that price for subsequent deliveries. The plaintiff brought this action for the amount that is admittedly due if it was entitled to increase its price after June 20.

We do not consider the controlling rules of law to be open to dispute. The construction and legal effect of a written contract are to be determined by the court as a question of law except where the meaning of the language depends upon disputed extrinsic evidence. *Security Ins. Co. of Hartford* v. *Owen,* 252 Ark. 720, 480 S.W. 2d 558 (1972). Here there was undoubtedly an ambiguity as to the precise meaning of the phrase, "the Spring of '74," because dictionaries uniformly recognize that "spring" is popularly considered to be the months of March, April, and May, but scientifically considered to be the period from the vernal equinox (about March 21) to the summer solstice (about June 21). Webster's Second New International Dictionary (1934); American Heritage Dictionary (1969).

When such a minor ambiguity is involved, the contract does not fail, because the complaining party may fairly be allowed to insist upon the interpretation that is least favorable to him. For instance, in *Dolly Parker Motors* v. *Stinson,* 220 Ark. 28, 245 S.W. 2d 820 (1952), we upheld an agreement by which Stinson promised to purchase a new Ford car from a dealer. Even though the particular car to be purchas-

ed, among many available models, was not specified, we held that, upon the buyer's breach of the contract, the seller was entitled to recover the profit that he would have made upon that model which provided him the smallest profit. Similarly, the plaintiff in this case can fairly insist, as it does, upon the definition of spring which is least favorable to it.

There remains the appellant's principal argument, that the parties knew that the highway department requires that repairs, such as those that the appellant undertook, be made between April 1 and October 31 of each year, when the weather is warm enough for the asphalt to be sealed properly. It is insisted that the parties' contract was intended to conform to that policy.

The trouble is, this argument runs squarely into the parol evidence rule. That is a rule of substantive law, which prevents a party from proving a prior or contemporaneous oral agreement that contradicts the written contract. *Hoffman* v. *Late,* 222 Ark. 395, 260 S.W. 2d 446 (1953). It is true that when the language of a contract is ambiguous, proof of oral negotiations is admissible to show that the language was intended to have "any particular meaning that the words will reasonably bear." *Kerr* v. *Walker,* 229 Ark. 1054, 321 S.W. 2d 220 (1959). But the rule does not allow a party to prove by oral testimony that clear and unambiguous words were subjectively intended to have a meaning not fairly attributable to them. The remedy in that situation is a suit for reformation of the contract. Restatement, Contracts, § 230 (1932).

The pivotal language in the contract before us is the stipulation that the quoted price is "with consideration the material will be used in the Spring of '74." The appellant insists that those words were chosen as a method of saying that the use of the material was expected to *begin* in the spring of 1974 and might continue, at the quoted price, at least until October 31 (and perhaps even longer if the work was proceeding at a reasonable rate). It may well be that the purchaser's representative had that meaning in mind when he endorsed his acceptance upon the letter-contract. If so, it was his obligation to insist that the contract be made to declare his understanding. Instead, he accepted language that cannot be reasonably interpreted to say what he now

contends that he intended. As we pointed out in *Hoffman* v. *Late, supra,* the justification for the parol evidence rule lies in the stability that it gives to written contracts; for otherwise a party might always testify that an oral understanding was contrary to the obligation he assumed in writing. Here the purchaser signed an essentially unambiguous agreement and must bear the consequences.

Affirmed.

FOGLEMAN and BYRD, JJ., dissent.

JOHN A. FOGLEMAN, Justice, dissenting. I do not agree that appellants were entitled to judgment as a matter of law. The trial judge properly recognized that there was an issue as to the proper construction of the contract because of ambiguity. There was at least a latent ambiguity and the court submitted the question of the meaning of the parties to the jury by a correct instruction. It seems to me, however, that a cardinal rule of construction should have been stated to the jury and that appellant submitted a correct instruction which would have advised the jury that any doubt or ambiguity about the meaning of the contract was to be resolved against the party who prepared it. See *Manhattan Factoring Corp.* v. *Orsburn*, 238 Ark. 947, 385 S.W. 2d 785; *Stevenson* v. *Marques* 241 Ark. 321, 407 S.W. 2d 391.

The contention of appellee that a contract was not involved cannot be sustained. All of the testimony shows clearly that all parties, even when testifying, regarded it as a contract, not a quotation or unaccepted offer. The highway contract number was shown as the subject of the letter which constituted the agreement. The approximate number of gallons of asphalt for which the "quotation" was made was stated. It was specified that the material should meet Arkansas Highway Department specifications. The offer or "quotation" required an acceptance and expressed an appreciation, not for the opportunity to furnish a quotation, but for "this business." This is not a case where orders were invited or where appellee, the offeror, simply offered to supply whatever Arkansas Rock & Gravel Company ordered.

Appellee points up the question involved in construing the words "in the spring of '74" by referring to the duration of the "quote" as being limited "through the spring of 1974" or as being "for the spring of '74." They are treated in the majority opinion as if they read "during the spring of '74." Absent the circumstances surrounding the execution, I would agree that the words should be treated as the majority treats them. But, given the circumstances, the circuit court in my opinion correctly recognized that there was evidence from which it could be said that there was a latent ambiguity.

A latent ambiguity arises from facts not disclosed in the instrument. *Dorr* v. *School District No. 26,* 40 Ark. 237. It may imply a concealment of the real meaning or intention of the writer which does not appear upon the face of the words used until they are brought in contact with collateral facts. It arises, not upon the words as looked at in themselves, but upon those words when applied to that which they describe. It does not appear upon the face of the language used in the instrument, but occurs when the language appears to be clear, intelligible, unambiguous, but in fact, is shown by some intrinsic fact or extrinsic evidence to be uncertain in meaning. 3A CJS 409, Ambiguity; *Conkle* v. *Conkel,* 31 Ohio App. 2d 44, 285 N.E. 2d 883 (1972). In determining whether a latent ambiguity exists, a contract must be read in the light of what the parties intended as gathered from its language in view of all surrounding circumstances. *Arkansas Amusement Corp.* v. *Kempner,* 57 F. 2d 466 (8 Cir., 1932). See also, *Ellege* v. *Henderson,* 142 Ark. 421, 218 S.W. 831. Words not ambiguous in the abstract may, when considered in relation to the circumstances surrounding the making of it, create an ambiguity requiring interpretation. *Arkansas Amusement Corp.* v. *Kempner,* supra. *Paepcke-Leicht Lumber Co.* v. *Talley,* 106 Ark. 400, 153 S.W. 833. See also, *Ellege* v. *Henderson,* supra; *Easton* v. *Washington County Insurance Co.,* 391 Pa. 28, 137 A. 2d 332 (1957).

In order for the court to determine whether a latent ambiguity exists, it is obviously necessary that it consider evidence of extraneous and collateral facts as to extrinsic circumstances. *Logan* v. *Wiley,* 357 Pa. 547, 55 A. 2d 366 (1947). The rule is well settled that extrinsic evidence is admissible to show that a latent ambiguity exists. *Hall* v. *Equitable Life Assurance Society,* 295 Mich. 404, 295 N.W. 204 (1940); *McCar-*

ty v. *Mercury Metalcraft Co.,* 372 Mich. 567, 127 N.W. 2d 340, cert. den., 380 U.S. 952, 129 N.W. 2d 854 (1964); *Widney* v. *Hess,* 242 Iowa 342, 45 N.W. 2d 233 (1951). See also, *Ellege* v. *Henderson,* supra; *Easton* v. *Washington County Ins. Co.,* supra; 3 Jones on Evidence 124, § 16:23. To discover a latent ambiguity, it is proper to go outside the instrument to ascertain whether the words used aptly fit the facts existing when the instrument was executed and the words used. *Widney* v. *Hess,* supra; *Queen Insurance Company of America* v. *Meyer Milling Co.,* 43 F. 2d 885 (8th Cir., 1930). In making the determination, courts may acquaint themselves with the persons and circumstances that are the subjects of the statements in the written instrument and place themselves in the position of the parties who made the contract, so as to view the circumstances as they did. *Wood* v. *Kelsey,* 90 Ark. 272, 119 S.W. 258.

Once it was shown that there was a latent ambiguity, oral evidence was admissible to explain it. *Ft. Smith Appliance Co.* v. *Smith,* 218 Ark. 411, 236 S.W. 2d 583; *Paepcke-Leicht Lumber Co.* v. *Talley,* supra; *Ellege* v. *Henderson,* supra. Testimony of the parties as to the meaning of the words is admissible. *Ellege* v. *Henderson,* supra. Parol evidence is also admissible to explain the situation and relation of the parties and the surrounding circumstances at the time of the execution of the contract. *Wynn & Sklar* v. *Phillips Oil Co.,* 254 Ark. 332, 493 S.W. 2d 439; *Clear Creek Oil & Gas Co.* v. *Bushmaier,* 165 Ark. 303, 264 S.W. 830.

The agreement was reached by acceptance on October 10, 1973. George Thweatt, officer of Ben M. Hogan & Company who became the chief managing officer of appellee, made the offer after negotiations with other representatives of Hogan. Thweatt was familiar with Arkansas Highway Department specifications that prohibited application of the asphalt materials between October 31 and April 1 or when the air temperature was below 60 degrees. He knew that the material was not to be used until springtime and that it could not be used before April 1 and that April 1 was not the beginning of "spring," whether spring be March, April and May or March 21 through June 20. He knew that appellee had fixed working days, i.e., 90, from the issuance of a work order by the highway department for completion of the contract. Ob-

viously, working days are not the same as calendar days. The price was increased from 13 cents to 14 cents, because appellee asked for a firm price. There was also evidence tending to show that Hogan, whose obligation appellee assumed, was interested in selling appellee crushed stone or chips and appellee bought chips from Hogan for use in performing this highway job.

John Harsh, who was employed by Arkansas Rock & Gravel Co. took a quotation on the asphalt in September, 1973 from Ivan Justice, a representative of Hogan, on the eve of the bidding for the highway contract. He delivered the price quotation to officials of Arkansas Rock & Gravel Company. One of these, Warren Simmons, talked with Justice on the telephone and asked for a firm figure. When Justice returned the new price Simmons asked that it be confirmed in writing and as a result the "contract letter" came into being. The jury might well have inferred that Arkanaas Rock & Gravel Company based its bid on the job on the agreement with appellee.

The work order was not issued until May 28, 1970. Simmons testified that had it not been for rain and other matters, the highway contract might have been completed by June 20, but that he had not expected to do so, even though they had planned theoretically to do so. He also said that he had not been made aware, in the telephone conversation, that the firm price was based upon the contract being completed in the spring of 1974.

Ivan Justice said that the sentence in question here was a sentence added to appellee's usual form of quotation and that the intent was "how soon it was to be used."

There was contradictory evidence from which the jury might have found that appellee was well aware that the quotation or firm price was based upon the use of all the material during the spring of 1974, but I agree with the circuit judge that there was a fact question. Under the circumstances, the contract could have meant only that the use was to commence after the beginning of the highway department's sealing season and continue during the time allotted for completion of the job.

I see no reason why the instruction I have previously referred to should not have been given. I would reverse the judgment because of its being refused.

I am authorized to state that Mr. Justice Byrd joins in this opinion.

Ersaleen HALL *v.* STATE of Arkansas

CR 75-222 537 S.W. 2d 155

Opinion delivered June 1, 1976

Hollingsworth & Crutcher, P.A. and *Walker, Kaplan & Mays, P.A.*, for appellant.

Jim Guy Tucker, Atty. Gen., by: *Jack T. Lassiter,* Asst. Atty. Gen., for appellee.

GEORGE ROSE SMITH, Justice. The appellant was charged with the first degree murder in the shooting of her former husband, Charles Hall. The jury found her guilty of voluntary manslaughter and imposed a seven-year sentence. The principal points for reversal relate to the admissibility of the

defendant's confession and the manner in which the panel of petit jurors was selected.

In the course of an argument the defendant shot Hall twice at her home in Newport. She immediately telephoned for the police and an ambulance. When the police arrived she went outside and told them that she had shot Hall and hoped that he wasn't dead. She was arrested and taken to police headquarters, where she was questioned about an hour and a half later, after having been warned of her rights. The interview was taped and transcribed. About midway through the interview, when the interrogating officer asked her to calm down, she said: "I don't want to talk about it. Please don't make me. Lord have mercy." The rest of the confession was not admitted in evidence, the State conceding that it was not to be admitted.

