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ARKANSAS STATE HIGHWAY COMMISSION
*v.* Jess BELT et ux

76-32 537 S.W. 2d 378

Opinion delivered June 14, 1976

*Thomas B. Keys* and *Robert E. Diles,* for appellant.

*Lonnie C. Turner* and *Warner & Smith,* for appellees.

GEORGE ROSE SMITH, Justice. In this condemnation suit the highway department is taking 16.07 acres of Mr. and Mrs. Belt's 78.7-acre tract. The jury fixed just compensation at $10,000. For reversal the condemnor argues that it should have been permitted to show, by cross-examining Mr. Belt, that five years after the taking the Belts sold eight of their remaining acres for $35,000. We agree with the condemnor.

On direct examination Belt testified to "before and

after" values of $40,000 and $25,000, entitling the Belts to $15,000. On cross-examination counsel asked if Belt had not listed part of his remaining land for sale. Upon objection to that question the trial judge directed that the matter be heard in chambers. There, after some discussion, the judge announced that he would allow proof of a sale within a year or two after the taking, but a sale four or five years after the taking would be too remote.

We infer that neither attorney knew the details of the sale, which apparently was not a matter of record. Belt was brought into chambers and testified, upon further cross-examination, that about five years after the taking he had contracted to sell eight of the remaining acres for $35,000. The court adhered to its ruling that the sale was too remote.

The court was mistaken in excluding the transaction solely because it occurred five years after the taking. Many circumstances might be pertinent to the issue of remoteness. The appellees argue, for instance, that all property near the Arkansas River was shown to have been rising in value and that the condemnor failed to prove similarity between the 8-acre tract and the 16.07 acres being condemned. Such considerations, however, were open to further exploration with regard to their bearing upon the issue of remoteness. Inasmuch as the matter of the 8-acre sale arose somewhat abruptly upon cross-examination, the condemnor could not be expected to make a proffer of proof with respect to all related facts. See our discussion in *Washington Nat. Ins. Co.* v. *Meeks,* 249 Ark. 73, 458 S.W. 2d 135 (1970).

There is also the pertinent issue of credibility. Belt had testified that he had sustained a loss of $15,000 as a result of the condemnation. He had valued the remaining 62.63 acres at $25,000 as of the date of the taking. Yet, before the trial, he had sold only 8 of those acres for $35,000. It may be, as counsel argue, that the enhancement in value was attributable to something other than the highway construction project for which the land was being taken. But there is no unfairness in requiring Belt to explain to the jury the apparent inconsistency in his positions as condemnee and as seller. Needless to say, the testing of credibility is one of the basic reasons for allowing counsel wide latitude in cross-

examination. *Arkansas State Highway Commn.* v. *Dean,* 247 Ark. 717, 447 S.W. 2d 334 (1969).

Reversed.

John M. PRIDDY et al *v.*
MAYER AVIATION, INC.

75-347 537 S.W. 2d 370

Opinion delivered June 14, 1976

*Coleman, Gantt, Ramsay & Cox; John Lile;* and *Barber, McCaskill, Amsler & Jones,* for appellants.

*Gibson & Gibson, P.A.; Laser, Sharp, Haley, Young & Boswell,* and *Smith, Williams, Friday, Eldredge & Clark,* by: *William H. Sutton* and *Hermann Ivester,* for appellee.

J. FRED JONES, Justice. John M. Priddy, d/b/a Priddy Insurance Agency, and Utica Mutual Insurance Company, his insurance carrier for errors and omissions, bring this appeal from a declaratory judgment rendered on the petition of the appellee, Mayer Aviation, Inc.

The facts, as gathered from the testimony, appear as follows: The appellee Mayer Aviation, Inc., hereafter referred to as Mayer, was engaged in crop dusting operations by distributing chemicals, including 2-4-D, on growing crops from the air by airplane. Mayer obtained his liability insurance coverage through the appellant insurance agent Priddy. Prior to August, 1970, Priddy had obtained the required coverage for Mayer's operations through brokers in policies issued by North American Insurance Company and Lloyd's of London. Mayer had obtained favorable information concerning liability coverage for his type of operation in policies being written by Pan American Fire and Casualty Company through its underwriters, Aviation Office of America, hereafter referred to as AOA. Mayer requested Priddy to obtain coverage through AOA and he paid Priddy approximately $5,000 as intended insurance premium for the coverage requested.

It appears that in order to distribute the chemical 2-4-D it was necessary to have special license from the Arkansas State Plant Board, and in order to obtain the license it was

necessary to file a copy of liability insurance policy with the Board as a condition precedent to issuing the license. Priddy made application to AOA for the coverage requested by Mayer but the application was refused because of Mayer's past year's loss experience. It appears that when the application was refused by AOA, Priddy intended to place the coverage with one of the original insurers, North American or Lloyd's of London, but failed to do so. In the meantime, however, in order to obtain a renewal of Mayer's license to distribute 2-4-D, it appears that Priddy simply altered a copy of a similar policy he had obtained from Pan American through AOA for a Mr. King and filed the altered copy, showing Mayer as the insured, with the Plant Board and Mayer's license was issued. It appears that Mayer thought he had the coverage he had requested until he was unable to find his policy following rumors of pending claims against him for damages to crops growing out of his operation. When he was unable to find his policy, he obtained a copy from the Plant Board and upon contacting Pan American was advised that no such policy had been issued to him by that company.

It appears that when Mayer advised Priddy of the pending claims and Pan American's denial that it had issued the policy or authorized a binder, Priddy admitted he had not placed the coverage. Priddy advised Mayer of Priddy's own coverage under an errors and omissions policy issued by Utica Mutual and advised Mayer he would have the same protection under that policy as he would have had if the policy coverage he had requested had been obtained.

Two lawsuits, alleging damages to crops in the total amount of approximately $168,000, were filed in circuit court against Mayer, and on February 8, 1974, Mr. Mayer filed in chancery court his petition for declaratory judgment from whence comes this appeal. In his petition Mayer alleged that on or about August 5, 1970, he contracted with Priddy to provide insurance liability coverage for his operation of aircraft in the application of agricultural chemicals. He alleged that Priddy allegedly did provide the coverage by Pan American under policy No. AC6-3-1281, and that he paid a premium to the defendant Priddy for the coverage which was to expire on August 5, 1971; that in July, 1971, claims arose for damages to crops caused by his operation; that he called

on Pan American to take action because of its liability coverage, but that Pan American denied it had issued any policy to him. He alleged that a copy of the alleged policy contract was in the possession of Pan American and he believed at all times he did have liability coverage for damage to crops in the operation of his business. He alleged that the matter had been investigated by the Arkansas insurance commissioner who apparently determined that no valid policy had been issued by Pan American, and that Priddy had acted in error, omission, negligence and/or fraud in connection with the matter. He alleged that subsequent to July, 1971, there had been filed against him lawsuits in circuit court for alleged damages occurring in July, 1971, growing out of his operation during July, 1971, and that lawsuits were then pending against him in the approximate amount of $168,000 for alleged damages occurring during July, 1971. He alleged that he had given notice to the defendant Utica Mutual Insurance Company who had insurance coverage under policy No. 6456-LE for errors, negligence, omissions and/or fraud on the part of the defendant Priddy but that Utica had denied liability. He alleged that he was entitled to legal aid and expenses sustained from either Pan American or Utica Mutual and for the purposes of defending the pending litigation or settlement of same if proper. He alleged that he was presently in the position of not knowing what his best procedure would be to protect his interest due to the actions of the defendants; that he was having to expend money for legal services without the assistance of the defendants, and that he needed their assistance. He alleged that since his legal position as to insurance coverage had not been passed on by a court, his future liability would depend to a large extent on the question of his insurance coverage and the acts of the defendants in connection therewith, and that without such adjudication he would suffer irreparable damage to his business because of the serious consequences of the liability involved. He alleged that either Pan American or Utica Mutual should provide the coverage and assistance for which he contracted and paid to the defendant Priddy. He prayed for a declaratory judgment against all the defendants jointly and severally or for declaratory judgment as to which one of the defendants is responsible for the present and future damage that he had suffered and will suffer.

Priddy filed a response and cross complaint denying the material allegations in the petition for declaratory judgment and alleged that if the policy was not issued as alleged in the petition, it was due to simple negligence on his part and that Utica Mutual Insurance Company should take over his defense and pay any judgment rendered, up to the applicable limits of its obligation to him under its policy. He prayed that the petition be denied and in the alternative that it be denied in so far as it seeks relief from him; and, in the alternative, that if any acts of his caused the petitioner to not have coverage, that Utica Mutual, his errors and omissions carrier, should provide his defense and pay any judgment rendered against him.

Utica Mutual and Pan American demurred to the petition on the grounds that the chancery court was without jurisdiction of the subject matter.

On March 14, 1974, Priddy filed a separate answer in which he denied the allegations in the petition for declaratory judgment and specifically denied that he acted in error, omission, neglect and/or fraud as alleged in the petition.

On March 15, 1974, Utica filed a demurrer to the petition on the grounds that the petition did not state a cause of action against it and that it was not subject to a direct action by Mayer even if it had coverage for the errors and omissions of Priddy as alleged in the petition. On May 24, 1974, Pan American filed a separate demurrer to the petition on the ground of defect in parties defendant, and on June 19, 1974, Mayer filed a motion to strike the allegation of fraud by Priddy from his petition and the motion was granted. On September 3, 1974, Priddy filed a third party complaint making the various plaintiffs in the circuit court action parties defendant and prayed that they be bound by the final ruling of the chancellor on the petition for declaratory judgment.