Upon the testimony as a whole we cannot say that the trial judge's finding that the confession was voluntary is against the weight of the evidence. *Degler* v. *State,* 257 Ark. 388, 517 S.W. 2d 515 (1974). It is apparent and understandable that the appellant was nervous and upset when she was questioned, but her responses seem reasonably clear and coherent. That the interrogation took place some two hours after the shooting indicates that she had had an opportunity to regain her composure. Counsel argue that she had not been told that she was charged with first degree murder, but she undoubtedly knew why she was being questioned. The exact charge that would ultimately be made could hardly be determined until the investigation was complete and the information had been submitted to the prosecuting attorney. The trial judge had the advantage of hearing the testimony as it was given. We do not find his admission of the confession to be erroneous.

With regard to the exclusion of blacks from the jury panel, a prima facie case of discrimination was made, so that the State should have been required to go forward with rebutting evidence. Hence the court erred in denying the motion to quash the jury panel, without requiring the State to submit proof.

The proof is not as complete as it might be, but that is

hardly the fault of defense counsel. A few weeks before trial the judge directed that all motions be filed by May 12, the date of the pretrial conference. No motion attacking the composition of the jury was filed within the time allowed. If the record stopped at that point it might be said that a motion filed later on came too late. The judge's policy of requiring pretrial motions to be made in advance, so that jurors are not kept waiting while preliminary testimony is being heard, is not subject to criticism.

It happened, however, that it became necessary to draw additional jurors' names from the jury wheel after the May 12 deadline. Those names were not supplied to defense counsel until the Friday before the trial began on Monday. In those circumstances counsel were not at fault in being able to offer only somewhat limited proof.

Even so, a prima facie case of discrimination was made. It was stipulated that one fourth of the county population was black and that there were only 3 black persons upon the panel of 85 jurors. (The percentage of eligible black registered voters could not be shown, as the registration of voters does not indicate the race of the registrants.)

A prima facie case of discrimination is made by a showing (a) that there is a substantial disparity, such as the difference between a 25% black population and a 3½% representation on the panel, as here, and (b) that there are positive indicia of discrimination or that the selection procedure provides an opportunity for discrimination. *Sanford* v. *Hutto,* 394 F. Supp. 1278 (E.D. Ark., 1975), affirmed, 523 F. 2d 1383 (8th Cir., 1975).

Here point (b) was sufficiently established. Our jury wheel statute does not require a random process of selection; instead, the selection is committed to the discretion of the jury commissioners. We do not know what further proof might have shown, for the State was not required to go forward with the evidence. It was shown, however, that when the additional names were drawn from the jury wheel the trial judge, owing to the season of the year, excused all the farmers (some 25 or 30) without requiring them even to appear and ask to be excused. That practice cannot be ap-

proved, for it is a deliberate and systematic exclusion of a large class of eligible jurors. It does not matter that this appellant is not a farmer or a resident of a rural area, for the Supreme Court has held that anyone has standing to question a jury that does not meet constitutional standards, even though he is not a member of the race or group that is being made the subject of improper discrimination. *Peters* v. *Kiff,* 407 U.S. 493 (1972).

Counsel also questioned the trial court's practice of drawing names from the jury wheel in chambers rather than in the courtroom. The statute requires that, pursuant to an order made at least 15 days in advance, the jury wheel be unlocked and the names drawn "in open court." Ark. Stat. Ann. § 39-209 (Supp. 1975). The distinction between the courtroom and the judge's chambers cannot invariably and inflexibly be regarded as decisive. We know that many contested cases, especially those involving only a few witnesses, are tried in chambers. Such proceedings have frequently been held to take place in open court. *McCann* v. *Todd,* 201 La. 953, 10 So. 2d 769 (1942); *People* v. *Janoske,* 206 Misc. 155, 132 N.Y.S. 2d 186 (1954); *People ex rel. Walsh* v. *Warden of Sing Sing Prison,* 176 Misc. 627, 27 N.Y.S. 2d 273 (1941); see also *Suesemilch* v. *Suesemilch,* 43 Ill. App. 573 (1892); *Hobart* v. *Hobart,* 45 Iowa 501 (1877).

There is also the practical consideration that the courtroom may not be available, owing to the continuation of a trial in progress or to the use of the courtroom by the chancery or probate court. Certainly the better practice is for the names to be drawn in the courtroom. What the statute really contemplates, however, is that the drawing in every instance be open to the members of the public. If the drawing does take place outside the courtroom, precautions should be taken to avoid even the appearance of secrecy or of exclusion of the public.

On the merits it is argued that the proof is insufficient to support the verdict. This argument cannot be sustained. The defendant has admitted from the outset that she shot her former husband. There was other proof in addition to her confession. Upon the testimony it was for the jury to say whether the homicide was justifiable.

Other arguments for reversal are urged, but none of the asserted errors are apt to arise upon a new trial.

Reversed and remanded for a new trial.

FOGLEMAN, J., concurs in all of the opinion except the statement that a prima facie case of racial discrimination was made.

Connie BETNAR *v.* Willard L. ROSE
and Wanda ROSE

76-3 536 S.W. 2d 719

Opinion delivered June 1, 1976

Reed & Blackburn, for appellant.

Lightle, Tedder, Hannah & Beebe, for appellees.

JOHN A. FOGLEMAN, Justice. This appeal arose out of a suit by appellees to recover $2,000 held in escrow by the Cleburne County Bank in connection with an oral real estate sales agreement between appellees and appellant. The trial court granted appellees' motion for summary judgment and ordered the return of the money to appellees who were to have been the vendees of a home built by appellant. Appellant contends that the court erred in granting the motion.

Appellant is a homebuilder. He offered for sale a house which was near completion. It is admitted that appellees approached him wanting to purchase it. At their second meeting, appellant agreed to complete construction and finish out a storage room, provide insulation, and put storm doors on patio and carport entrances. There is no allegation

that appellant failed to perform in any regard. The parties orally agreed upon a total price of $27,500, with earnest money of $2,000 to be applied as a down payment against the total. The agreement was not reduced to writing. Mr. Rose wrote his check payable to the order of appellant in that amount but, according to her testimony, Mrs. Rose was loathe to "turn loose of $2,000 not knowing him [appellant]." Appellant suggested that the bank hold the check, whereupon they visited Jerome Johnson of the Cleburne County Bank and placed the $2,000 check into an escrow account. Mr. Johnson wrote the terms of the escrow agreement on the deposit ticket. They were:

> This deposit is to be applied on the house and lot that Rose is buying from Betnar, provided Rose can obtain a loan. This Escrow Deposit is to be refunded back to Rose if a loan cannot be obtained.

Appellees did not get a loan and filed suit after demand for the return of the $2,000 in accordance with the condition listed on the deposit slip. In their complaint, appellees alleged that the bank held the funds relative to a purported real estate transaction, that there was no enforceable contract or agreement, that they had elected to withdraw from further negotiations relative to said purported transaction, and that they had demanded a return of the funds deposited by them. The Cleburne County Bank interpleaded the funds. Appellant answered, denying appellees' right to recovery and counterclaimed, alleging: that the sum was his, having been received pursuant to a legal contract for the sale of a home for $27,500, contingent upon appellees' obtaining a loan; that he remained ready and able to perform; that appellees were the equitable owners of the house, the subject of the contract; and that appellees had paid him the $2,000, which was then deposited with the bank. Appellees amended their complaint to allege that they had been unable to obtain a loan and denied that the Cleburne County Bank offered an acceptable loan.

The trial court granted appellees' motion for summary judgment, finding that the oral sales agreement was unenforceable as barred by the Statute of Frauds and that appellant stood ready to perform the agreement and declar-

ing the law to be that where a person has paid money or delivered property, under a parol contract for the purchase of land, which is void by the Statute of Frauds, he cannot maintain an action to recover it back so long as the other party, to whom the money or property was paid or delivered, is willing and able to perform, quoting from *Sturgis* v. *Meadors,* 223 Ark. 359, 266 S.W. 2d 81. However, the court concluded that delivery of the money to an escrow agent did not constitute delivery as contemplated under the rule of *Sturgis,* that the escrow agreement was itself parol and unenforceable under the Statute of Frauds, and ordered the bank to pay the $2,000 to appellees.

Thereafter, appellant amended his cross-complaint to allege physical receipt of the check of appellees and negotiation by delivery to the bank which had stamped the check "credited to the account of the within named payee." He also alleged that the terms of the escrow agreement, set out on the deposit slip, contained a condition subsequent, to wit, ". . . this Escrow Deposit to be refunded back to Rose if he can't obtain a loan."

Appellant filed a motion to set aside the summary judgment and for further hearings. The court reopened the matter to hear the testimony of the parties, again entering judgment for appellees.

For reversal, appellant argues that delivery of the check into escrow did constitute complete delivery for purposes of the *Sturgis* rule, that the escrow agreement was therefore enforceable, and that appellees failed to sustain the burden of proof to show the existence of the condition, to wit, that they were, after a good faith effort, actually unable to obtain a loan.

We agree that the payment of the check into escrow constituted delivery as is required for the application of the rule in *Sturgis*. The rationale underlying the rule applied by this court in *Sturgis* is that the purpose of the Statute of Frauds, so far as it relates to the sale of land, is to protect the vendor only, and the vendee seeking to recover the purchase price or a portion thereof cannot set up the statute against a vendor who is ready and willing to perform. Thus, the oral contract

cannot be considered void so long as he, for the protection of whose rights the statute exists, is willing to treat and consider the contract good. 73 Am. Jur. 2d 178, Statute of Frauds, § 542. According to the great weight of authority, the vendee, under an agreement for the sale and purchase of land which does not satisfy the statute of frauds, cannot recover back payments upon the purchase price if the vendor has not repudiated the contract but is ready, willing and able to perform in accordance therewith, even though the contract is not enforceable against the vendor either at law or in equity. See *Venable* v. *Brown,* 31 Ark. 564; Annot, 169 ALR 188 (1947). This is but a specific variation of the general rule recognized and applied by the court in *Baker* v. *Taylor & Co.,* 218 Ark. 538, 237 S.W. 2d 471. Under this rule, one who has paid money in consideration of an oral contract cannot rescind such contract and recover the money paid unless the other party insists upon the statute and refuses to perform it on his part. *Grauel* v. *Rohe,* 185 Md. 121, 43 A. 2d 201 (1945); 37 CJS Statute of Frauds, § 256, p. 779; 73 Am. Jur. 2d 177, § 541, 542.

This rule is generally applied, except in a few of the jurisdictions in which the Statute of Frauds makes a contract in violation of its terms void, rather than merely unenforceable. Our statute provides that no action may be brought on a contract which is not in compliance with the stated requirements. Ark. Stat. Ann. § 38-101 (Repl. 1962). The plain words of the statute indicate that contracts in violation of it are merely unenforceable, but not void. In spite of the fact that we once said that a contract was *void* because of the lack of a written memorandum (see *Robbins* v. *Horn,* 145 Ark. 475, 224 S.W. 748) and, on another occasion, referred to such a contract as invalid and unenforceable (see *Lee Wilson & Co.* v. *Springfield,* 230 Ark. 257, 321 S.W. 2d 775), we have also referred to a parol contract which did not comply with the statute as being unenforceable. *Wyatt* v. *Yingling,* 213 Ark. 160, 210 S.W. 2d 122. The statute is designed to prevent fraud, not shield or effectuate it. *Bolin* v. *Drainage District No. 17,* 206 Ark. 459, 176 S.W. 2d 143; *Lesser-Goldman Cotton Co.* v. *Merchants & Planters Bank,* 182 Ark. 150, 30 S.W. 2d 215. It has been said that it should not be considered the grant of a license to welch on a deal. *Hyder* v. *Newcomb,* 236 Ark. 231, 365 S.W. 2d 271. Our application of the statute has been

much more consistent with a construction that the statute only renders the contract unenforceable, not void. This construction is not contrary to the result reached in either *Robbins* v. *Horn,* supra, or *Lee Wilson & Co.* v. *Springfield,* supra. Although the words "void" and "voidable" have entirely different meanings, they are used interchangeably all too often, and we have on other occasions construed "voidable" to mean "void" and "void" to mean "voidable." *Simmons* v. *A. C. Carter & Co.,* 125 Ark. 547, 189 S.W. 176; *Ragan* v. *Cox,* 210 Ark. 152, 194 S.W. 2d 681; *Ragan* v. *Cox,* 208 Ark. 809, 187 S.W. 2d 874.

In statutory construction, we have said that their meaning is an open question to be decided by the connection and context in which they are used to carry out legislative intent. *Mobbs* v. *Millard,* 106 Ark. 563, 153 S.W. 821. We take the use of the words "void" and "invalid" in our opinions to be subject to the same treatment as we have given the words in such statutes. The real intent and effect of our opinions, in spite of occasional poor word choice, is consistent with the statutory language, i.e., that a contract in violation of the statute is merely unenforceable. This is best illustrated by language in *Skinner* v. *Fisher,* 120 Ark. 91, 178 S.W. 922. We said:

> Even though the statute of frauds might have been interposed if an effort had been made on the part of the appellee to enforce the verbal agreement for the sale of the plant to him by the appellant, still in such case it would not be obligatory upon the appellant to plead the statute of frauds in defense. It would at least be optional with him whether he did so or not, and his verbal contract to sell the property would at least impose upon him a moral obligation, and the appellee would at least have had the right to sue upon the contract and put the appellant to the test as to whether he would set up the defense of the statute of frauds. Therefore the verbal agreement gave to the appellee rights which would have warranted him in interfering with an attempted sale of the property to other parties. Appellant, as we have seen, when he signed the contract in suit, acknowledged those rights and the binding obligation he was under to make the sale he had verbally agreed to make and promised to pay the $500 as a consideration for his

abandoning his rights under the verbal contract, even though appellant now disputes that appellee had such rights. The contract sued on plainly shows an agreement on the part of the appellant to pay appellee the sum of $500 for whatever alleged rights the appellee had under the verbal contract, whether these rights were susceptible of enforcement or not.

Furthermore, the rule applied in *Sturgis* has been applied even though the money may have been in the hands of a third person for the benefit of the vendor to be paid over to him upon his performance under the contract. *Burford* v. *Bridewell,* 199 Okla. 245, 185 P. 2d 216 (1947); *Coughlin* v. *Knowles,* 7 Met (Mass) 57 (1843). In *Coughlin,* the court stated: " . . . it is equally true, that the provisions of the statute [of frauds] are not so broad as to entitle a party, who has entered into an oral contract, by which he is to receive a conveyance of land, and towards payment for which he has made advances in money, to set aside such contract as a nullity, and reclaim the money so advanced, the other party being no way in fault, but being both able and ready to perform his contract . . . the money was placed in the hands of the defendant [escrow], under a written contract executed by him, and the terms of this contract show that he held it for M'Nulty [vendor] dependent only upon the condition that M'Nulty performed his part of the agreement. The effect of thus placing the money in the hads of the defendant was to render it irreclaimable by the plaintiff, except in case of failure on the part of M'Nulty to fulfill his agreement." Accord, *Chaffin* v. *Harpham,* 166 Ark. 578, 266 S.W. 685. Indeed, it would make no sense to distinguish in the application of the rule between actual delivery to the vendor and delivery to an escrow since, in the light of the purpose of precluding the vendee from using the statute as a sword against the party for whom it was intended to be a shield, the rationale underlying *Sturgis* applies with equal force in either case.

In the instant appeal, a writing containing the terms of the escrow agreement was produced. It conditioned the effectuation of the sale upon the appellees' getting a loan. It expressly conditioned the return of the $2,000 upon appellees' failure to arrange a loan. The writing contained no specifics regarding just what efforts appellees were to have made or

what terms they were to have accepted for a loan, but in the absence of such specifics, appellees had the duty to make a reasonable effort and to accept reasonable terms in order to satisfy the condition of the agreement relating to the return of the $2,000. See, *Jones* v. *Gregg,* 226 Ark. 595, 293 S.W. 2d 545.

The evidence on the subject of appellees' failure to obtain a loan is somewhat conflicting. Appellant testified that Johnson offered the Roses a loan when the escrow was arranged but the Roses said they could get one in White County. Johnson testified that the Cleburne County Bank would take a first mortgage on the house they were buying and a second mortgage on their house in Searcy until they could sell it and apply the proceeds, first to the payment of the first mortgage debt and the balance remaining to the Cleburne County Bank loan. Johnson said the loan offered was temporary until the Searcy property was sold. He also said that the payments on the loan he could make would have been pretty large.

Jack Claridy, manager of the Heber Springs Savings & Loan Association testified that he could have made a 25-year loan on a $27,500 home for 90 per cent of the purchase price, but that he would not have loaned $26,000.

Willard Rose testified that White County Guaranty Company turned them down because they were experiencing a shortage of funds. They would loan only 80 per cent of the purchase price. Mrs. Rose said that they intended to borrow all of the purchase price except for the down payment, i.e., $25,500. A niece of the Roses testified that Mrs. Rose said when she asked appellant about the amount of the deposit that she did not want to tie up their house in Searcy. Whether the efforts of appellees in this case were reasonable in either respect was a question which should properly have been put to a trier of fact. See, *Southern Wooden Box, Inc.* v. *Ozark Hardwood Mfg. Co.,* 226 Ark. 899, 294 S.W. 2d 761; *Reynolds* v. *Ashabranner,* 212 Ark. 718, 207 S.W. 2d 304.

Appellees suggest that the parties intended for the trial court to decide the entire case sitting as the trier of fact and not merely the motion for summary judgment and that the judgment should be affirmed because it is supported by sub-

stantial evidence. We cannot agree.

There was nothing in the abstract of the record to indicate that the court tried the issue on the merits or that the parties waived their right to a trial of the factual issue by a jury. At the rehearing of the motion for summary judgment, the reporter recorded the following:

> THE COURT: I don't think we are at a point where the Court is going to try this case on the testimony. We are at a point where the Court decides whether or not he sets aside the Summary Judgment. The Court is not going to decide this case. The Court is going to decide whether his Summary Judgment should stand or he should set it aside and the case be ready for trial.
>
> MR. LIGHTLE: Your Honor, if we put on all the testimony this afternoon, that will be all the case.
>
> THE COURT: I didn't know we had agreed to submit it on the evidence. This evidence is merely taken on whether or not the Summary Judgment should be set aside.
>
> *******
>
> MR. LIGHTLE: Of course, we move that the motion to set aside the Summary Judgment be dismissed. There is nothing new out of this testimony.
>
> THE COURT: Do you have other witnesses, Mr. Blackburn?
>
> MR. BLACKBURN: I have Jack Claridy from the Savings and Loan, who will testify to the ability of the man to get a loan. And I would show he had good credit there.
>
> THE COURT: I am going to hear all the evidence either of you has, and ask you to submit briefs on it, and take it home and decide it within a week.
>
> MR. LIGHTLE: This testimony adds nothing to it.

This is the testimony on which the Summary Judgment was granted.

THE COURT: Motion taken under advisement.

We reject appellees' strained construction of these exchanges. There is no doubt that the trial court considered only the issue of summary judgment. The final judgment recited that, after submission of motions for summary judgment by both parties, the court heard *additional* oral testimony and concluded with a statement that its previous findings and conclusions should not be disturbed.

In light of the existence of a factual issue, it was error to have entered the summary judgment. In order for a summary judgment to have been justified, there must have been no genuine issue of material fact and all evidence must have been viewed in the light most favorable to the party against whom the judgment would go. If fair-minded men might differ about the conclusion to be drawn or if inconsistent hypotheses might reasonably have been drawn from the supporting testimony, a summary judgment should have been denied. *Southland Insurance Agency* v. *Northwestern Netional Insurance Co.,* 255 Ark. 802, 502 S.W. 2d 474. Such was the case here. The motion for summary judgment should have been refused and the cause heard on all the evidence before a trier of fact.

The judgment is reversed and the cause remanded for further proceedings.

MASS MERCHANDISERS, Inc., Employer
and HOME INSURANCE COMPANY,
Insurance Carrier *v.* Jimmy E. HARP

76-22 536 S.W. 2d 729

Opinion delivered June 1, 1976

Putman, Davis & Bassett, for appellants.

Adams & Covington, for appellee.

JOHN A. FOGLEMAN, Justice. Appellee Jimmy E. Harp was an over-the-road truck driver for appellant, Mass Merchandisers, Inc. His claim for compensation for injuries incurred on May 4, 1974 in an automobile collision on Highway 166 near Edna, Kansas, was denied by the Workmen's Compensation Commission. The commission found that appellants, his employer and its carrier, had met their burden of proving that Harp was intoxicated and that his injury was solely occasioned by his intoxication. Specifically, the commission found that medical testimony showed that Harp had consumed sufficient alcohol to bring his blood alcohol content to a level which would impair one's judgment and depth perception and that impaired sense of judgment and depth perception seemed to be the only logical

explanation for the accident. Appellee appealed to the Circuit Court of Boone County. That court reversed the commission's denial of compensation, holding that appellants had failed to meet their burden of proving that Harp's injuries resulted solely from his intoxication. The court's findings were that the evidence was directed to a showing that Harp was under the influence of intoxicating liquors and that the commission erred by equating proof of blood alcohol content sufficient to raise a presumption that Harp was under the influence of intoxicating liquors with proof of intoxication. The court also found that there was no proof as to the cause of the accident. We reverse because we find substantial evidence to support the holding of the Workmen's Compensation Commission.

Perhaps there is justification in the circuit judge's and appellee's distinction between intoxication and being under the influence of intoxicating liquors, but it is one of degree only. See *St. Louis, I.M. & S. Ry. Co.* v. *Waters,* 105 Ark. 619, 152 S.W. 137. An accepted and appropriate definition of intoxication which will preclude compensation is the state of being under the influence of intoxicating liquors to the extent that one is not entirely himself or so that his judgment is impaired and his acts, words, or conduct is visibly impaired. 99 C.J.S. 908, Workmen's Compensation § 263. See also, 6 Workmen's Compensation Text (Schneider) 493, § 1587. This is very similar to a statement of this court that one is drunk, or in an intoxicated condition, whenever he is under the influence of intoxicating liquors to the extent that they affect his acts or conduct so that persons coming in contact with him could readily see and know that the intoxicating liquors were affecting him in that respect. *St. Louis, I.M. & S. Ry. Co.* v. *Waters,* supra.[1]

The first question then is the extent to which Harp was under the influence of intoxicating liquors at the time of the collision. The collision took place at approximately 5:30 p.m. A blood alcohol test was performed on Harp at the direction of Sgt. Seibert of the Kansas State Police and with the consent of Harp. It was done at the Coffeyville Memorial Hospital under the supervision of Dr. James W. Wilson. The

[1]This case was the source of AMI, Civil, 607.

results of that test showed a blood alcohol content of .120 "weight per volume." The sample on which the test was made was taken about an hour and a half after the collision. Dr. Wilson testified that the human liver has an enzyme that metabolizes alcohol, in the case of one with Harp's physique, at the rate of approximately nine cubic centimeters per hour, so that the blood alcohol level is thereby reduced. From this, he said it could be presumed that Harp's blood alcohol level would have been higher at the time of the collision and might have been as much as .150. Even at .120, this physician said that an average person would have some slurring of speech, possibly a showing of incoordination to a minimum degree, and, more seriously, impaired judgment and depth perception. He related that depth perception is one of the things that one imbibing alcohol loses first and that the result is impairment of direct relationship to things in space and compression of time and distance. According to Dr. Wilson, a person with that level of alcohol would be in the range of what a layman would call "tipsy, happy, relaxed." He explained that when one ceases drinking, the level of blood alcohol first rises to a peak within an hour, then declines.

Sgt. Seibert first saw Harp at least one hour after the collision at the hospital where Harp had been taken by ambulance. The officer immediately observed a strong odor of alcohol on Harp's breath, saw that Harp's eyes were bloodshot, and noted that his speech was slurred. He talked with Harp for about ten minutes and then asked Harp for his license, which Harp produced after fumbling through his wallet. He said Harp admitted drinking one beer at Joplin, commencing at 1:00 p.m. In the opinion of Seibert, who had investigated approximately 1000 accidents in his eight years with the Kansas State Police and had had occasion to observe people who had been drinking, Harp was definitely under the influence of intoxicating liquors.

Harp admitted drinking a 12 oz. can of beer at Mt. Vernon, Missouri about 10:00 a.m. He remembered that he had stopped in Branson, Missouri and had bought a 6-pack of 12 oz. cans of beer on the night preceding the day of the accident. When this evidence is viewed in the light most favorable to the commission's finding, the evidence that Harp was under the influence of intoxicating liquors at the time of his in-

jury to the extent that those coming in contact with him could readily see that his acts and conduct were affected by intoxicating liquors was very substantial. It also was substantial to show that Harp's judgment and speech were impaired.