On September 23, 1974, the chancellor entered an order denying the demurrers and motions to dismiss and finding that all interested parties had been joined. He gave 20 days in which to answer or plead.

On October 1, 1974, Priddy amended his answer and

cross complaint by praying attorney's fees against Utica and on October 2 Utica filed a response denying the allegations in the petition; denying that the acts of Priddy constituted acts of error, omissions, etc. In the alternative it alleged that it would not be liable for Priddy's defense in the litigation, and as a second alternative it alleged it would in no event be liable for any amount in excess of the amount of insurance Priddy was supposed to have contracted for. On November 12, 1974, the chancellor entered an order, at the request of Priddy, dismissing his cross complaint as to statutory penalty and attorney's fees against Utica without prejudice.

In answer to interrogatories propounded by Pan American, Priddy answered that he does not contend Pan American issued the policy in question or authorized him to do so. He answered that he deposited the premium he collected in his agency account. He answered that he advised Mayer that his application had been submitted and subsequently when informed of a possible loss, he advised Mayer that his coverage was in effect as he, Priddy, thought he had obtained the replacement of coverage through Mayer's previous insurers. He answered that he mailed Mayer's application to AOA in Beaumont, Texas, whom he understood to be the underwriter for Pan American; that he did not mail a premium check and was advised by AOA that it could not accept the risk because of losses sustained by previous carriers. On February 11, 1975, the chancellor ordered and directed Utica to submit for inspection any errors and omissions policies issued to or in favor of Priddy.

At the hearing on the merits Priddy testified as above indicated and set out, and following final hearing Pan American demurred to the evidence and the demurrer was overruled. Utica demurred to the evidence on the grounds of lack of allegation of privity and no substantial evidence. Priddy demurred to the evidence for insufficiency and because the petition did not allege acts of negligence. The demurrers were overruled, and on April 24, 1975, the chancellor entered declaratory judgment as follows:

Upon the pleadings and proof the court finds:

1. All demurrers not heretofore specifically overruled

are now overruled and this court finds the complaint states a cause of action in equity and this court has jurisdiction to issue a declaratory judgment. *Jackson* v. *Smith,* 366 S.W. 2d 278 (1963).

2. That the defendant, John M. Priddy, was negligent in failing and omitting to obtain aircraft liability insurance coverage for Mayer Aviation, Inc. from August 5, 1970 to August 5, 1971; and,

3. At the time of the said negligence of John M. Priddy he was insured under the terms of a contract of insurance covering his errors and omissions as an insurance agent issued by the defendant, Utica Mutual Insurance Company; and,

4. That the liability coverage to have been obtained by Priddy for Mayer was $25,000.00 per occurrence and $100,000.00 aggregate; and,

5. There are presently pending two cases in the Circuit Court of Lincoln County, Arkansas, against Mayer Aviation, Inc. Nos. 2047 and 2048, arising out of alleged tortious aerial application of herbicides during the period from August 5, 1970, to August 5, 1971.

IT IS THEREFORE by the court adjudged and declared as follows:

(1) The defendant, John Priddy, shall defend the two lawsuits, Cases 2047 and 2048, referred to in the findings hereinabove, for and on behalf of the plaintiff, Mayer Aviation, Inc., arising from the two aforementioned cases, up to $25,000.00 per occurrence and up to $100,000.00 in the aggregate; and,

(2) It is the judgment of this court that a contract of insurance issued by the defendant, Utica Mutual Insurance Company, insuring the errors and omissions of the defendant, John M. Priddy, was in force during the period of August 5, 1970, to August 5, 1971.

(3) The complaint of the plaintiff against Pan

> American Fire and Casualty Insurance Company should be, and is hereby, dismissed for want of equity.

The appellant Priddy first contends that the chancellor erred in overruling his demurrer to the evidence. He argues in support of this contention that the petition for declaratory judgment failed to allege acts of negligence on the part of Priddy and failed to allege that Priddy's acts were the proximate cause of any damage sustained by Mayer. We do not agree with the appellant's contention. Mayer alleged that he entered into a contract with Priddy to provide insurance liability coverage and paid Priddy an insurance premium for such coverage; that Priddy allegedly obtained the coverage from Pan American but this was denied by Pan American. He alleged that following an investigation by the insurance commissioner, Pan American's denial was confirmed and that Priddy had acted in error, omission and neglect. He alleged that he was having to spend money for legal services and will be further damaged unless the rights and relationship of the parties are determined. We conclude that the petition stated a cause of action against Priddy for breach of contract with sufficient clarity for a declaratory judgment.

Priddy also argues that since the appellee Mayer failed to allege and prove a *written* contract with Priddy, the chancellor should have dismissed the action. He argues that the declaratory judgment act only authorizes construction of written contracts. Ark. Stat. Ann. § 34-2502 (Repl. 1962) provides as follows:

> Any person interested under a deed, will, written contract or other writings constituting a contract, or whose rights, status or other legal relations are affected by a statute, municipal ordinance, contract or franchise, may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract, or franchise and obtain a declaration of rights, status or other legal relations thereunder.

The *construction* or *validity* of a contract to procure insurance coverage is not really involved on this appeal. Section 34-2504 provides as follows:

> The enumeration in Sections 2, 3 [§§ 34-2502, 34-2503] and 4 does not limit or restrict the exercise of the general powers conferred in Section 1 [§ 34-2501], in any proceeding where declaratory relief is sought, in which a judgment or decree will terminate the controversy or remove an uncertainty.

Furthermore, § 34-2501 provides: "Courts of record within their respective jurisdictions shall have power to declare rights, status, and other legal relations whether or not further relief is or could be claimed." And, § 34-2511 provides as follows:

> This Act [§§ 34-2501 — 34-2512] is declared to be remedial; its purpose is to settle and to afford relief from uncertainty and insecurity with respect to rights, status and other legal relations; and is to be liberally construed and administered.

Appellant Priddy further contends that the chancery court was without jurisdiction to entertain an action for declaratory judgment adjudging him guilty of a tort. Chancery courts clearly have jurisdiction to render declaratory judgments where the subject matter of the declaration is within equity jurisdiction. *Jackson* v. *Smith, Chancellor,* 236 Ark. 419, 366 S.W. 2d 278 (1963). Appellant Priddy did not demur to the petition for declaratory judgment, nor did he move to have the cause transferred to law for lack of jurisdiction. In *Stolz* v. *Franklin,* 258 Ark. 999, 531 S.W. 2d 1 (1975), this court said:

> In the absence of such a motion, [to transfer] the chancery court may, in its discretion, transfer the case on its own motion or proceed to trial on the merits. *Sledge-Norfleet Co.* v. *Matkins,* 154 Ark. 509, 243 S.W. 289; *Catchings* v. *Harcrow, supra.* Where a defendant has answered and not reserved any objection to the jurisdiction of the court on the ground that there is an adequate remedy at law, he cannot insist on it at the hearing unless the court is wholly incompetent to grant the relief sought. *Reid* v. *Karoley, supra; Whitten Developments, Inc.* v. *Agee, supra.*

Priddy alleged in his response and cross complaint that if the policy was not issued by Pan American as alleged in the petition for declaratory judgment, it was because of simple negligence on his part. In the declaratory judgment with respect to Priddy the chancellor found: "That the defendant, John M. Priddy, was negligent in failing and omitting to obtain aircraft liability insurance coverage for Mayer Aviation, Inc. . . . " And, in effect, found that Priddy was obligated to provide a defense to the lawsuits filed against Mayer, and to assume such obligations of providing such insurance coverage he agreed to obtain for Mayer and failed to obtain. It was more or less admitted in oral argument that this was the intent and effect of the chancellor's holding and judgment, and that Priddy was not directed to *personally* assume the defense and pay such judgments as might be rendered against Mayer in the circuit court cases pending against him. Priddy unequivocally admitted he was negligent, but we conclude that the complaint and judgment against him sounded in contract and not in tort and the chancery court was not wholly without jurisdiction to render the judgment that was rendered.

It is quite true that even in contracts a court of equity is not competent to afford redress by way of compensation or damages for a mere breach of contract, where the remedy at law is plain, adequate, and complete, and where no peculiar equity intervenes. *Cockrell* v. *Warner,* 14 Ark. 345 (1854); *Carroll* v. *Wilson,* 22 Ark. 32 (1860); *Cosby* v. *Hurst,* 149 Ark. 11, 231 S.W. 194 (1921). But failure to plead lack of jurisdiction in equity because of an adequate remedy at law waives this objection to jurisdiction on appeal. *Reid* v. *Karoley,* 232 Ark. 261, 337 S.W. 2d 648 (1960); *Stolz* v. *Franklin, supra.* Since the chancery court had jurisdiction the appellant Priddy's argument concerning his right to a jury trial is without merit. Ark. Const. Art. 2, § 7; *State* v. *Churchill,* 48 Ark. 426, 3 S.W. 352.

The appellant Priddy contends that the chancellor erred in admitting evidence prejudicial to Priddy. This assignment relates to evidence of Utica's insurance coverage on Priddy for his errors and omissions. We find no error in this connection. Testimony was to the effect that when Mayer learned that Priddy had not procured coverage as agreed, and con-

fronted Priddy with that fact, Priddy assured Mayer that he would have the same coverage under Priddy's policy from Utica. Utica Mutual was brought into the declaratory judgment action by Mayer as a necessary party. See Ark. Stat. Ann. § 34-2510 (Repl. 1962). Furthermore, Priddy cross complained against Utica and sought relief against Utica under his errors and omissions policy.