It would be difficult indeed to account for the collision in which Harp was involved if it was not attributable solely to Harp's intoxication. He was driving along the highway on a stretch that was straight for a mile to a mile and a half, without any obstructions to view, when, after having followed a Cadillac passenger automobile for about a quarter of a mile, he undertook to pass the automobile. A collision quickly resulted. Harp testified that he was unable to see the car at the time of the collision. He didn't know what part of his tractor-trailer rig struck the Cadillac and said that nothing distracted his attention at the time. He admitted that the right rear wheel of the tractor-trailer rig he was driving came up over the back of the automobile. He had no knowledge of any improper driving on the part of the operator of the Cadillac and admitted telling Sgt. Seibert that he didn't know how the accident happened.

Seibert arrived at the accident scene at 5:53 p.m. He found the Cadillac automobile smashed. It was in a field north of the highway. Both vehicles has been proceeding in a westerly direction. Sgt. Seibert found skid marks and gouge marks on the north or westbound lane of the highway beginning at the indicated initial point of contact between the two vehicles. The gouge marks were one foot north of the center line of the highway. There were also skid marks in the passing lane. They originated at approximately the same point as the gouge marks, and were made by dual wheels. All of the automobile marks originated in the westbound traffic lane. The tracks of the left side of the truck were in the south or left-hand lane.

The damage to the Cadillac started at the back bumper. The left side of its rear deck lid was smashed down, the left rear window knocked out and the left side of the top smashed down even with the front windshield. There were tire marks on the car commencing at the back bumper which were continuous over the deck lid onto the top. It is clear that the tractor-trailer rig ran over the automobile and that the

Cadillac was entirely within its own proper lane.

Although Harp was totally ignorant of how the collision occurred, he claimed that a witness had told him that the Cadillac had swerved under his trailer and he had taken the name of this person. Admittedly he never told the investigating officer of this and claimed that he had lost the piece of paper on which the name was written when his pants leg was cut off at the hospital after he had talked with the officer. The commission found a lack of credibility in Harp's testimony and there were reasons to do so, among which were inconsistencies and conflicts in his testimony, his admission that he had falsified the log he had kept on the trip and his forgetting pertinent adverse facts.

Viewing the evidence in the light most favorable to the commission's findings, reasonable minds could conclude that Harp's intoxication was the only plausible explanation for the right rear wheels of the rig Harp was driving being literally run over the Cadillac automobile while that vehicle was moving along the highway in its own proper traffic lane. It seems highly unlikely that this could have resulted from anything other than a failure of the truck driver's perception of time, space and distance. Appellee admits that there was substantial evidence to support a finding that his coordination and depth perception were impaired to some degree and that his drinking might have, to some extent, contributed to the cause of the accident. Still, he says that no witness testified that Harp's drinking was the sole cause and that it cannot be said with certainty that it was.

It is true that doubts on factual issues are to be resolved by the commission in favor of a claimant. But that is the function of the commission, not the courts. Both the circuit court and this court must view the evidence in the light most favorable to the findings of the commission and give the testimony its strongest probative force in favor of the action of the commission. *Herman Wilson Lumber Co.* v. *Hughes,* 245 Ark. 168, 431 S.W. 2d 487. The test is whether the evidence before the court would have sustained a jury verdict. *Donaldson* v. *Socia,* 254 Ark. 158, 492 S.W. 2d 253. The most favorable view of appellee's arguments is that the commission might have found from the evidence that Harp was not intoxicated or

that his intoxication was only a contributing cause to his injury. Even so, the courts may not overturn the order of the commission holding to the contrary, unless it can be said as a matter of law, that the commission acted upon insufficient, i.e., insubstantial, evidence. *Marks* v. *Moore,* 209 Ark. 410, 190 S.W. 2d 524. The burden of proof on appellants was not to show Harp's intoxication and its being the sole cause of his injuries beyond a reasonable doubt. A preponderance sufficed. *O'Reilly* v. *Roberto Homes, Inc.,* 31 N.J. Super. 387, 107 A. 2d 9 (1954). And circumstantial evidence which does not leave the factfinder to speculation and conjecture is substantial evidence in workmen's compensation cases. *United Steelworkers* v. *Walden,* 228 Ark. 1024, 311 S.W. 2d 787.

It was incumbent upon the trial court to accept that version of the facts most favorable to the commission's findings. *Albert Pike Hotel* v. *Tratner,* 240 Ark. 958, 403 S.W. 2d 73. It was the function of the trial court and this court to determine whether there was any substantial evidence to support the commission's findings. *Goza* v. *Central Arkansas Development Council, Inc.,* 254 Ark. 694, 496 S.W. 2d 388. Neither a circuit court nor this court may reverse the findings of the commission on a disputed factual issue unless the proof is so nearly undisputed that fair-minded persons could not reach the conclusion of the commission. *Corbitt* v. *Mohawk Rubber Co.,* 256 Ark. 932, 511 S.W. 2d 184. There was substantial evidence to sustain the commission's findings, so both the circuit court and this court are bound by them. *Employers Cas. Co.* v. *United States Fidelity & Guaranty Co.,* 214 Ark. 40, 214 S.W. 2d 774.

The judgment must be reversed and the findings and conclusions of the Workmen's Compensation Commission reinstated.

Wilsie WOOTEN *v.* MOHAWK RUBBER COMPANY and TRAVELERS INSURANCE COMPANY

76-23 536 S.W. 2d 734

Opinion delivered June 1, 1976

Youngdahl, Larrison & Agee, for appellant.

Wright, Lindsey & Jennings, for appellees.

J. FRED JONES, Justice. This is a workmen's compensation case involving a second injury in the same employment under § 13 (f) (1) of the Compensation Act, Ark. Stat. Ann. § 81-1313 (f) (1) (Supp. 1975).

The appellant employee, Wilsie Wooten, sustained a compensable injury to his back on June 22, 1967, while employed by the appellee Mohawk Rubber Company. That injury, according to medical reports in the record, resulted in a large extruded L-4 disc which was compressing the right L-5 nerve root and it was surgically removed during the first

week in August, 1969. When Mr. Wooten was released to return to work following his surgery, he was paid compensation for a 20% permanent partial disability to the body as a whole on the basis of an estimate by his attending physician and he was retained in the employ of Mohawk.

On February 18, 1971, Mr. Wooten sustained another back injury resulting in additional surgery for the removal of a protruding disc at the same L-4 interspace but this time on the left side. Following the second disc surgery Mr. Wooten filed claim for total and permanent disability as a result of his second injury. The Administrative Law Judge and the full Commission awarded permanent and total disability under findings, conclusions, pertinent statutory provisions and award recited as follows:

FINDINGS OF FACT

1. That the claimant suffered a compensable injury on or about June 22, 1967, and that all benefits due the claimant were paid as a result of that injury. The claimant was further rated as having a permanent partial disability of 20 percent as a result of this injury.

2. That the claimant suffered a second compensable injury on or about February 18, 1971, was earning sufficient wages to entitle him to compensation at the rate of $49.00 per week, and is now totally disabled as a result of this injury.

3. That the respondents' liability for the claimant's disability benefits for both injuries is limited to $19,500.00 as provided by Section 13 (f) (1) of the Workmen's Compensation Act. * * *

CONCLUSIONS

The claimant suffered his first compensable injury on June 22, 1976, and received a permanent partial disability rating of 20 percent to the body as a whole as a result of that injury. The claimant was subsequently injured on February 18, 1971, while working for the same respondent, and he is now totally disabled.

Section 13 (f) (1) of the Workmen's Compensation Act

(f) Second Injury. In cases of permanent disability arising from a subsequent accident, where a permanent disability existed prior thereto:

(1) If an employee receives a permanent injury after having previously sustained another permanent injury in the employ of the same employer, for which he is receiving compensation, compensation for the subsequent injury shall be paid for the healing period and permanent disability by extending the period and not by increasing the weekly amount. When the previous and subsequent injuries received result in permanent total disability, compensation shall be payable for permanent total disability, but the sum total of compensation payable for previous and subsequent injuries shall not exceed 450 weeks or Nineteen Thousand Five Hundred Dollars ($19,500.00).

After considering all of the evidence, we find that the claimant sustained a permanent injury on June 22, 1967, and a subsequent permanent injury on February 18, 1971, while working for the same employer, which caused him to be totally disabled.

Therefore, as per Section 13 (f) (1) of the Workmen's Compensation Act and the case of *Mohawk Rubber Company* vs. *Corbitt,* [sic] 256 Ark. 932 (1974) the liability of the respondent is limited to the sum total of compensation payable for both injuries, not to exceed $19,500.00.

* * *

AWARD

The respondents shall pay to the claimant compensation at the rate of $49.00 per week for a total disability, beginning February 19, 1971, and are to continue said benefits until the combined total of compensation payable for both injuries does not exceed $19,500.00. * * *

The award was affirmed by the circuit court and on

appeal to this court Mr. Wooten contends that "The award of the workmen's compensation Commission is contrary to the law." The appellant argues that under the provisions of the Act, *supra,* the permanent and total disability must be the combined effects of the two injuries. The appellant then quotes from the Act with supplied emphasis and states his contention in relation thereto as follows:

> *When the previous and subsequent injuries received result in permanent total disability,* compensation shall be payable for permanent total disability, but the sum total of compensation payable for previous and subsequent injuries shall not exceed 450 weeks or Nineteen Thousand Five Hundred Dollars ($19,500.00).
>
> The issue before this Court is the construction of the second sentence of the quoted portion of the Workmen's Compensation Act, and in particular, the italicized language of that section.

The appellant is right in his interpretation of the Act but we are unable to say the Commission misinterpreted the Act or failed to properly apply it to the facts in this case. Certainly the Commission could have been more specific in its findings that the total disability resulted from a combination of the two injuries, but the medical evidence is so clear we feel it would be idle gesture to remand for a more specific finding.

Dr. Morris W. Ray attended Mr. Wooten following both injuries. A number of Dr. Ray's medical reports appear in the record and we paraphrase in brief form the pertinent language of his reports following the first injury and surgery in chronological order by dates as follows: September 4, 1969: absence of back pain but continued numbness in the right lower extremity, weakness in the foot on the right side and occasionally dull aching pain in the right hip. October 2, 1969: absence of pain but occasional cramping in the right calf; -2 range of motion in the back compatible with a post-operative status. Right extensor muscle slightly improved. November 10, 1969: still having occasional cramping pain in the right lower extremity which seemed to shoot out of the end of his toes. Pain intermittent and occurs with severe bending and occasionally with heavy sneezing. No low back pain

but unable to do his exercises because of discomfort. Still -1 weakness of the right extensor muscle but released as "clear to return to work," to return in about three months because of continued residual weakness. December 8, 1969: been back at work for five days, occasional intermittent sharp pain in the low back and pain in the long toe and in the fourth toe at times. Has been somewhat nervous, upset because he had been asked to work more than 40 hours per week; said he believes he could work a full 40 hour week but more than that seemed to tire him excessively; has been somewhat depressed of late. "I do not feel he should be working over forty hours at this time." February 16, 1970: having some low back pain primarily in low back after work; complained that toes and legs felt weak. Having headaches of late. "He is depressed, unhappy at his job. He states that there is considerable pressure in his job and he is doing different things. He is quite depressed about this." Right extensor still weak but improving. Slight tenderness over T6 vertebral spinous process but not marked. X-rays within normal limits for postoperative film. "As mentioned, the patient is quite depressed about his work and has talked about quitting work. I have encouraged him to continue to try as I do not feel he will improve symptomatically or emotionally by quitting work. He is given a prescription for Butazolidin alka #40 and fitted with a Taylor three-quarter back brace." March 16, 1970: back considerably better; been working 40 hours a week and work going better; as long as not behind in his work does all right; occasional cramping pain in the right lateral calf; wearing back brace. Not necessary to see again unless additional difficulty. Will "have approximately 20% disability." September 29, 1970: complaining of headache, neck pain and interscapular pain, which has persisted ever since accident in 1967; been out of work on strike for about three and one-half months but been back at work about three days. Head, neck and upper back pains extending into the arms and down the back, seem to be increased by working. Back sore but no back pain. "I feel that some of his pain is on a chronic myofascial strain basis, and in addition, there is an element of depressive reaction here. * * * He is to call or write in 6 weeks to let me know how he is doing. *Disability 20%.*"

On February 19, 1971, the day following Mr. Wooten's second injury, Dr. Ray reported that Mr. Wooten returned stating that he had been doing fairly well and had missed no time from work because of his back trouble until about three months ago. Had been transferred to a heavier job and when throwing a tire onto a conveyor belt, experienced rather severe low back pain but kept working until the previous day, February 18, when he threw another tire onto the belt and felt severe right lower extremity pain. Upon examination Dr. Ray found muscle spasm, slight limitation, etc. He placed Mr. Wooten on conservative treatment and when he failed to respond, he was hospitalized on November 17, 1971, and Dr. Ray reported as follows: "the patient was taken to surgery on the second hospital day, and at that time a partial hemilaminectomy at L-4 and L-5 left was performed, with removal of a protruding HNP [herniated nucleus pulposus] at the L-4 left interspace." The subsequent medical reports in the record pertain to Mr. Wooten's postoperative course following the second operation. His nervous condition worsened and that was the primary basis for his permanent total disability.

We have had occasion to consider section 13 (f) of the Compensation Act in at least three cases. *Davis-Stearns-Rogers Const. Co.,* 248 Ark. 344, 451 S.W. 2d 469 (1970), involved a second injury in different employment under 13 (f) (2), rather than in the same employment under 13 (f) (1) as in the case at bar, but our reasoning is applicable here. Davis had sustained a series of accidents each resulting in small percentages of permanent disability but totaling in the aggregate 75% to the body as a whole. Following subsequent injury he became permanently and totally disabled and the Commission, relying on *O. K. Processors, Inc.* v. *Dye,* 241 Ark. 1002, 411 S.W. 2d 290 (1967), awarded compensation for permanent total disability without credit or regard to the permanent disability occasioned by the previous injuries. The circuit court held that the evidence before the Commission was insufficient to sustain the Commission's award and the circuit court fixed compensation based on 15% disability to the body as a whole. We reversed the circuit court judgment and remanded with directions to remand to the Commission for a determination of a proper award in accordance with our opinion, which was in pertinent part as follows:

The statute here involved, Ark. Stat. Ann. § 81-1313 (f) (2) (ii), provides:

If the subsequent injury is one that is not scheduled under section 13 (c), the injured employee shall be paid compensation for the healing period and for the degree of disability that would have resulted from the subsequent injury if the previous disability had not existed.

It appears that the Commission had here taken the view that, if the employee is capable of gainful employment, the subsequent employer must take the employee as the employer finds him and that for purposes of compensation, the Commission may disregard previous disabilities. That is neither our understanding of the statute above, nor of our holding in *O.K. Processors, Inc.* v. *Dye,* 241 Ark. 1002, 411 S.W. 2d 290 (1967).

Our understanding of Ark. Stat. Ann. § 81-1313 (f) (2) (ii), is that if Davis' prior disabilities are a contributing factor to his present total permanent disability, then Stearns-Rogers Construction Co., as a subsequent employer, is not liable for 100% of the total permanent disability but only for that degree which would have resulted had the prior disability not existed.

The reason for the apportionment of liability for compensation for permanent disability between prior and subsequent injuries is stated in Larson Workmen's Comp. Vol. 2, § 59-31 as follows: * * *

Neither do we interpret our opinion in *O. K. Processors, Inc.* v. *Dye, supra,* as holding to the contrary. In that case we held that the degree of disability resulting from the subsequent injury was a question of fact for the Commission. In so holding we partially quoted from Larson Workmen's Comp., Vol. 2, § 59-42. * * *

In *Intl. Paper Co.* v. *Remley,* 256 Ark. 7, 505 S.W. 2d 219 (1974), the injured workman sustained an injury to his hand in 1934 before Arkansas even had a workmen's compensation act and 34 years before obtaining the different employment in which he sustained another injury to his hand in 1971. The

first injury resulted in a 20% permanent partial disability to his hand and his 1971 injury resulted in an additional 15% permanent partial disability to the hand. The Commission awarded compensation for the entire 35% and on appeal it was insisted that the respondent-appellant was responsible only for the 15% disability suffered in the respondent's employ and, after quoting the statute, § 81-1313 (f) (2) (Supp. 1973), we said:

> [T]he appellee's recovery for the functional loss caused by the second injury cannot, under the statutory language, include the functional loss caused by the first injury.

As already noted, the two above cases as well as the *O. K. Processors* case cited in *Davis* were subsequent injuries resulting in permanent disability while in the employ of different employers and fell under § 81-1313 (f) (2) rather than in the employment of the same employer under (f) (1) as is the case at bar, and as was the situation in *Corbitt* v. *Mohawk Rubber Co.,* 256 Ark. 932, 511 S.W. 2d 184 (1974). In *Corbitt* v. *Mohawk,* Corbitt became permanently and totally disabled from the *combined* effects of two successive and compensable work related back injuries while employed by Mohawk, but in that case the Commission specifically so found. The Commission in applying the provisions of § 81-1313 (f) (1) in *Corbitt,* awarded permanent total disability benefits but limited recovery to $19,500 as the maximum benefits payable under the Act. The circuit court affirmed and the primary contention on appeal to this court was that § 81-1313 (f) (1) was unconstitutional in that it attempted to limit recovery for permanent total disability; whereas, § 81-1310 (c), having to do with total permanent disability as a result of a single accident, is not so limited as to payment. We held the statute constitutional and in affirming the judgment we remarked on the philosophy behind such statutes as being to encourage industry in employing and retaining in employment physically handicapped persons. Of course, as already pointed out, the *Corbitt* case differs from the case at bar in one primary respect. As stated in *Corbitt,* the Commission found "the appellant was permanently and totally disabled from the *combined effects* of two successive and compensable work related back injuries [italics supplied]." In the case at bar the

Commission simply found "The claimant was further rated as having a permanent partial disability of 20 percent as a result of this [first] injury."

We are of the opinion that the only logical interpretation to be placed on § 81-1313 (f) (1) is that the permanent total disability must result from the combined effects of first and second injuries. The statute by its plain language only applies when there is some degree of permanent disability resulting from the first injury. The entire subsection (f) as to second injury only applies "where a permanent disability existed prior thereto." An injury which does not result in some degree of permanent disability simply is not within the purview of § 81-1313 (f).

As we interpret the language in the Commission's decision, it did find that Mr. Wooten's permanent total disability was the combination of the disabilities he suffered as a result of both accidental injuries as was the case in *Corbitt* v. *Mohawk, supra,* cited and relied on by the Commission. There is substantial evidence to sustain the Commission's findings and award and the judgment must be affirmed.

Affirmed.

FOGLEMAN, J., would remand to the circuit court with directions to remand to the Workmen's Compensation Commission for a clarification of its findings of fact.

Benjamin Cole LUCKY *v.* EQUITY MUTUAL INSURANCE CO.

76-7 537 S.W. 2d 160

Opinion delivered June 1, 1976
[Rehearing denied June 28, 1976.]

Spencer & Spencer, for appellant.

Shackleford, Shackleford & Phillips, for appellee.

CONLEY BYRD, Justice. Involved on this appeal is whether a renewal certificate of automobile liability insurance or an endorsement covering a substitute vehicle constitutes insurance "delivered or issued for delivery" within

the meaning of the Uninsured Motorist Statute, Ark. Stat. Ann. § 66-4003 (Repl. 1966). The trial court held that a written rejection of uninsured motorist insurance by appellant Benjamin Cole Lucky on January 5, 1966, was an effective rejection through the 16th six months renewal of the policy on January 5, 1973, and awarded summary judgment to appellee Equity Mutual Insurance Co.

The record shows that prior to January 5, 1966, appellant carried uninsured motorist insurance on his 1960 Ford pickup. On that date he signed a rejection of uninsured motorist insurance and was issued automobile liability insurance by appellee, Policy No. AF 701684, for the period "from 1-5-66 to 7-5-66 12:01 A. M." Thereafter, appellee issued a renewal certificate every six months which would extend appellant's coverage upon the payment of the premium for an additional six month period. Each renewal certificate identified the automobile liability insurance as being Policy No. AF 701684. Effective October 1, 1971, appellee issued a non-premium endorsement showing that Policy No. AF 701684 had been extended to cover a 1964 Ford pickup that was substituted for the 1960 Ford pickup in the original policy. On July 3, 1973, appellant received injuries in an automobile collision with an uninsured motorist. When appellant brought this action under the uninsured motorist provision of his wife's policy and his own policy, the appellee countered with a motion for summary judgment, which the trial court granted because of the 1966 written rejection.

Our Uninsured Motorist Statute, Ark. Stat. Ann. § 66-4003 (Repl. 1966) provides:

> "No automobile liability insurance, covering liability arising out of the ownership, maintenance, or use of any motor vehicle shall be delivered or issued for delivery in this State with respect to any motor vehicle registered or principally garaged in this State unless coverage is provided therein or supplemental thereto, in not less than limits described in section 27 of Act 347 of 1953 [§ 75-1427], as amended, under provisions filed with and approved by the Insurance Commissioner, for the protection of persons insured thereunder who are

legally entitled to recover damages from owners or operators of uninsured motor vehicles because of bodily injury, sickness or disease, including death, resulting therefrom; provided, however, that the coverage required under this section shall not be applicable where any insured named in the policy shall reject the coverage."

The non-premium endorsement effective October 1, 1971, falls literally within the meaning of the uninsured motorist statute, *supra*. That endorsement provided liability insurance coverage that had not previously existed on that vehicle "arising out of the ownership, maintenance or use . . . with respect to any motor vehicle registered or principally garaged in this State." The automobile insured by that endorsement was, at the time owned by appellant, to be registered or principally garaged in this State, and by the terms of policy No. AF 701684, the existing liability insurance would not have applied to the 1964 model truck without insurance having been "delivered or issued for delivery in this State."

Our interpretation of the uninsured motorist statute here follows the statutory construction rule that where the enacting clause of a statute is general in its language and purpose, a proviso subsequently following should be construed strictly so as to exempt no cases from the enacting clause which do not fairly fall within its terms, *McRea* v. *Holcomb,* 46 Ark. 306 (1885). To accept the construction which appellee would have us place on the uninsured motorist statute would permit one rejection to be effective for any and every automobile that might be substituted by the insured for the original vehicle. Such a construction should not be placed upon a public policy statute that expects uninsured motorist coverage to be issued or rejected any time automobile liability insurance is "delivered or issued for delivery in this State."

Since the above disposes of the question of the validity of the 1966 written rejection and the trial court did not rule upon a rejection made subsequent to the effective date of Ark. Acts of 1969, No. 333, we do not and need not reach the issue of whether a renewal certificate constitutes liability insurance "delivered or issued for delivery" in this state. Furthermore,

neither party has discussed the effect of Ark. Acts of 1969, No. 333 upon that issue.

Appellant suggests that we should overrule our holding in *Holcomb* v. *Farmers Ins. Exchange,* 254 Ark. 514, 495 S.W. 2d 155 (1973). We find no merit in this contention. The construction there given to the uninsured motorist statute has become as much a part of the statute as the words of the General Assembly, *Merchants' Transfer & Warehouse Co.* v. *Gates,* 180 Ark. 96, 21 S.W. 2d 406 (1929). Furthermore, even if we should reconsider our holding in *Holcomb, supra,* the reconsideration could not be applied retroactively to appellant since it involves a matter of contract, *Hare* v. *General Contract Purchase Corp.,* 220 Ark. 601, 249 S.W. 2d 973 (1952).

Reversed and remanded.

James Henry SMITH Jr. *v.* STATE of Arkansas

CR 76-12 537 S.W. 2d 158

Opinion delivered June 1, 1976

Harold L. Hall, Public Defender, by: *William R. Simpson Jr., Dep. Public Defender, for appellant.*

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

FRANK HOLT, Justice. Appellant was convicted by the court, sitting as a jury, of two counts of burglary, Ark. Stat. Ann. § 41-1001 (Repl. 1964), and two counts of grand larceny, Ark. Stat. Ann. § 41-3901 (Repl. 1964). He was sentenced to six years in the Arkansas Department of Correction on each charge, to run concurrently, with the further order that he serve one-third of the sentence before becoming eligible for parole.

Appellant was brought into the police station at approximately 11 a.m. for questioning regarding a till-tapping theft of a cash register in which one of appellant's companions and appellant's automobile were implicated. There was testimony that he was orally advised of his constitutional rights on the way to the police station. Upon arrival and before questioning, he was advised again of his rights. He signed a standard rights form at 11:40 a.m. He was told he was a suspect and that they (the police) were looking for a stolen cash register. Appellant signed a consent form to search his automobile. The interrogation stopped while the officers searched the automobile. The officers found a briefcase with broken locks, a tape recorder, a key to a local motel, two keys to another local motel, and a black coat. The papers and a passport in the briefcase bore the name of a customer of

one of the motels. Appellant was then interrogated regarding the articles found in his car. At approximately 12:30 appellant gave a written statement about his participation in the crime that led to his possession of the property. He testified that he thought he was signing something about possession of stolen property.