Appellant Priddy also contends that in any event, he should be liable to Mayer for no more than the unauthorized premiums he had collected. This contention is prematurely presented and is, therefore, without merit. The chancellor did not render a money judgment for damages against Priddy. The chancellor did not rule on the extent of Priddy's liability to Mayer in damages, if any, but only ruled on Priddy's obligation to Mayer as a result of Priddy's breach of their agreement.

The appellant Utica contends that the chancellor did not have jurisdiction pertaining to the subject matter of the claim against it. This contention is likewise without merit. Utica filed a demurrer for want of jurisdiction, but did not request a transfer to circuit court because there was an adequate remedy at law. We have held a number of times that the proper method of procedure in this type situation is by a motion to transfer and not by demurrer. *The Church of God in Christ* v. *The Bank of Malvern,* 212 Ark. 971, 208 S.W. 2d 770; *Higginbotham* v. *Harper,* 206 Ark. 210, 174 S.W. 2d 668; *Reid* v. *Karoley, supra.* Utica argues that it should not have been subject to this declaratory judgment because its contract with Priddy was not a justiciable issue. In *Andres* v. *First Ark. Dev. Fin. Corp.,* 230 Ark. 594, 324 S.W. 2d 97 (1959), we said:

> Our declaratory judgment act (§ 34-2501 *et seq,* Ark. Stats.) was not intended to allow any question to be presented by any person; the matters must be justiciable. In Anderson on "Declaratory Judgments" 2nd Ed. § 187, the general rule is stated as to declaratory judgments:
>
> Since purpose of the declaratory relief is to liquidate uncertainties and interpretations which might result in future litigation it may be maintained when these pur-

> poses may be subserved. The requisite precedent facts or conditions, which the courts generally hold must exist in order that declaratory relief may be obtained, may be summarized as follows: (1) There must exist a justiciable controversy; that is to say, a controversy in which a claim of right is asserted against one who has an interest in contesting it; (2) the controversy must be between persons whose interests are adverse; (3) the party seeking declaratory relief must have a legal interest in the controversy; in other words, a legally protectable interest; and (4) the issue involved in the controversy must be ripe for judicial determination.

It would appear from the evidence in the case at bar that Mayer did have a legally protectable interest under the errors and omissions policy Utica issued to Priddy. There is no contention that a justiciable issue was absent in Priddy's cross-complaint against Utica. This court has held that in a declaratory judgment action between an insured and insurer disputing the coverage of a liability policy, an injured party possibly covered by the policy is a proper party. *So. Farm Bur. Cas. Ins. Co.* v. *Robinson,* 236 Ark. 268, 365 S.W. 2d 454 (1963). The case at bar resembles *Robinson* except that in the case at bar the declaratory judgment action was brought by the injured party. The record indicates that Utica disputes the extent of its liability under the errors and omissions policy. That issue was not determined by the chancellor and is still available to Utica. The chancellor made no attempt to settle the issue as to the extent of Utica's liability under its policy to Priddy. He only found that Priddy had such policy issued by Utica and adjudged that the policy was in effect during the period of August 5, 1970, to August 5, 1971.

The decree is affirmed.

FOGLEMAN, J., concurs.

JOHN A. FOGLEMAN, Justice, concurring. I concur in the majority opinion, but I feel that I should state the reasons for my agreement on the jurisdictional question. I deplore the tendency to seek declaratory judgments in chancery court when the anticipated action would otherwise be a matter for jury trial. For this reason, such actions for a declaration of

rights should always be carefully scrutinized for the basis of equity jurisdiction. We have held, and properly so, that the mere filing of an action for declaratory judgment does not give the chancery court any jurisdiction it would not otherwise have and that courts of equity could render declaratory judgments only where the subject matter of the declaration is within equity jurisdiction. *Jackson* v. *Smith,* 236 Ark. 419, 366 S.W. 2d 278. See also, *Robinson* v. *Morgan,* 228 Ark. 1091, 312 S.W. 2d 329. When the subject matter is such that a chancery court is totally devoid of power to interfere, it is not necessary that the question of jurisdiction be raised in any particular manner or at any particular time. *Roper* v. *Rodgers,* 249 Ark. 416, 459 S.W. 2d 419; *Robinson* v. *Morgan,* supra.

I do not take this to be a case in which the chancery court is totally devoid of power. As I read the petition of Mayer Aviation, Inc. and the cross-complaint of Priddy, they partake of the nature of an action for specific performance, and did not sound in tort. It seems that the weight of authority supports the view that a prospective insured may elect to sue for negligent failure to obtain or deliver an insurance policy either ex delicto or ex contractu. *Ursini* v. *Goldman,* 118 Conn. 554, 173 A. 789 (1934); *Wiles* v. *Mullinax, Jr.,* 267 N.C. 392, 148 S.E. 2d 229 (1966); *Hall* v. *Charlton,* 447 S.W. 2d 5 (Mo. Ct. App. 1969); *Pittman* v. *Great American Life Ins. Co.,* 512 S.W. 2d 857 (Mo. Ct. App. 1974); *Winans-Carter Corp.* v. *Jay & Benisch,* 107 N.J. Super. 268, 258 A. 2d 131 (1969); *Waldon* v. *The Commercial Bank,* 50 Ala. App. 567, 281 S. 2d 279 (1973); *MacDonald* v. *Carpenter & Pelton, Inc.,* 31 A.D. 2d 952, 298 N.Y.S. 2d 780 (1969).

There was an election here to proceed upon the contract theory. The inquiry then turns to the jurisdiction of equity, which ordinarily cannot be invoked in an action for breach of contract. But it is within the power of a court of equity to award damages for breach of contract when the relief sought is specific performance. *Loveless* v. *Diehl,* 236 Ark. 129, 235 Ark. 805, 364 S.W. 2d 317; *Ashworth* v. *Hankins,* 241 Ark. 629, 408 S.W. 2d 871. Equity does have power to order specific performance of a contract to insure or to deliver a policy of insurance, even though a loss has occurred, if the remedy at law is inadequate. *Henry Clay Fire Ins. Co.* v. *Grayson County State*

*Bank,* 239 Ky. 239, 39 S.W. 2d 482 (1930); *Collins* v. *Aetna Ins. Co.,* 103 Fla. 848, 138 S. 369 (1931); *Gerrish* v. *German Ins. Co.,* 55 N.H. 355 (1875); *Bohnsack* v. *Detroit Trust Co.,* 292 Mich. 167, 290 N.W. 367 (1940), 71 Am. Jur. 2d 137, Specific Performance § 106. Where the chancery court has power to act on the subject matter, but jurisdiction depends upon the inadequacy of the remedy at law, the jurisdiction may be questioned only by a motion to transfer and a failure to move for such a transfer is a waiver of the jurisdictional question. *Stolz* v. *Franklin,* 258 Ark. 999, 531 S.W. 2d 1 (1975); *Titan Oil & Gas, Inc.* v. *Shipley,* 257 Ark. 278, 517 S.W. 2d 210. A demurrer will not be adequate to raise the question. *Reid* v. *Karoley,* 232 Ark. 261, 337 S.W. 2d 648.

Juan CENTENO *v.* STATE of Arkansas

CR 75-170 537 S.W. 2d 368

Opinion delivered June 14, 1976

*Rodney T. Chambers,* for appellant.

*Jim Guy Tucker,* Atty. Gen., by: *Terry R. Kirkpatrick* and *Robert A. Newcomb,* Asst. Attys. Gen., for appellee.

J. FRED JONES, Justice. The appellant Juan Centeno was charged on several counts of burglary and grand larceny and was placed in the county jail pending trial. At his trial for burglary and larceny of guns from the Sam Crumpler home, the jury was unable to agree on the burglary charge but found him guilty of grand larceny. The jury was unable to reach a decision as to punishment and the trial judge sentenced the appellant to twelve years in the Arkansas Department of Correction.

On appeal to this court Centeno has designated the following points on which he relies for reversal:

> The court erred in allowing appellee to introduce evidence of appellant's flight from confinement.
>
> The court erred in allowing the appellee to ask questions of irrelevant matters prejudicing the jury.

We find no merit to either assignment.

At the trial of the case the sheriff was permitted to testify that after the appellant had been arrested and placed in jail he escaped from the jail and was again apprehended. The appellant contends that this testimony was inadmissible and

prejudicial to him in the trial of the charge on which he was being tried. He argues that since he was incarcerated in jail under charges of having committed several separate felonies, testimony pertaining to his escape from jail would be inadmissible as evidence of guilt on the particular charge for which he was being tried as distinguished from the other charges pending against him.