Appellant contends that the court erred in finding that he was properly advised of his rights and in admitting his statement into evidence. The thrust of appellant's argument is that his statement was not admissible because in the second interrogation he was questioned regarding an entirely new subject matter without being advised and given another Miranda warning that he was a suspect in a burglary and grand larceny investigation. We find no merit in appellant's contention.

In determining the voluntariness of a statement, this court makes an independent determination based upon the totality of the circumstances and the court's finding of voluntariness will not be set aside unless it is clearly against the preponderance of the evidence or "clearly erroneous." *Degler* v. *State,* 257 Ark. 388, 517 S.W. 2d 515 (1975).

Appellant argues that *Michigan* v. *Mosley,* 423 U.S. 96, 46 L. Ed. 2d 313, 96 S. Ct. 321 (1975), requires a full and complete Miranda warning at the outset of each interrogation and this is especially true where a defendant is being questioned in regards to a new or different incident. We do not so construe *Mosley*. There appellant was informed of his constitutional rights and then interrogated regarding some robberies. He said he did not want to discuss the robberies and the interrogation ceased. After an interval of more than two hours, Mosley was questioned by another police officer at another location about an unrelated holdup-murder. However, he was given full and complete Miranda warnings at the outset of the second interrogation. In the case at bar appellant did not ask to cut off the questioning. Appellant did testify that he said he wanted to speak to an attorney although the police said he did not ask for an attorney. One officer said appellant specifically said he did not want one when asked. There was testimony that appellant was advised of his constitutional rights twice within approximately

one hour during which time he signed a standard rights form and a consent to search his automobile. The police ceased their interrogation only long enough to perform a consensual search of appellant's automobile. Thereafter, appellant made and signed an incriminating statement which was less than an hour after he had been given a Miranda warning and had signed the standard rights form. Appellant was interrogated at the same location the second time by the same officers who had interrogated him the first time. Appellant had completed one year of college.

Where, as here, there was no significant time lapse between the two interrogations; there was no evidence that the police acted in such a way so as to dilute the efficacy of the earlier warnings; he was interrogated by the same officers in the same location as the earlier interrogation; and there was no indication that appellant was so intellectually deficient or emotionally unstable that he had forgotten his constitutional rights had been fully explained to him a short time earlier, we cannot say that the appellant was prejudiced by the failure of the officers to repeat the Miranda warnings or that the court's finding the statement was voluntary is "clearly erroneous." See *United States* v. *Hopkins,* 433 F. 2d 1041 (5th Cir. 1970); and *State* v. *McZorn,* 219 S.E. 2d 201 (N.C. 1975).

Neither do we find any merit in appellant's assertion that his statement should not have been admitted because he was not told he was a suspect in a burglary and grand larceny investigation. In *Hall* v. *State,* 259 Ark. 815, 537 S.W. 2d 155, delivered this date, appellant argued that she was not told she was being charged with murder. There we said "she undoubtedly knew why she was being questioned. The exact charge that would ultimately be made could hardly be determined until the investigation was complete and the information had been submitted to the prosecuting attorney. The trial judge had the advantage of hearing the testimony as it was given. We do not find his decision to be erroneous."

Affirmed.

SOUTHERN SECURITY LIFE INSURANCE COMPANY et al *v.* Betty J. SMITH, Administratrix

76-25 537 S.W. 2d 542

Opinion delivered June 7, 1976
[Rehearing denied July 6, 1976.]

Davidson, Plastiras & Horne, Ltd., by: *Allan W. Horne,* for appellants.

Gill, Johnson & Bivens, by: *Marion S. Gill,* for appellee.

GEORGE ROSE SMITH, Justice. This action upon two $10,000 credit life insurance policies is governed by our decisions in *American Pioneer Life Ins. Co.* v. *Smith,* 255 Ark. 949, 504 S.W. 2d 356 (1974); *American Pioneer Life Ins. Co.* v. *Turman,* 254 Ark. 456, 495 S.W. 2d 866 (1973); *Union Life Ins. Co.* v. *Davis,* 247 Ark. 1054, 499 S.W. 2d 192 (1970); and *Life & Cas. Ins. Co.* v. *Smith,* 245 Ark. 934, 436 S.W. 2d 97 (1969).

Here, as in the cases cited, the insured signed applications in which he falsely stated that he was in good health. In

fact, he had suffered a heart attack in 1967, after which he was placed upon a program of medication and was told to carry nitroglycerin tablets with him continuously. In December of 1972 he suffered a second attack, an acute infarction, for which he was hospitalized for two weeks. Upon his discharge he was placed upon a program of limited activity, with nitroglycerin and other medication. The two three-month policies of credit life insurance were issued in connection with the renewal of a bank loan on January 18, 1973, only 30 days after Smith's hospitalization. He re-entered the hospital five days later as a result of recurrent chest pains. He was discharged on February 5 but died two days later from another acute infarction. There is no doubt that Smith was aware of his affliction.

In effect the appellee argues that we should overrule our recent cases and put credit life insurance in a special category. The argument is that since credit life insurers issue policies for short terms without a physical examination, they should be required to take the borrowers "as they come" and in the aggregate, rather than upon an individual basis. That argument overlooks the fact that the system of credit life insurance presumably enables borrowers who are in fact in good health to obtain such insurance at low premium rates. The appellee's contention, if accepted, would tend to deprive those borrowers of the economical coverage that the system is meant to provide. Moreover, our controlling decisions are based upon a section of the Insurance Code, which we are not at liberty to disregard. Ark. Stat. Ann. § 66-3208 (Repl. 1966).

Reversed and dismissed.

Dan DUNN d/b/a DAN DUNN ROOFING COMPANY *v.* Judge BRIMER Jr.

76-33 537 S.W. 2d 164

Opinion delivered June 7, 1976

Laser, Sharp, Haley, Young & Boswell, P.A., for appellant.

William R. Wilson, for appellee.

GEORGE ROSE SMITH, Justice. This appeal is from a $25,000 judgment for the appellee in an action for personal injuries. The principal issue, presented by the direct appeal, is whether the trial judge was right in submitting to the jury, in the format of AMI Civil 2d, 601 (1974), the appellant's asserted violation of a federal safety regulation.

Brimer, the plaintiff, was employed by the general contractor as a carpenter at a building construction job in Bald Knob. Dunn, the defendant, was the roofing subcontractor. On the day of his injury Brimer was working several feet above the ground upon a scaffold that was beneath a wide eave. Dunn's employees were using a ladder that extended from the ground to the edge of the roof, passing very close to the scaffolding. Brimer testified that as he worked from one end of the scaffold to the other it was easier for him to step on and off the ladder than to crawl past it. During one such transit Brimer looked up and thought a bucket of tar was being swung toward him by one of the roofers. Brimer tried to jump aside, but the ladder, which was not fastened in place, shifted its position, causing Brimer to fall upon debris on the ground and break his ankle.

Federal regulations issued pursuant to the Occupational Safety and Health Act of 1970 (29 USCA §§ 651 et seq.) provide that portable ladders shall be fastened and that the area below them shall be kept clean. Dunn, in his contract with the general contractor, had agreed to comply with that Act. The trial judge inserted the regulations in AMI 601, telling the jury that a violation of the regulations is evidence of negligence to be considered with the other facts and circumstances.

Dunn argues that the federal regulations had nothing to do with the case, because they apply only as between employers and employees. Brimer was employed not by Dunn but by the general contractor. Hence, it is said, the regulations had no application.

We cannot agree. Of course, one element in Brimer's cause of action for negligence is the violation of a duty of care owed by Dunn to Brimer. Restatement, Second, Torts, § 281 (1965). But it is not essential that the duty be owed to Brimer as an employee of Dunn. Dunn's employees had reason to know that Brimer, in the course of his work, might step onto the ladder in just the way that he did. In fact, he had done so before, as was to be expected in the circumstances. The required duty of care existed.

In that situation the jury might consider, without regard

to any employer-employee relationship, whether Dunn's violation of the regulations was negligence. Prosser points out that "where the statute does set up standard precautions, although only for the protection of a different class of persons, or the prevention of a distinct risk, this may be a relevant fact, having proper bearing upon the conduct of a reasonable man under the circumstances, which the jury should be permitted to consider." Prosser, Torts, p. 202 (4th ed., 1971). A case in point is *Marshall* v. *Isthmian Lines,* 5th Cir., 334 F. 2d 131 (1964), where the court held that a violation of a regulation that was designed to prevent fires could also be considered as evidence of negligence in a personal injury case.

Dunn's second point for reversal is that he was entitled to a directed verdict, because Brimer was a mere licensee, to whom Dunn owed only a duty of not wilfully injuring him. The duty in question is traditionally and properly one owed to third persons by an owner or occupier of land. Dunn does not fit that category. He simply owned a ladder, which was negligently put in place by his workmen. His liability is to be tested by the principles that govern negligent conduct, not by those applicable to the passive condition of premises. *Tatum* v. *Rester,* 241 Ark. 1059, 242 Ark. 271, 412 S.W. 2d 293 (1967).

On cross appeal Brimer argues that the judgment should bear interest at the rate of 10% instead of 6%, as allowed by the trial judge. For more than a century the interest rate upon judgments was 6%, but in 1975 the legislature increased the rate to 10%, with a proviso that the trial judge "in his discretion" may reduce the rate to not less than 6%. Ark. Stat. Ann. § 29-124 (Supp. 1975). Here counsel submitted a precedent for judgment reciting the 10% rate. The judge reduced it to 6%, explaining in a letter that he understood the legal rate to be 6% in the absence of a contract for a higher rate. No other explanation for the reduction appears in the record. Hence it does not appear that the court exercised its discretion with knowledge of the 1975 statute. Consequently we think that the rate should be fixed at 10%, as the statute provides — not because the trial judge abused his discretion but because he was apparently not aware of the leeway that was open to him. The judgment is modified accordingly.

Affirmed on direct appeal, modified on cross appeal.

Roberta Z. FENNEY *v.* William C. FENNEY

76-51 537 S.W. 2d 367

Opinion delivered June 7, 1976
[Rehearing denied July 6, 1976.]

Carpenter, Finch & Dishongh, for appellant.

Wayne R. Foster, for appellee.

CONLEY BYRD, Justice. Appellant Roberta Z. Fenney having been granted a divorce from appellee William C. Fenney appeals from the trial court's holding that she was not entitled to one-third of her husband's Air Force retirement pay. We affirm the trial court.

Ark. Stat. Ann. § 34-1214 (Repl. 1962) provides that a wife who is granted a divorce "shall be entitled to one-third [1/3] of the husband's personal property absolutely, and one-third [1/3] of all the lands whereof her husband was seized of an estate of inheritance at any time during the marriage for her life, . . . "

We do not consider the right to receive retirement pay from the armed forces to be personal property within the meaning of Ark. Stat. Ann. § 34-1214, *supra.* The right to a pension and retirement pay, not yet due and payable, cannot be assigned, sold, transferred, conveyed or pledged. See *In re Marriage of Ellis,* 538 P. 2d 1347 (Colo. App. 1975).

Appellant relies upon cases from community property states, such as *Ramsey* v. *Ramsey,* 96 Idaho 672, 535 P. 2d 53 (1975), and *Miser* v. *Miser,* 475 S.W. 2d 597 (Tex. Civ. App. 1971), to support her position. For the reasons stated in *In re*

Marriage of Ellis, supra, we do not find the decisions from the community property states to be persuasive. In effect, the community property jurisdictions treat armed forces' retirement pay as alimony; otherwise, it is not collectible, 42 U.S.C. § 659 (Supp. IV, 1974).

Affirmed.

Delmer STRODE *v.* STATE of Arkansas

CR 76-17 537 S.W. 2d 162

Opinion delivered June 7, 1976

Erwin L. Davis, for appellant.

Jim Guy Tucker, Atty. Gen., by: *Jackson Jones,* Asst. Atty. Gen., for appellee.

ELSIJANE T. ROY, Justice. On April 4, 1975, three informations were filed, each charging appellant with the crime of selling intoxicating liquor on Sunday, and each also charged that appellant had previously been convicted of a like offense.