The appellant is apparently asking us to adopt an exclusionary rule discussed in Underhill's Criminal Evidence § 373, 5th ed., 1956, and 22A C.J.S. § 631 (1961), to the effect that evidence of an attempted escape by a prisoner in jail awaiting trial for two distinct crimes is not relevant to show that he is guilty of either. Although this exclusionary rule was followed by other state courts in two early cases, *People* v. *McKeon,* 64 Hun. 504, 19 N.Y.S. 486 (1892), and *State* v. *Crawford,* 59 Utah 39, 201 P. 1030 (1921), it has been rejected by several jurisdictions in more recent cases. *State* v. *Hudson,* 491 S.W. 2d 1 (Mo. App. 1973); *Archie* v. *State,* 488 P. 2d 622 (Okla. Crim. 1971); *People* v. *Neiman,* 90 Ill. App. 2d 337, 232 N.E. 2d 805 (1967); *Fulford* v. *State,* 221 Ga. 257, 144 S.W. 2d 370 (1965); *Chapple* v. *State,* 528 S.W. 2d 62 (Tenn. 1975). The rationale applied in these more recent cases is that the question of whether an escape shows consciousness of guilt of the offense on trial, when the defendant is also charged with other offenses, is a question of fact for the jury, going to the *weight* of the evidence, rather than a question of law for the court, going to the *admissibility* of the evidence. In Arkansas, evidence of an accused's flight is a circumstance to be considered along with other evidence in determining the accused's guilt. *Murphy* v. *State,* 255 Ark. 90, 498 S.W. 2d 884 (1973); *Rowe* v. *State,* 224 Ark. 671, 275 S.W. 2d 887 (1955). Thus, in Arkansas, the words of the Illinois Court in *People* v. *Neiman, supra,* for rejecting the exclusionary rule, are applicable.

> It would seem inappropriate to hold evidence of attempted escape inadmissible against an accused who was awaiting trial on various charges, and to admit such evidence against the accused who was charged with only one offense. Such procedure would reward the professional criminal and punish the neophyte.

Also, in *Fulford* v. *State, supra,* the Supreme Court of Georgia said:

> It would place upon the State an impossible burden to prove that one charged with multiple violations of law fled solely because of his consciousness that he committed one particular crime. It is better logic to infer that the defendant, who is charged with several offenses, fled because of a conscious knowledge that he is guilty of them all.

In *Chapple* v. *State, supra,* the Court of Criminal Appeals of Tennessee said: "[W]e think the attempted escape when in confinement on both of the charges would be relevant on the trial of either."

The appellant's second point is directed at various names and Social Security numbers discovered by the investigating officers in connection with their investigation. Other witnesses had testified that the appellant had used an alias in pawning guns allegedly taken from the Crumpler residence. In *Glover* v. *State,* 194 Ark. 66, 105 S.W. 2d 82 (1937), this court said:

> It is an accepted rule that a relevant fact will not be rejected because not sufficient in itself to establish the whole or any definite portion of a party's connection, "but all that is required is that the fact must legitimately tend to prove some matter in issue, or to make a proposition in issue more or less probable. Indeed, it is sufficient if the fact may be expected to become relevant in connection with other facts, or if it forms a link in the chain of evidence necessary to support a party's contention, although requiring other evidence to supplement it." 22 C.J. § 91, page 164.

The appellant also argues that the trial judge made prejudicial comments in connection with the Social Security numbers. The trial judge inquired whether the appellant actually used one of the spurious Social Security numbers in connection with the transaction involved and the answer was that he did not. Furthermore, the appellant failed to object to the judge's comments as comments on the evidence and,

therefore, waived his right to argue this issue on appeal. *Powell* v. *State,* 231 Ark. 737, 332 S.W. 2d 483 (1960). The appellant also argues that the court erroneously permitted cross-examination of the appellant concerning his guilt in other criminal activities. We find no merit in this contention. *Butler* v. *State,* 255 Ark. 1028, 504 S.W. 2d 747 (1974).

The judgment is affirmed.

David A. OWEN and Juanita OWEN
*v.* Dr. F. M. WILSON et al

76-4 537 S.W. 2d 543

Opinion delivered June 21, 1976

*McMath, Leatherman & Woods,* for appellants.

*Frierson, Walker, Snellgrove & Laser; Barrett, Wheatley, Smith & Deacon,* and *Cathey, Goodwin & Hamilton,* for appellees.

JOHN A. FOGLEMAN, Justice. David A. Owen underwent abdonimal surgery by Dr. F. M. Wilson, assisted by Dr. Henry S. Keisker, on February 6, 1969, in the operating room at St. Bernard's Hospital in Jonesboro. On June 10, 1975, Owen and his wife filed the complaint in this action against Drs. Wilson and Keisker and employees of the hospital, alleging that the physicians negligently closed the incision made for the operation without removing a surgical instrument they had introduced into his body and that the hospital employees had negligently failed to count the surgical instruments used. The physician defendants and Aetna Casualty & Surety Co., the carrier for the hospital, denied negligence and pleaded the statute of limitations. Ark. Stat. Ann. § 37-205 (Repl. 1962). Each of them filed a motion for summary judgment with supporting affidavit. The motions were based upon the statute. The trial court granted these motions and we affirm.

The facts considered were those stated in affidavits by the physicians, the administrator of the hospital and by appellants. Viewed in the light most favorable to appellants, these affidavits showed that:

> Dr. F. M. Wilson performed a right hemicolectomy on David A. Owen on February 6, 1969. He was assisted by Dr. Henry W. Keisker. There was no instrument count at the end of the operation before the incision was clos-

> ed. Appellant had an infection in the area of the surgery and remained in the hospital for 23 days. The infection continued for some four months thereafter. Appellant was seen by Dr. Wilson on nine visits by the patient, the last on January 20, 1970, for routine postoperative care. On the last occasion appellant complained of rectal bleeding. Appellant, not having regained his strength two years after the operation, sought and obtained treatment by a chiropractor between June, 1971, and January 18, 1975. Appellant had diarrhea most of the time for six years following the surgery and on two occasions — April 11, 1973 and October 2, 1973 — had emergency treatment prescribed by Dr. G. D. Poole and Dr. Bascom P. Raney, respectively, at St. Bernard's Hospital. Finally appellant went to Dr. Wilson on January 28, 1975, thinking that his condition must have been related to the surgery. When he told Dr. Wilson of his suffering from diarrhea, this physician ordered X-rays, which disclosed a hemostat or surgical clamp in appellant's abdomen. Appellant was told by the doctor that the clamp had been left inside him by mistake at the time of the 1969 surgery. On February 19, 1975, Dr. Buckman of Little Rock removed a six-inch surgical scissors from appellant's abdomen. No X-rays or other procedures which would have disclosed the presence of the surgical instrument had been ordered or taken prior to those taken in January 1975.

Both physicians and the hospital administrator denied that the presence of the surgical instrument was concealed from the patient. Dr. Wilson and Dr. Keisker each stated that he had no knowledge or reason to believe or suspect the presence of the surgical instrument prior to the X-rays Dr. Wilson ordered taken. The hospital administrator stated that no employee of the hospital concealed the presence of the instrument from appellant or anyone else.

The applicable statute, Ark. Stat. Ann. § 37-205 (Repl. 1962), reads:

> Hereafter, all actions of contract or tort for malpractice, error, mistake, or failure to treat or cure, against physicians, surgeons, dentists, hospitals, and sanitaria, shall be commenced within two [2] years after

> the cause of action accrues. The date of the accrual of the cause of action shall be date of the wrongful act complained of, and no other time.

Appellants rely entirely upon the "continuing tort" theory to prevent the bar of the statute. Under this theory, it is urged that the "wrongful act" commences when the surgeon closes an incision without removing a foreign object he has inserted and continues as long as the object remains undetected. Appellants' theory is that there was a continuing invasion of the patient's body by the physician which constituted a continuing tort. Appellants proceed upon the assumption that this court has not heretofore decided whether the "continuing tort" theory operates to toll the statute of limitations and read *Williams* v. *Edmondson,* 257 Ark. 837, 520 S.W. 2d 260 as not deciding that question. Appellants properly admit that the theory was advanced in that case. We did reject that theory in *Williams,* however, when we said that the continuing tort theory best addressed itself to the General Assembly, which has the responsibility for establishing public policy on that issue. Our views on the subject remain unchanged. They were not confined to the particular fact situation there presented. The negligence both here and there took place at the time the physician acted or failed to act. In *Williams,* it was at the time of reading the X-rays. Here it was at the time of closing the incision without removing the foreign object.

Appellants also argue that even if the statute would operate as a bar to their cause of action, it is unconstitutional and void because it deprives them of property without due process of law in violation of the Fourteenth Amendment to the United States Constitution. They rely in part upon *Emberson* v. *Buffington,* 228 Ark. 120, 306 S.W. 2d 326, where we found Ark. Stat. Ann. § 75-915 (Repl. 1957) in violation of § 13, Art. II of the Arkansas Constitution. That statute was considerably different. It completely deprived a certain class, i.e., persons related to the driver of a motor vehicle, of any remedy for damages caused to them by the negligence of the driver while they were passengers in a vehicle driven by him. That is not the case here. Any statute of limitations will eventually operate to bar a remedy and the time within which a claim should be asserted is a matter of public policy, the determination of which lies almost exclusively in the

legislative domain, and the decision of the General Assembly in that regard will not be interfered with by the courts in the absence of palpable error in the exercise of the legislative judgment. *Tipton* v. *Smythe,* 78 Ark. 392, 94 S.W. 678, 7 LRA (n.s.) 714, 115 Am. St. Rep. 44, 8 Ann. Cas. 521. The statutory time within which an action must be brought cannot be judicially pronounced unreasonable unless it is so short as under the circumstances to amount to a practical denial of the right itself. *Steele* v. *Gann,* 197 Ark. 480, 123 S.W. 2d 520, 120 ALR 754. We are in no position to say that the legislative determination that two years (rather than the three years provided by the statute in *Steele*) is such an unreasonably short period of time for those situated like appellants to discover and assert their cause of action, absent fradulent concealment, to deprive them of due process of law or to deprive them of any remedy. It is not contended here that there was any concealment by appellees. There is really little difference in the effect of the "continuing tort" theory and the theory that the statute does not begin to run until discovery of the wrong, which we rejected in *Steele* v. *Gann,* supra.

It is true that we did not actually decide the constitutional questions posed here in *Williams.* We did, however, clearly imply that the act was constitutional by reference to our holding in *Carter* v. *Hartenstein,* 248 Ark. 1172, 455 S.W. 2d 918. There we upheld a statute limiting actions for deficiencies in design, planning and supervision of construction of improvements to real estate to four years. It seems that the problems of discovery of hidden defects in structures would be at least as great as in human beings. Humans are conscious of pain, illness, and other symptoms of disorder, but hidden defects in buildings may not be evidenced for many years, and then perhaps only because injuries and damages have been inflicted by reason of them. Still, we found no constitutional infirmity in the statute there involved. The vital question is one of reasonableness, and the courts may not strike down a statute of limitations unless the period before the bar becomes effective is so short that it amounts to a virtual denial of the right itself or it can be said that the legislature has committed palpable error. *Tipton* v. *Smythe,* supra; *Carter* v. *Hartenstein,* supra; *Steele* v. *Gann,* supra; *Mills* v. *Scott,* 99 U.S. 25, 25 L. Ed. 294 (1879). See also, *Canadian Northern Railway Co.* v. *Eggen,* 252 U.S. 553, 40 S. Ct. 402, 64 L. Ed. 713 (1920); *Wichelman* v. *Messner,* 250 Minn. 88, 83

N.W. 2d 800, 71 ALR 2d 816 (1957). In making this evaluation the basic policy reasons for statutes of limitations come into play. They were well expressed in *Chase Securities Corp.* v. *Donaldson,* 325 U.S. 304, 65 S. Ct. 1137, 89 L. Ed. 1628 (1945) in these words:

> Statutes of limitation find their justification in necessity and convenience rather than in logic. They represent expedients, rather than principles. They are practical and pragmatic devices to spare the courts from litigation of stale claims, and the citizen from being put to his defense after memories have faded, witnesses have died or disappeared, and evidence has been lost. [Citation omitted.] They are by definition arbitrary, and their operation does not discriminate between the just and the unjust claim, or the avoidable and unavoidable delay. They have come into the law not through the judicial process but through legislation. They represent a public policy about the privilege to litigate. *****

Appellants' arguments as to constitutionality have been rejected by the Supreme Court of Missouri in considering a statute very similar to the one before us. *Laughlin* v. *Forgrave,* 432 S.W. 2d 308 (Mo. 1968). We also must reject appellants' arguments which might more appropriately be addressed to the General Assembly as policy matters.

The judgment is affirmed.

Ronald MASON, Incompetent By and Through
The Arkansas Bank and Trust Company,
Guardian of His Estate *v.*
Jim M. SORRELL

76-60 551 S.W. 2d 184

Opinion delivered June 21, 1976

*Evans, Farrar, Patterson & Farrar,* for appellants.

*Laser, Sharp, Haley, Young & Boswell, P.A.,* for appellee.

CONLEY BYRD, Justice. Because appellant Ronald Mason, incompetent, had a guardian of his estate appointed prior to the date of his injuries, allegedly caused by appellee Jim M. Sorrell on January 10, 1972, the trial court by summary judgment held that his action for personal injuries filed by his guardian, The Arkansas Bank & Trust Company, on April 7, 1975, was barred by the three-year statute of limitations, Ark. Stat. Ann. § 37-206 (Repl. 1962). To sustain the action of the court, appellee contends that appellant is not entitled to the savings clause in Ark. Stat. Ann. § 37-226 (Repl. 1962), which provides:

> "If any person entitled to bring any action, under any law of this state, be, at the time of the accrual of the cause of action, under twenty-one [21] years of age, or insane or imprisoned beyond the limits of the state, such person shall be at liberty to bring such action within three [3] years next after full age, or such disability may be removed."

To avoid the effect of the savings clause, appellee relies upon such cases as *Johnson* v. *Pilot Life Insurance Co.,* 217 N.C. 139, 7 S.E. 2d 475 (1940) and *Dignan* v. *Nelson,* 26 Utah 186, 72 P. 936 (1903) and contends as follows:

> "Appellee respectfully submits that a review of the case law applicable to the running of the statute of limitations in cases involving incompetents will readily reveal that the Trial Court's decision was eminently correct. It seems clear that the cases hold that where a cause of action accrues prior to appointment of a guardian the mere fact that a guardian is subsequently appointed will not toll the running of the statute. On the other hand, the cases just as uniformly hold that where there is a guardian already appointed at the time the cause of action accrues and where the guardian has the authority to prosecute the action, the statute begins to run both as to the guardian and the incompetent at the time the cause of action so accrues."

The general rule with respect to savings clauses in favor of infants and incompetents is set forth in 54 C.J.S. *Limitations of Actions* § 235 (1948), as follows:

> "As a general rule under the various statutes limitations do not run against infants during their minority. The exemptions ordinarily granted to infants, however, do not rest on any fundamental doctrine of the law, but on the legislative will expressed in the statutes; infants may be put on the same footing as adults in this respect, and unless excepted they so stand. In many jurisdictions, by express statutory enactment, or by judicial construction, where the statute excepts persons laboring under disabilities from its operation, even if not mentioning infants specifically, infants are within the saving clause of the statute, if it is purely a statute of limitation, affecting the remedy and not the right, and the statute does not run against them during such disability, even where such infant has a guardian or trustee who might maintain the action in the infant's name, provided the title or right of action is in the infant. Where the title or right of action vests in a personal representative, guardian, or trustee, who is under no legal disability, it has been held that the statute of

limitations begins to run notwithstanding the minority of the beneficiary, and, as discussed supra § 19, where the former is barred by the statute the latter is likewise barred, although there are also authorities holding that a minor may sue within the statutory period after attaining his majority, even where the representative or turstee is barred by the statute. Likewise, where a minor is seeking to toll the statute of limitations, his interest must be such as will enable him to maintain an action in his own name, and, where a suit is a purely derivative one, infancy of plaintiff does not except him from the bar of the statute of limitations."

The majority rule as above stated is recognized in *Johnson* v. *Pilot Life Insurance Co., supra,* but it is there stated that "a different rule obtains in North Carolina" apparently because of the statutory duties and obligations owed by the guardian to the ward.

The result reached in *Dignan* v. *Nelson, supra,* arises because of the provisions of the Utah statute which gives possession of lands of an intestate to the personal representative. The court there held that since the statute started running against the administrator it continued to run against the infant.

We can find nothing in our guardian and ward statute that would require us to follow the minority view expressed in the cases cited by appellee when construing the savings clause set forth in Ark. Stat. Ann. § 37-226, *supra.* Of course, the rule with respect to infants under Ark. Stat. Ann. § 37-226 is equally applicable to incompetents.

It follows that the judgment must be reversed and remanded.

# Ray BEST *v.* Judy WILLIAMS

76-71 537 S.W. 2d 793

Opinion delivered June 21, 1976
[Rehearing denied July 19, 1976.]

*Paul K. Roberts,* for appellant.

*John F. Gibson Jr.,* for appellee.

CONLEY BYRD, Justice. Appellant Ray Best and appellee Judy Williams were divorced November 11, 1972. In that decree appellee was awarded for life a one-third interest in 210 acres of land owned by appellant. Following her remarriage and the relinquishment of custody of the two children to appellant, appellee brought an action to partition the 210 acres. The trial court entered an order appointing commissioners to divide the lands in kind. For reversal appellant raises the issues hereinafter discussed.

We find no merit in appellant's contention that this partition action is prevented by the homestead laws, Ark. Const., art. 9, § 3. As pointed out in *Keesee* v. *Bushart,* 203 Ark. 668, 158 S.W. 2d 915 (1942), one may not claim the homestead exemption as to a claimant against whom he does not have an exclusive possessory right — *i.e.* a homestead exemption cannot be claimed in a partition suit against a co-tenant.

Appellant also complains that the trial court erred in consolidating the partition suit with the original divorce action. Since the divorce decree would not be conclusive of the right of appellee to a partition, we can find no prejudicial error that could result from the consolidation.

Appellant complains that the trial court erred in awarding the appellee in the original divorce action a one-third interest for life in the whole 210 acres instead of designating the specific property to which she was entitled. Not having appealed from that decision within the time permitted by law, the appellant is not now in a position to complain.

Affirmed.

Edna HICKS d/b/a THE BEAUTY BOX
*v.* ARKANSAS STATE MEDICAL BOARD

76-13 537 S.W. 2d 794

Opinion delivered June 21, 1976

*Kip Glassock,* Port Arthur, Tex., and *John M. Fincher,* of counsel, for appellant.

*Eugene R. Warren,* for appellee.

ELSIJANE T. ROY, Justice. Appellant Edna Hicks, a licensed cosmetician, desired to offer ear piercing as a service to her customers. She filed a petition with the Arkansas State Medical Board (hereafter Board) requesting a declaratory ruling that the piercing of ears was not within the definition of the practice of medicine or surgery. On June 12, 1975, the Board after a hearing decided that ear piercing was encompassed in the phrase "the practice of medicine" as defined in Ark. Stat. Ann. § 72-604 (Repl. 1964).[1] The circuit court affirmed the decision of the Board and from that affirmation comes this appeal.