On July 1, appellant was tried and found guilty of a first offense of selling intoxicants on Sunday, February 9, 1975. The remaining two informations for alleged offenses on February 16, 1975, and March 2, 1975, were consolidated and tried on August 14, 1975. No appeal was taken from the July 1 conviction. The August trial resulted in convictions on both remaining informations, and appellant was fined $500 and sentenced to 15 days in the county jail on each. From those convictions this appeal is brought.

Appellant first alleges error in the trial court's failure to instruct the jury according to his proffered instruction no. 1. This instruction provided, "If you should find the defendant guilty (of one or more charges) then you should affix his fine (on each charge) at no less than $100 nor more than $500."

Appellant was charged pursuant to Ark. Stat. Ann. § 48-901(b) (Repl. 1964), which in pertinent part reads as follows:

> Any person who shall sell intoxicating alcoholic liquor on Sunday . . . shall be guilty of a misdemeanor and for the first offense be punishable by a fine of not less than One Hundred Dollars ($100.00) nor more than two hundred and fifty dollars ($250.00), *and for the second and subsequent offenses* he shall be guilty of a misdemeanor and punishable by a fine of not less than two hundred and fifty dollars ($250.00) and not more than five hundred dollars ($500.00) or by imprisonment in the county jail for not less than ten (10) days nor more than six (6)

> months, or both so fined and imprisoned in the discretion of the court or jury. (Italics supplied.)

The State introduced into evidence a copy of the order indicating appellant had been convicted on July 1, 1975, of the offense of selling liquor on Sunday. Appellant contends that since on the date the informations were filed he had not been convicted, the July 1, 1975, conviction should not have been used to enhance his punishment in either case on appeal here.

Appellant was on notice from the time the informations were filed that a prior conviction was charged in each. Appellant obviously was aware of his conviction of July 1, 1975, and of its possible application in any later convictions. While it is not the customary practice for the State to rely on a conviction not yet existent at the time the informations are filed, no prejudice has resulted from such action in this case. Accordingly we find appellant was not denied benefit of notice and the opportunity to prepare and respond accordingly.

It also is noted that the offenses which led to the convictions involved in this appeal occurred on February 16, 1975, and March 2, 1975. Section 48-901(b), *supra,* provides for enhanced punishment for second and subsequent *offenses,* not for second and subsequent *convictions.*

Appellant next questions the trial court's exclusion, for cause, of a juror who on voir dire indicated that she thought the sale of beer on Sunday should be allowed. Although she later changed her response, she was rather equivocal about it, and we find the court did not abuse its discretion in discharging her for cause.

Even if it be assumed that the exclusion of this juror was erroneous, an assumption we do not make, we have held that:

> * * * "Since a party is not entitled to have any particular juror, the erroneous rejection of a competent talesman is not prejudicial, in the absence of a showing that some biased or incompetent juror was thrust upon him."

Lewis v. *Phillips,* 223 Ark. 380, 266 S.W. 2d 68 (1954). * * *

Satterfield v. *State,* 252 Ark. 747, 483 S.W. 2d 171 (1972). Appellant did not make the requisite showing herein.

Appellant's concluding assignment of error questions the admission of a portion of the testimony of Joe Moreno, the undercover police officer responsible for effecting appellant's arrest. When asked on redirect examination his purpose for being at appellant's residence, Moreno replied, "We were also purchasing what we thought were narcotics." Appellant asserts that this testimony was prejudicial and should have been stricken. However, as was noted by the trial court in response to appellant's objection at the time, appellant on cross-examination previously opened this line of inquiry. An examination of the record establishes that it was appellant who initially sought to determine Moreno's purpose for going to appellant's residence. Appellant cannot be heard to complain of error that he was responsible for inviting. *Denton* v. *State,* 189 Ark. 284, 71 S.W. 2d 197 (1934); *Anderson* v. *State,* 210 Ark. 548, 197 S.W. 2d 36 (1946); *Randle & Wright* v. *State,* 245 Ark. 653, 434 S.W. 2d 294 (1968).

Affirmed.

In Re: The Arkansas Criminal Code Revision Commission, Ex Parte

74-345 530 S.W. 2d 672

PER CURIAM

December 22, 1975

IN THE MATTER OF RULES OF CRIMINAL PROCEDURE. Per Curiam. The movement for reformation of the Arkansas criminal justice system began in 1971 with three workshops to study the American Bar Association's "Minimum Standards for the Administration of Criminal Justice" and criminal procedure in Arkansas. The workshops were sponsored by the Arkansas Supreme Court, the Arkansas Judicial Council, the Arkansas Prosecuting Attorneys' Association, the American Bar Association, the Arkansas Bar Association, and the Arkansas Commission on Crime and Law Enforcement. Later in 1971 the General Assembly enacted Act 470 of 1971, expressly authorizing the Arkansas Supreme Court to prescribe rules of pleading, practice, and procedure in criminal cases and proceedings.

Pursuant to Act 470 the Supreme Court, acting by its Chief Justice, and the Attorney General joined in creating the Arkansas Criminal Code Revision Commission. That eighteen-member Commission was selected to provide representation for all concerned groups, professions, institutions, and geographical areas in the state. The Commission was divided into two committees. One was charged with the responsibility of revising the substantive criminal law. That task was completed in 1974 and culminated in the adoption by the General Assembly of Act 280 of 1975, the Arkansas Criminal Code, effective January 1, 1976.

The procedural committee also completed its proposed draft in 1974. In December the Commission petitioned the Supreme Court to adopt the Rules of Criminal Procedure. The Court entered an order fixing a briefing schedule and

providing any interested person or group with an opportunity to file objections or suggest modifications. The Bobbs-Merrill Company had co-operated by publishing, without cost to the State, the proposed Rules. Copies had been sent to all attorneys in the state, with an invitation for suggestions. The Rules were also submitted to many groups, including the General Assembly's Legislative Council Judiciary Committee and its Standing Joint Interim Committee on the Judiciary.

Pursuant to the Court's briefing schedule suggestions and briefs were filed by the Arkansas Prosecuting Attorneys' Association, bail bondsmen, and others, including responses by the Criminal Code Revision Commission. All suggestions were considered by the Court, resulting in several amendments to the proposed Rules. All those amendments are on file with the Clerk of the Court.

Pursuant to Act 470 of 1971, and in harmony with the Court's constitutional superintending control over all trial courts, the Court hereby adopts and approves the proposed Rules of Criminal Procedure, as amended, effective January 1, 1976.

The amendments to the Rules of Criminal Procedure, as proposed by the Arkansas Criminal Code Revision Commission and published by the Bobbs-Merrill Company, are as follows:

1. Rule 2.3 appearing on Lines 21-25 of Page 7 is amended to read as follows:

   Warning to Persons Asked to Appear at a Police Station. If a law enforcement officer acting pursuant to this rule requests any person to come to or remain at a police station, prosecuting attorney's office or other similar place, he shall take such steps as are reasonable to make clear that there is no legal obligation to comply with such a request.

2. Rule 3.1 appearing on Lines 26-38 of Page 7 is amended to read as follows:

   A law enforcement officer lawfully present in any place may, in the performance of his duties, stop and detain any person who he reasonably suspects is committing, has committed, or is about to commit (1) a felony, or (2) a misdemeanor involving danger of forcible injury to persons or of appropria-

tion of or damage to property, if such action is reasonably necessary either to obtain or verify the identification of the person or to determine the lawfulness of his conduct. An officer acting under this rule may require the person to remain in or near such place in the officer's presence for a period of not more than fifteen (15) minutes or for such time as is reasonable under the circumstances. At the end of such period the person detained shall be released without further restraint, or arrested and charged with an offense.

3. Rule 7.1 (c) appearing on Lines 209-213 of Page 18 is amended to read as follows:

   The clerk of a court or his deputy may, when authorized by the judge of that court, issue an arrest warrant upon the filing of an information or upon affidavit sworn to by the complainant and approved by the prosecuting attorney. Any such information or affidavit shall be indorsed by the prosecuting attorney approving the issuance of the warrant.

4. Rule 11.2 (a) appearing on Lines 47-49 of Page 33 is amended to read as follows:

   search of an individual's person, by the individual in question or, if the person is under fourteen (14) years of age, by both the individual and his parent, guardian or a person *in loco parentis*;

5. Rule 11.3 entitled "Warning Required to Search" appearing on Lines 55-58 of Page 33 is eliminated. Rules 11.4, 11.5 and 11.6 appearing on Lines 59-72 on Page 33 are renumbered as Rules 11.3, 11.4 and 11.5 respectively.

6. Rule 16.2 (e) appearing on Lines 482-485 on Page 45 is eliminated and Comment I (b) on Page 46 is adopted as Rule 16.2 (e). Comment I (c) shall be redesignated as Comment I (b).

7. Rule 17.1 (a) (i) on Lines 6-9 on Page 46 is amended to read as follows:

   the names and addresses of persons whom the prosecuting attorney intends to call as witnesses at any hearing or at trial;

8. Rule 17.1 (a) (ii) appearing on Line 10 at Page 46 and Lines 11 and 12 on Page 47 is amended to read as follows:

   any written or recorded statements and the substance of any oral statements made by the defendant or a codefendant;

9. Rule 17.1 (a) (iii) appearing on Lines 13-15 on Page 47 is amended to read as follows:

those portions of grand jury minutes containing testimony of the defendant;

10. Rule 17.1 (e) appearing on Lines 43-47 of Page 47 is eliminated from the rule but is reclassified as part of the commentary on Rule 17.1.

11. Rule 17.2 (d) appearing on Lines 63-67 on Page 53 is eliminated as a part of the rule but shall be considered as a comment on Rule 17.2.

12. Rule 23.1 (a) appearing on Lines 118-122 on Page 64 is amended to read as follows:

    The court may order consolidation of two (2) or more charges for trial if the offenses, and the defendants if there are more than one (1), could have been joined in a single indictment or information without prejudice to any defendant's rights to move for severance under preceding provisions.

13. Rule 28.1 appearing on Lines 18-22 on Page 75 and Lines 23-36 on Page 76 is eliminated. In lieu thereof the alternate provision appearing on Lines 37-50 of Page 76 is adopted and substituted as Rule 28.1.

14. Rule 36.1 appearing on Lines 1-9 of Page 84 is amended to read as follows:

    Right of Appeal. Any person convicted of a misdemeanor or a felony by virtue of a trial in any circuit court of this state has the right to appeal to the Supreme Court of Arkansas. An appeal may be taken jointly by codefendants or by any defendant jointly charged and convicted with another defendant, and only one (1) appeal need be taken where a defendant has been found guilty of one (1) or more charges at a single trial. There shall be no appeal from a plea of guilty or nolo contendere.

15. Rule 1.6 (e) is added on Page 3 following Line 48 as follows:

    "Defense counsel" shall include the defendant in a case, as well as his attorney, whenever obligations are imposed upon defense counsel.

16. Rule 1.7 (d) appearing on Lines 63 and 64 on Page 3 is amended to read as follows:

    These rules shall become effective on January 1, 1976.

17. Rule 8.3 (c) appearing on Lines 275-277 on Page 20 is amended by adding the following:

    In so doing, the judicial officer shall first determine by an informal, non-adversary hearing whether there is probable

cause for detaining the arrested person pending further proceedings. The standard for determining probable cause at such hearing shall be the same as that which governs arrests with or without a warrant.

18. Rule 4.4 appearing on Lines 33-49 on Page 13 is eliminated. Rules 4.5, appearing on Lines 50-53 on Page 13 and Lines 54-56 on Page 14, 4.6, appearing on Lines 57-61 of Page 14 and Rule 4.7 appearing on Lines 62-73 on Page 14 are renumbered as Rules 4.4, 4.5 and 4.6, respectively.

19. Rule 13.3 (b) and (c) appearing on Lines 218-225 on Page 38 are eliminated. Sections (d) appearing on Lines 226-236 on Page 38 and (e) appearing on Lines 237-244 on Page 38 and (f) appearing on Lines 245-248 of Page 38 and Lines 249-252 on Page 39 and (g) appearing on Lines 253-263 on Page 39 are redesignated as subsections (b), (c), (d) and (e) of Rule 13.3.

20. Certain amendments made by The Arkansas Criminal Code Revision Commission in its petition for promulgation of Rules of Criminal Procedure after the publication of the proposed Rules by The Bobbs-Merrill Company are also adopted and approved. They are:

I

Rule 1.5 appearing on Lines 29 and 30 of Page 2 is amended to read as follows:

> All prosecutions for violations of the criminal laws of this state shall be in the name of the State of Arkansas, provided that this rule shall in no way affect the distribution, as provided by law, of monies collected by municipal courts.