Appellant first urges that "the findings, conclusions and decision of the Board, affirmed by the circuit court, are based upon an error of law." Ark. Stat. Ann. § 72-604(1) provides:

> (1) The term "practice of medicine" shall mean: (a) holding out one's self to the public within this state as being able to diagnose, treat, prescribe for, palliate or prevent any human disease, ailment, injury, deformity, or physical or mental condition, whether by the use of drugs, surgery, manipulation, electricity, or any physical, mechanical or other means whatsoever; (b)

[1]Jurisdiction of the Board to determine this issue has not been raised, and we do not consider it in this opinion.

suggesting, recommending, prescribing or administering any form of treatment, operation or healing for the intended palliation, relief, or cure of any physical or mental disease, ailment, injury, condition or defect of any person with the intention of receiving therefor, either directly or indirectly, any fee, gift, or compensation whatsoever; (c) the maintenance of an office, or other place to meet persons, for the purpose of examining or treating persons afflicted with disease, injury or defect of body or mind; (d) using the title M.D., M.B., Physician, Surgeon, or any word or abbreviation to indicate or induce others to believe that one is engaged in the diagnosis or treatment of persons afflicted with disease, injury or defect of body or mind, except as otherwise expressly permitted by the laws of this state now or hereafter enacted relating to the practice of any limited field of the healing arts; or (e) *performing any kind of surgical operation upon a human being*. If any person who does not possess a valid license to practice medicine within this state and who shall not be exempted from the licensing requirements hereunder, shall do any of the acts hereinabove mentioned as constituting the practice of medicine, shall be deemed to be practicing medicine without complying with the provisions of this Act [§§ 72-601, 72-603 — 72-623] and in violation thereof.

We consider the issue raised in this case to be primarily a question of interpretation of the definitional aspects of the statute rather than a question of fact. The testimony of the two doctcrs at the Board hearing dealt mainly with possible adverse effects from the ear piercing procedure if not properly carried out. However, the Board after its hearing noted that it had ". . . consistently interpreted the practice of surgery as contained in the Arkansas Medical Practices Act as being the penetration of the epidermis by mechanical instruments or appliances . . . ," and would include the procedure of ear piercing.

At the Board hearing a copy of an advisory opinion issued by the attorney general was introduced. The opinion, relying upon Subsection (e) of 72-604(1), *supra,* determined that ear piercing was a surgical procedure within the intendment of this subsection and thus could be performed only by

a licensed physician or other qualified person acting under physician supervision. The Board premised its determination of the issue to a large extent on the attorney general's opinion.

The opinions of executive agencies are not, of course, binding upon the court, but are held to some extent persuasive. In *Shivers, et al* v. *Moon Distributors, Inc., et al,* 223 Ark. 371, 265 S.W. 2d 947 (1954), we said:

> * * * Inasmuch as the interpretation of statutes is a judicial function, naturally the construction placed upon a statute by an executive or administrative official will not be binding upon the court.

See also *McCarley* v. *Orr,* 247 Ark. 109, 445 S.W. 2d 65 (1969).

We cannot agree with the interpretation placed on the statute by the attorney general and the Board. In interpreting statutes " . . . we give words their ordinary and usually accepted meaning in common language [citations omitted]," *Phillips Petroleum Co.* v. *Heath,* 254 Ark. 847, 497 S.W. 2d 30 (1973); *Kaiser* v. *Price-Fewell, Inc.,* 235 Ark. 295, 359 S.W. 2d 449 (1962), and avoid resort to " . . . subtle and forced construction for the purpose of limiting or extending the meaning [citation omitted]," *Black* v. *Cockrill, Judge,* 239 Ark. 367, 389 S.W. 2d 881 (1965).

"Surgery" is a word which, commonly defined, embraces a more complex procedure than the relatively simple technique used in piercing ears. Webster's New International Dictionary, 2nd Ed., defines surgery as:

> That branch of medical science, art, and practice, which is concerned with the correction of deformities and defects, the repair of injuries, the diagnosis and cure of diseases, the relief of suffering, and the prolongation of life, by manual and instrumental operations.

Black's Law Dictionary, Revised 4th Ed., 1968, defines surgery as:

> The art or practice of healing by manual operation; that

> branch of medical science which treats of mechanical or operative measures for healing diseases, deformities or injuries.

To the same effect see Random House Dictionary of the English Language, 1966 Ed., and Maloy's Medical Dictionary for Lawyers. It follows that when we accord the word "surgery" its most commonly accepted definition such definition excludes the process here under review.

We noted in *Aetna Life Ins. Co. & Pacific Mutual Life Ins. Co.* v. *Orr,* 205 Ark. 566, 169 S.W. 2d 651 (1943), that:

> . . . [S]urgery is defined as: "That branch of medical science which treats of mechanical or operative measures for *healing diseases, deformities or injuries.*" (Italics supplied.)

The statutory language at issue herein denominates as the practice of medicine the representation to the public by an individual of those skills which can aid in the palliation or prevention of " . . . any human disease, ailment, injury, deformity, or physical or mental condition . . . " by various methods including surgery.

The case of *People* v. *Lehrman,* 251 App. Div. 451, 296 N.Y.S. 580 (N.Y. App. Div. 1937), construed the statutory words "practice of medicine" as related to electrolysis for hair removal. This process involved the penetration of the skin with an electrically charged needle. The court held that the definition in the statute in *Lehrman* (basically analogous to our own) was never meant to include the process questioned, and the court stated:

> Practices such as this have always been held to be matters of personal taste and adornment and not connected with the practice of medicine.

Ear piercing is a simple physical change effected solely to facilitate the wearing of ear ornamentation. It is an uncomplicated penetration of the skin and tissue of the ear lobe by a sharp instrument. The procedure is not as serious as the normal anatomical change customarily wrought by surgery. It is not a corrective undertaking, nor one intended to ac-

complish a palliative objective. No transformation other than an opening in the ear lobe is created, and it is thus distinguishable from the more conspicuous alteration normal cosmetic surgery is intended to provide.

Although not controlling, we note that in Texas the attorney general, in interpreting a statute similar to our own, ruled that ear piercing did not constitute the practice of medicine. Other states, including Arizona, Virginia, Kansas, New Jersey, Georgia and California, have, through opinions rendered by their respective attorneys general or state medical boards, excluded the piercing of ears as a procedure to be found within the term "the practice of medicine." Appellee has not cited and our research has not disclosed any decisions to the contrary except the decision involved in this appeal.

We are not unmindful nor unconcerned about possible adverse effects from "uncontrolled ear piercing." However, we are not at liberty to declare, by judicial interpretation, a procedure "surgery" which is not encompassed by the legislative enactment under consideration.

Reversed.

Tommy KARAM and KAR-MAL, Inc.
*v.* Clyde O. HALK

75-270 537 S.W. 2d 797

Opinion delivered June 28, 1976

*Howell, Price, Howell & Barron,* for appellants.

*Wood, Smith & Schnipper,* for appellee.

JOHN A. FOGLEMAN, Justice. Appellee Clyde O. Halk brought suit against appellants for breach of an agreement relating to the operation of a store and for damages to fixtures and equipment. The case was tried to the circuit judge, without a jury, on September 4 and September 11, 1974. On December 6, 1974, the court sent a memorandum letter to the

attorneys for all parties making his findings and fixing the damages to be recovered by appellee. On January 2, 1975, judgment based on the court's memorandum letter was entered. When writs of execution and garnishment were issued on this judgment on August 11, 1975, appellants promptly filed a motion to vacate the judgment and a petition for stay of execution. This motion was denied by order entered September 5, 1975. On September 12, 1975, appellants filed notice of appeal from that order and from the judgment entered on January 2, 1975.

The principal ground for reversal is alleged abuse of discretion by the trial court in not setting aside the judgment. In their motion appellants asserted that, even though the circuit judge, in his letter, instructed the attorneys for appellee to furnish a precedent for judgment, appellants received no communication from the attorneys for appellee or from the court indicating that the precedent had been submitted to the court, that such a precedent had been approved or the date upon which the judgment was entered. Appellants alleged that the first notice they had that judgment had been entered was the issuance of writs of execution and that, by reason of the failure of appellee's attorneys to submit a copy of the precedent to appellants' attorneys or to serve a copy of the judgment on them, they were precluded from exercising their right to appeal. Appellants also alleged in their petition for stay of execution that appellee had made no effort to contact appellants to collect the judgment prior to the issuance of execution.

There was a stipulation by the parties that there was no indication in any of the records of appellants' firm of attorneys or in the memory of any of them of the receipt of a copy of the judgment entered on January 2, 1975, but that said attorneys had received the memorandum letter dated December 6, 1974. The trial court's order denying appellants' motions included findings that the memorandum letter was sufficient notice to the parties that judgment would be entered in accordance therewith, that more than one term of court had elapsed between the entry of the judgment and the filing of appellants' motions, that appellants had failed to establish good cause for vacation of the judgment and that the court was without power to vacate, stay or set aside the judgment.

Appellants argue that appellee and his attorneys, by failing to send them or their attorneys a copy of the precedent for judgment before it was entered, violated Rule 1e of the Uniform Rules for Circuit and Chancery Courts promulgated by this court on March 1, 1969, and had deprived appellants of their right of appeal by leaving them without any means of determining when the period allowed for giving notice of appeal began to run.