II

Rule 4.1 (a) (ii) appearing on Lines 6-10 of Page 8 is amended to read as follows:

> (ii) a traffic offense involving:
>
> (A) death or physical injury to a person; or
> (B) damage to property; or
> (C) driving a vehicle while under the influence of any intoxicating liquor or drug; . . .

III

The introductory portion of Rule 7.1 (b) appearing on Lines 187-191 of Page 18 is amended to read as follows:

(b) In addition, a judicial officer may issue a warrant for the arrest of a person if, from affidavit, recorded testimony, or other information, it appears there is reasonable cause to believe an offense has been committed and the person committed it. If the offense is a misdemeanor a summons should issue unless:

IV

Rule 7.3 (a) appearing on Lines 232-233 of Page 19 is amended to read as follows:

(a) The law enforcement officer executing a warrant shall make return thereof to the court before which the accused is brought, and notice thereof shall be given to the prosecuting attorney.

V

Rule 9.2 appearing on Pages 22 and 23 is amended by adding the following subsection:

(e) An appearance bond and any security deposit required as a condition of release pursuant to subsection (b) of this rule shall serve to guarantee all subsequent appearances of a defendant on the same charge or on other charges arising out of the same conduct before any court, including appearances relating to appeals and upon remand. If the defendant is required to appear before a court other than the one ordering release, the order of release together with the appearance bond and any security or deposit shall be transmitted to the court before which the defendant is required to appear. This subsection shall not be construed to prevent a judicial officer from:

(i) decreasing the amount of bond, security or deposit required by another judicial officer; or

(ii) upon making written findings that factors exist increasing the risk of willful nonappearance, increasing the amount of bond, security, or deposit required by another judicial officer.

Upon an increase in the amount of bond or security, a surety may surrender a defendant.

VI

Rule 11.2 (b) appearing on Lines 50-52 on Page 33 is hereby amended to read as follows:

(b) search of a vehicle, by the person registered as its owner or in apparent control of its operation or contents at the time consent is given; and

VII

Rule 13.1 (b) and (c), appearing on Lines 154-167 on Page 4 is amended to read as follows:

(b) The application for a search warrant shall describe with particularity the persons or places to be searched and the persons or things to be seized, and shall be supported by one (1) or more affidavits or recorded testimony under oath before a judicial officer, particularly setting forth the facts and circumstances tending to show that such persons or things are in the places, or the things are in possession of the person, to be searched. If an affidavit or testimony is based in whole or in part on hearsay, the affiant or witness shall set forth particular facts bearing on the informant's reliability and shall disclose, as far as practicable, the means by which the information was obtained.

(c) Before acting on the application, the judicial officer may examine on oath the affiants or witnesses, and the applicant and any witnesses he may produce, and may himself call such witnesses as he deems necessary to a decision. He shall make and keep a fair written summary of the proceedings and the testimony taken before him, except that if sworn testimony alone is offered in support of the application, such testimony shall be recorded pursuant to subsection (b) hereof.

VIII

Rule 16.2 (d) appearing on Lines 477-481 on Page 45 is amended to read as follows:

(d) An order granting a motion to suppress prior to trial shall be reviewable on appeal pursuant to Rule 36.10.

IX

Rule 17.1 (a) (vi) appearing on Lines 22-24 on Page 47 is amended to read as follows:

(vi) any record of prior criminal convictions of persons whom the prosecuting attorney intends to call as witnesses at any hearing or at trial, if the prosecuting attorney has such information.

X

Rule 17.5 (a) appearing on Lines 88-91 of Page 54 is amended to read

as follows:

(a) WORK PRODUCT. Except as provided in Rule 17.1 (a) (i) and (iv), disclosure shall not be required of research or of records, correspondence, reports or memoranda to the extent that they contain the opinions, theories or conclusions of the prosecuting attorney or members of his staff or other state agents.

XI

Rule 19.1 appearing on Lines 139-144 of Page 55 is amended to read as follows:

Subject to the provisions of Rules 17.5 and 19.4, neither the prosecuting attorney, the defense counsel, nor members of their staffs shall advise persons other than the defendant having relevant material or information to refrain from discussing the case with opposing counsel or from showing opposing counsel any relevant material.

XII

Rule 19.7 (b) appearing on Lines 187-189 of Page 57 is amended to read as follows:

(b) Willful violation by counsel or a defendant of an applicable discovery rule or an order issued pursuant thereto may subject counsel or a defendant to appropriate sanctions by the court.

XIII

Rule 32.1 appearing on Lines 31-34 of Page 82 is amended to read as follows:

The circuit court shall require members of petit jury panels to complete written questionnaires setting forth the following information:

(i) age;
(ii) marital status;
(iii) extent of education;
(iv) occupation of juror and spouse; and
(v) prior jury service.

Upon request, such questionnaires shall be made available by the clerk of the court to the defendant or his counsel and the prosecuting attorney. Upon a showing of good cause, additional information may be furnished regarding jurors by order of the court.

XIV

Rule 36.10 appearing on Lines 102-106 of Page 90 and Lines 107-116 of Page 91 is amended to read as follows:

(a) Where an interlocutory appeal is desired on behalf of the state following a pretrial order in a felony prosecution, the prosecuting attorney shall file, within ten (10) days after the entering of the order, a notice of appeal together with a certificate that the appeal is not taken for purposes of delay and that the order substantially prejudices the prosecution of the case. Further proceedings in the trial court shall be stayed pending determination of the appeal.

(b) Where an appeal, other than an interlocutory appeal, is desired on behalf of the state following either a misdemeanor or felony prosecution, the prosecuting attorney shall file a notice of appeal within thirty (30) days after entry of a final order by the trial judge.

(c) When a notice of appeal is filed pursuant to either subsection (a) or (b) of this rule, the clerk of the court in which the prosecution sought to be appealed took place shall immediately cause a transcript of the trial record to be made and transmitted to the attorney general, or delivered to the prosecuting attorney, to be by him delivered to the attorney general. If the attorney general, on inspecting the trial record, is satisfied that error has been committed to the prejudice of the state, and that the correct and uniform administration of the criminal law requires review by the Supreme Court, he may take the appeal by filing the transcript of the trial record with the clerk of the Supreme Court within sixty (60) days after the filing of the notice of appeal.

BYRD, J., dissents.

ROY, J., not participating.

CONLEY BYRD, Justice, dissenting. I object to the adoption of the Rules of Criminal Procedure by this Court for the following reasons.

1. Many of the Rules affect matters of public policy about which teachers, farmers, business men, preachers and church deacons are as qualified to act as are members of this Court. One example is Rule 3.5, which provides:

"Whenever a law enforcement officer has

> reasonable cause to believe that any person found at or near the scene of a felony is a witness to the offense, he may stop that person. After having identified himself, the officer must advise the person of the purpose of the stopping and may then demand of him his name, address, and any information he may have regarding the offense. Such detention shall in all cases be reasonable and shall not exceed fifteen (15) minutes *unless the person shall refuse to give such information, in which case the person, if detained further, shall immediately be brought before any judicial officer or prosecuting attorney to be examined with reference to his name, address, or the information he may have regarding the offense.*"

The present law on this subject is set out in Ark. Stat. Ann. § 43-432 (Supp. 1973), as follows:

> "Whenever a law enforcement officer has reasonable cause to believe that any person found at or near the scene of a felony is a material witness to the felony, he may stop that person and after having identified himself he must advise the person of the purpose of the stopping and may then demand of him his name, address, and any information he may have regarding the felony. Said detention shall in all cases be reasonable and in no event shall such detention be in excess of fifteen (15) minutes."

Now, obviously, the present law provides a method for examining witnesses under oath, but that harsh remedy is left to the discretion of the prosecuting attorney, an elected official, Ark. Stat. Ann. § 43-801 (Repl. 1964). Under Rule 3.5, *supra*, the determination of whether a witness has any information regarding a felony and whether such information is necessary for prosecution is left solely to the discretion of a policeman. It looks to me that one does not have to be a lawyer, much less a judge, to know whether such discretion should be vested in just any policeman. In fact, it's a matter about which ordinary people are just as capable as I in making such a decision involving their own personal liberties.

Another example of matters involving public policy is

Rule 28. Our present law on the subject came to us from the Revised Statutes, Ch. 45, § 169, as compiled in 1838, now codified as Ark. Stat. Ann. § 43-1708 (Repl. 1964), which provides:

> "If any person indicted for any offense, and committed to prison, shall not be brought to trial before the end of the second term of the court having jurisdiction of the offense, which shall be held after the finding of such indictment, he shall be discharged so far as relates to the offense for which he was committed, unless the delay shall happen on the application of the prisoner."

Rule 28.1 this day adopted is not nearly as definite as to the time. That Rule provides:

> "(a) Any defendant charged with an offense in circuit court and committed to a jail or prison in this state shall be brought to trial before the end of the second full term of the court, but not to exceed nine (9) months, from the time provided in Rule 28.2, excluding only such periods of necessary delay as are authorized in Rule 28.3."

Rule 28.3 excludes periods of delay resulting from congestion of the trial docket, from continuances granted the prosecuting attorney and from "Other periods of delay for good cause."

As can be seen from the foregoing, the present law on speedy trials contains a definite time limitation that can be calculated by any normal citizen; whereas, Rules 28.1, together with the excluded periods in Rule 28.3, virtually leaves the matter of speedy trials up to the discretion of the trial court — it certainly is not a matter that any ordinary citizen can determine from an inspection of the files in the courthouse. (I don't know what happens to a person held in jail without any charge being made in the circuit court.)

In my opinion, the foregoing Rules (and others too numerous and lengthy to mention) involve matters of public policy, and when this Court uses its "Rule making power" to enact the same in statutory form, it is unlawfully legislating on such matters in contravention of the separation of powers doctrine in Article 4 of the Constitution of Arkansas.

2. In so far as this Court by these Rules attempts to supersede or set aside the laws of this State, its conduct is strictly prohibited by Art. 2, § 12 of the Constitution of Arkansas which provides:

> "No power of suspending or setting aside the law or laws of the State shall ever be exercised except by the General Assembly."

3. The people of this State have historically called upon their legislators individually and lobbied with them publicly to make their wishes known in matters involving public policy. On the other hand the citizens of this State, in general, have frowned upon the personal and political pressuring of the individual members of the judiciary in matters before this Court. Yet, if this Court insists on projecting itself into matters involving public policy, in statutory form, I can see no reason why the individual citizen should not apply the same personal contact and political pressure to the members of this Court that in the past have been applied to members of the legislative department.

Consequently, I suggest that we should stick to the adjudication of controversies in our appellate capacity and leave legislating to the Legislative Branch of our government.

4. Probably my most basic objection to the majority's construction of its rights and duties under Act 470 of 1971 and its "general superintending control" under Art. 7, § 4 of the Arkansas Constitution is the fear that it leaves this Court in a constantly ready position to enact laws in statutory form without notice and without the shackles of the Initiative and Referendum Amendment. Consequently, with that ability, there need no longer be any worry about whether this Court is messing up the law when it gives an ex post facto type interpretation to a procedural rule, because it can set the rules right the next day with a better and clearer rule.

For the reasons stated, I would deny the petition to adopt these Rules and would suggest that they be referred to the General Assembly for its consideration.

In Re: THE ARKANSAS CRIMINAL CODE REVISION COMMISSION, Ex Parte

74-345

In The Matter of Rules of Criminal Procedure

PER CURIAM

The Arkansas Criminal Code Revision Commission in their amendments to the Rules of Criminal Procedure as published by the Bobbs-Merrill Company included in their amended Rule 36.10 a subsection (d). This subsection was inadvertently omitted from our Per Curiam order of December 22, 1975. Rule 36.10 is hereby amended by adding thereto subsection (d) as follows:

> (d) A decision by the Arkansas Supreme Court sustaining in its entirety an order appealed under subsection (a) hereof shall bar further proceedings against the defendant on the charge.

This amendment shall be effective 30 days after this date.

In Re Rules of Criminal Procedure. Per Curiam. The fourth word in Rule 32.1 is changed from "shall" to "may," so that the use of the questionnaires becomes discretionary instead of mandatory. The court's decision to make this change is based upon the recommendation of a majority of the Criminal Code Revision Commission and a majority of the circuit judges.

In Re Model Criminal Jury Instructions. Per curiam. The Honorable Bobby Steel, at his own request, is relieved as a member of the Model Criminal Jury Instructions Committee. The court expresses its appreciation to Judge Steel for his services on the committee.