Appellants proceeded under Ark. Stat. Ann. § 29-506 (Repl. 1962) and particularly upon subdivision "Seventh" giving a trial court the power to vacate a judgment after the expiration of the term in which it was entered for unavoidable casualty or misfortune preventing the party seeking relief from the judgment from appearing of defending. They rely not only upon Rule 1e of the Uniform Rules for Circuit and Chancery Courts, but upon Rule 3 (Praecipe for Orders and Judgments) of the Civil Practice Rules of the Eighteenth Judicial Circuit, filed in the office of the Clerk of this court. The latter rule reads:

> Appropriate orders reflecting the action taken by the court on all motions or other pleadings will be prepared by the prevailing party and submitted to the court within five days after the action.

Admittedly this judgment was not entered within five days, but we do not know when the precedent was submitted to the court. We do not agree with appellants' argument that failure to enter the judgment within the five-day period set out in the rule invalidated it. The time limitation was upon the submission of the precedent and not upon the entry of the judgment. Since the judgment was entered by the court, if it was submitted late, we must presume, in the absence of a contrary showing, that the late submission was permitted by the court for good and sufficient reasons. In this respect, the court's consideration and action upon a tardily filed precedent is very similar to its consideration of a tardily filed motion for new trial, in which case like presumptions are indulged. *Peek* v. *Meadors,* 255 Ark. 347, 500 S.W. 2d 333.

We likewise find no failure to comply with Rule 1e of the Uniform Rules for Circuit and Chancery Courts, viz:

> Attorneys shall serve copies of all of their respective pleadings upon opposing counsel before or at the time of filing, and such papers must indicate the time and method of service.

A precedent for judgment is not, in any sense of the word, a pleading.

The question actually presented is whether the trial court abused its discretion in finding that there was no unavoidable casualty which prevented appellants from protecting their right to appeal. *Davis* v. *McBride,* 247 Ark. 895, 448 S.W. 2d 37. We are unable to say that there was. In reaching this conclusion, we take at face value appellants' assertions that counsel for appellee admitted in a telephone conversation with counsel for appellants that he had not submitted the proposed precedent to counsel for appellants for approval. Still, there were means available to appellants to avoid the situation in which they find themselves. There is no contention that the judgment entered is not in conformity with the memorandum containing the trial judge's findings. A litigant who makes no inquiry about the entry of a judgment based upon the trial court's findings for a period of eight months is in poor position to maintain that he is the victim of an unavoidable casualty. See *Bickerstaff* v. *Harmonia Fire Ins. Co.,* 199 Ark. 424, 133 S.W. 2d 890. Yet it is obvious from appellants' pleadings that no attention was given the matter after the receipt of the court's memorandum letter. It is no answer to say that appellee did not show that appellants did nothing. The burden of showing unavoidable casualty and that appellants were diligent and without negligence rested upon them. *Davis* v. *McBride,* supra.

A litigant is required to take notice of all proceedings during the pendency of an action to which he is a party. *Davis* v. *McBride,* supra. He must keep himself informed of the progress of his case and, when seeking relief from a judgment on account of unavoidable casualty, must show that he himself was not guilty of negligence. This principle has been applied to the very matter involved here, i.e., the failure of a defendant to ascertain that a judgment had been entered until execution was issued. *Bickerstaff* v. *Harmonia Fire Ins. Co.,* supra. There we said that the trial court did not abuse its discretion in denying a motion to vacate the judgment for un-

avoidable casualty and that it correctly held that there was a lack of diligence on the part of the defendant.

Appellants' objection to the judgment was that the amount of the court's award of damages to fixtures exceeded the amount sought in the prayer in appellee's complaint and that an award of damages for conversion and deceit was outside the scope of the pleadings, and that there had been no amendment to appellee's complaint or motion for the pleadings to be amended to conform to the proof to bring these matters within the scope of the pleadings. This objection could have been raised before the entry of judgment. Any error in this respect should have been disclosed by the memorandum letter. Appellants never objected to these features of the court's findings until after execution had been issued on the judgment. Appellant might have moved for a new trial after the court's decision and before entry of judgment. Ark. Stat. Ann. § 27-1901, 1904 (Repl. 1962); *Doup* v. *Almand,* 212 Ark. 687, 207 S.W. 2d 601; *Henderson* v. *Skerczak,* 247 Ark. 446, 446 S.W. 2d 243; *Peck* v. *Meadors,* supra; *St. Louise Southwestern Railway Co.* v. *Farrell,* 241 Ark. 707, 409 S.W. 2d 341. Appellants also might have filed notice of appeal before judgment was entered. *Wilhelm* v. *McLaughlin,* 228 Ark. 582, 309 S.W. 2d 203. Yet, the record does not disclose any inquiry about the status of the judgment when more than five days elapsed after the date of the court's memorandum letter without any indication to appellants that the precedent had been submitted.

Appellants belatedly, in their reply brief, assert that they were also proceeding under the fourth subdivision of Ark. Stat. Ann. § 29-506, which provides for vacation of a judgment for fraud practiced upon the successful party in obtaining the judgment. A thorough review of appellants' abstract and original brief fails to disclose even a hint of reliance upon fraud as a ground for relief, either here or in the trial court. The original brief placed reliance solely upon unavoidable casualty. Be that as it may, there certainly is no evidence of fraud. The burden of showing fraud rested upon appellants. *Karnes* v. *Gentry,* 205 Ark. 1112, 172 S.W. 2d 424. Premature entry of a judgment, even though erroneous, is not a fraud for which a court may vacate its judgment after the expiration of the term under this subdivision. *Old American Ins. Co.* v. *Perry,* 167 Ark. 198, 266 S.W. 943. Entry of a judg-

ment for an amount not justified by the facts, as appellants contend was the case here, does not constitute a showing of fraud in the procurement of the judgment. *Parker* v. *Sims,* 185 Ark. 1111, 51 S.W. 2d 517. To say the least, there is no indication that fraud was practiced upon the *court* in the procurement of the judgment so it cannot be said that the section has any application to this case. *Turner* v. *Turner,* 221 Ark. 932, 257 S.W. 2d 271.

Of course in the view we take of the matter, it is unnecessary that we consider the question whether appellants had a meritorious defense. For fear that there may be some misunderstanding of our holding, we hasten to emphasize that we are determining only the question whether the circuit judge abused his discretion in refusing to vacate the judgment under the circumstances prevailing here. We are not approving or encouraging the entry of a judgment on a precedent prepared by the prevailing party without the adverse party or parties having had an opportunity to see the proposed judgment and make objections to its form, content or language before entry. We simply find no abuse of discretion here.

The denial of appellants' motion to vacate the judgment entered in this case is affirmed.

Otis HINTON *v.* STATE of Arkansas

CR 76-16 537 S.W. 2d 800

Opinion delivered June 28, 1976

[redacted]

*John D. Bridgeforth,* court-appointed, for appellant.

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

JOHN A. FOGLEMAN, Justice. Otis Hinton was found guilty, by a jury, of the crimes of robbery by use of a firearm, kidnapping and assault with intent to rape. He seeks reversal alleging that the court erred in permitting Mrs. Georgia Ruff, the alleged victim, to identify him, that the evidence was insufficient to prove assault with intent to rape and that his sentence was excessive and constituted cruel and unusual punishment.

The robbery was committed on December 17, 1974, at approximately 7:00 p.m. The robbers took Mrs. Ruff away from her grocery store in Round Pond after one of them had struck her on the head with a pistol. She was forced into the back seat of an automobile which was driven from the scene by one of the robbers to a point on a rural road near Widener. During the trip one of the robbers got into the back seat with Mrs. Ruff. She testified that it was appellant. She said appellant tried to put his hands "up her dress" and when she fought him, he told her to move her hands or he would beat her brains out. She added that when she continued to fight appellant, he hit her three times with a pistol and then returned to the front seat of the car, which was shortly thereafter stopped along the road. Then, according to her, she was directed by appellant to get out of the car and, when she did, both of the robbers started trying to remove her underclothes. She stated that shortly thereafter the two fled when one of them detected the approach of another automobile.

The police investigating the crime, in checking the area where the robbers had stopped their automobile, found a pistol which they traced into appellant's possession a short time before the robbery. Appellant was taken into custody on December 19 and placed in the St. Francis County jail. He was advised of his constitutional rights. He refused to sign a waiver of his rights and advised the officers that he had an attorney. A "lineup" was conducted on Friday, December 20 at which appellant was identified by Mrs. Ruff as one of the robbers. At the trial she testified that appellant was the one who held a gun on her at the store, struck her in the face with the pistol in her living quarters, got in the back seat of the car with her and tried to put his hand under her dress, and with his companion tried to remove her clothing after they stopped the car. Appellant was charged with the crimes of which he was found guilty by information filed on January 29, 1975.

Appellant's motion to suppress the lineup identification was heard and denied on August 19, 1975, before the trial commenced. In his motion, appellant alleged that the identification should be suppressed because he was forced to participate in the lineup without the benefit of counsel, and that he was forced to confront the victim in a small hallway with several other prisoners, at which time he was called by name and asked to stand directly under a light in the room. He asserted that the procedure was impermissibly suggestive and gave rise to a substantial likelihood of irreparably mistaken identification.

One facet of appellant's argument on this point is the fact that the lineup was held without his attorney being present, and, as a matter of fact, without any effort being made to notify the attorney or even ascertain his identity. It is sufficient to say that appellant was not entitled to the assistance of counsel at the lineup conducted before the commencement of prosecutorial proceedings by the filing of an information against him. *Kirby* v. *Illinois,* 406 U.S. 682, 92 S. Ct. 1877, 32 L. Ed. 2d 411 (1972); *Pollard* v. *State,* 258 Ark. 512, 527 S.W. 2d 627; *King* v. *State,* 253 Ark. 614, 487 S.W. 2d 596.

We cannot say that there was error in the denial of appellant's motion to suppress or the circuit judge's finding that the pretrial identification proceedings were not so impermissibly suggestive as to give rise to any substantial

likelihood of irreparable misidentification. There were five persons in the lineup. The victim had viewed an earlier one in which appellant was not a participant and did not identify anyone. She said that she had not looked at a group of pictures shown her by Deputy Sheriff Irwin between the time she reported the incident and the lineup. Appellant contends the group included pictures of him and his brother that were newer and different in characteristics from the others, most of which were "penitentiary pictures." There was testimony that an officer, by calling appellant by name and directing him to stand under a light, directed attention to him so that Mrs. Ruff immediately connected him with the crime. The evidence on this point is in considerable conflict and we must defer to the judgment of the trial judge on credibility of the witnesses. Anthony King, a jail inmate who was a participant in the lineup said that, after viewing the lineup for four or five minutes, Mrs. Ruff had not identified anyone until the jailer (Buford Hopkins, called "Jackie") told Otis Hinton to move under the light, calling him by name. Charles Pruitt said "they" told Otis to move under the light, but said that the lineup participants were told to move under the lights "before the people came in." Appellant said that it was Irwin who directed him, by name, to stand under the light, and that Irwin made a gesture with his hand at the time, and all but put his hand on appellant's shoulder. He said that he was the first to be directed to move under the light. Appellant denied that he and the others were told to move under the light before Mrs. Ruff came in. Mrs. Ruff testified that nothing was said during the lineup. The jailer testified that he did not say anything to anyone during the course of the lineup.

On the other hand, Mrs. Ruff stated positively that her identification was based upon her observation of appellant on the evening of the crime. She said she was only three feet from him in the store when she first saw him and had opportunities to see his face as the robbers' automobile passed under lights while she was lying in the floor of the back seat. She said that he was the one who got into the back seat and was trying to put his hand up under her dress and that she was fighting with him.

The central question is whether, viewing the totality of the circumstances, the courtroom identification was reliable, even if we should find that the lineup was impermissibly

suggestive. *Neil* v. *Biggers,* 409 U.S. 188, 93 S. Ct. 375, 34 L. Ed. 2d 401 (1972). When we consider the opportunity the witness had to view her assailant during the progress of the crimes committed against her, her attention to her assailant, her certainty of identification at the lineup, at the suppression hearing and in the courtroom, after she had failed to identify anyone in a previous lineup, and the short period of time elapsing between the crime and the lineup, and when we resolve the questions of credibility as to suggestive procedures at the lineup as the trial judge did, we cannot say that the trial court's finding that there was no substantial likelihood of irreparable misidentification was erroneous.

We find sufficient evidence to raise a question for the jury as to appellant's intent to rape Mrs. Ruff. We recognize that this intent must be evidenced by some overt act which constitutes the beginning of, or a part of the perpetration of the offense and not merely a preparation therefor. But the intention to have sexual intercourse with the victim by force may be ascertained from acts or words connected with an assault and any overt act toward accomplishment of the purpose. It may be inferred from the circumstances surrounding the assault. See *Frederick* v. *State,* 258 Ark. 553, 528 S.W. 2d 362. Appellant argues that, because it was not shown that he ever attempted to remove his clothes, or that he put his person in condition or position to perform the act of sexual intercourse, there was not sufficient evidence of intent. We cannot accept that argument, when all the circumstances are considered. In addition to the testimony about appellant's conduct in the back seat of the car, Mrs. Ruff said that immediately upon stopping the car and ordering her out of it, the two robbers commenced trying to undress her, removed her underclothing, and when she vigorously resisted them, one of them said to the other "can you get to her" and, when he received the response "not yet," "throw her over the car," but both fled soon after they had thrown her over the car when one of the assailants thought he saw another automobile approaching. This evidence was sufficient to support the jury verdict. See *McGee* v. *State,* 215 Ark. 795, 223 S.W. 2d 603.

Appellant was sentenced to consecutive sentences of 21 years for robbery, 15 years for use of a firearm, 3 years for kidnapping and 21 years for assault with intent to commit

rape, all of which were maximum sentences. He admits that the trial judge has the discretion to make the sentences run consecutively, but argues that for the court to do so when all of the crimes were in one course of events and all were maximum sentences was such an abuse of discretion as to constitute cruel and unusual punishment. First we should say that the court's discretion includes the discretion to make maximum sentences run consecutively. Actually the sentences would run consecutively unless the trial court deemed a concurrent sentence or sentences best for society and the person convicted. Ark. Stat. Ann. § 43-2312 (Supp. 1975). We cannot say, on the record before us that the trial judge did not act for the best interest of both society and the appellant, whose interests must be balanced.

The constitutional prohibition is directed toward the kind of punishment imposed, not its duration. *Williams* v. *State,* 125 Ark. 287, 188 S.W. 826. The fact that punishment is severe does not make it cruel or unusual. *Thom* v. *State,* 248 Ark. 180, 450 S.W. 2d 550. We have held that the imposition of a maximum sentence for an offense is not cruel or unusual punishment. *Johnson* v. *State,* 214 Ark. 902, 218 S.W. 2d 687. See also *Carter* v. *State,* 255 Ark. 225, 500 S.W. 2d 368. We have rejected the argument that the cumulative effect of consecutive sentences makes punishment cruel and unusual. *Blake* v. *State,* 244 Ark. 37, 423 S.W. 2d 544. We have also held that making sentences consecutive is not cruel or unusual. *Holmes* v. *State,* 257 Ark. 871, 520 S.W. 2d 715; *Thom* v. *State,* supra.

The constitutional prohibitions against cruel and unusual punishment are primarily addressed to the legislative branch. *Blue* v. *State,* 224 Ind. 394, 67 N.E. 2d 377, cert. den. 330 U.S. 840, 67 S. Ct. 976, 91 L. Ed. 1286 (1946); *Brown* v. *State,* 157 Fla. 853, 13 S. 2d 458 (1943). Appellant does not contend that the maximum sentence for any of the offenses of which he was found guilty is cruel and unusual punishment. In order to be judicially held to be so, the statute must provide punishment so excessive and unusual and so disproportionate to the offense committed as to shock public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstance. *Ex parte Brady,* 70 Ark. 376, 68 S.W. 34. In that case, it was said that punishment is not cruel and unusual where the reason

for the severity of the punishment is found in the number of offenses committed by the defendant and not in the undue severity and cruelty of the statute. Punishment authorized by statute is never held cruel or unusual or disproportionate to the nature of the offense unless it is a barbarous one unknown to the law or so wholly disproportionate to the nature of the offense as to shock the moral sense of the community. *Carter* v. *State,* supra; *Geurin* v. *City of Little Rock,* 203 Ark. 103, 155 S.W. 2d 719.

The cumulative effect of our decisions is that the exercise of the court's discretion to make maximum sentences on each one of multiple offenses consecutive does not in and of itself constitute cruel and unusual punishment. This was the effect of our decision in *Thom* v. *State,* supra, where a total sentence of 63 years was imposed, even though it may not have been apparent from reading the opinion without reference to the permissible punishment under the applicable statute for the offense there charged. It is not for us to say that the punishment here is cruel and unusual, unless we could say that it was so disporportionate to the nature of the offenses involved as to shock the moral sense of the community. We cannot. Nor can we say that the punishment is excessive. See *Rogers* v. *State,* 257 Ark. 144, 515 S.W. 2d 79.

The judgment is affirmed.

Floyd SPRATLIN and SOUTHERN FARM BUREAU *v.* Lillie T. EVANS, Alleged Widow, and Dian Cohns, et al., Alleged Dependent Children of Hosea EVANS, also known as Hosea Evans STOKES, Deceased

76-11 538 S.W. 2d 527

Opinion delivered June 28, 1976

*Daggett, Daggett & Van Dover,* by: *Jesse B. Daggett,* for appellants.

*Brick, Wallin & Rainey,* by: *Jake Brick,* for appellees.

J. FRED JONES, Justice. This is a workmen's compensation case in which the appellant-employer, Floyd Spratlin, and the appellant-compensation carrier, Southern Farm Bureau, appeal from a circuit court judgment affirming the Commission's award of compensation benefits to Dian Cohns, Wilma Jean Cohns and Larry D. Cohns as acknowledged and dependent illegitimate children of the decedent-employee, Hosea Evans Stokes, and in reversing the Commission's finding that Lillie Tarpley Evans was not the widow of the decedent, and in ruling to the contrary as to the widow.

The appellants have designated the points they rely on for reversal as follows:

> The circuit court erred as a matter of law in its ruling that Lillie Tarpley Evans was the "widow" of Hosea Evans Stokes as that term applies to the Workmen's Compensation Act.
>
> The award of benefits to Dian Cohns, Larry Donnel Cohns and Wilma Jean Cohns was procured by fraud, is based upon perjured testimony and is not supported by substantial evidence.

The pertinent facts as reflected by the testimony may be stated as follows: The decedent-employee, Hosea Evans Stokes, also known as Hosea Evans, sustained a compensable accident resulting in his death on June 12, 1972. Lillie Tarpley Evans filed workmen's compensation claim for death benefits for herself as widow and Leona Cohns filed claim for the statutory funeral allowance and for compensation benefits for her minor children already mentioned.

The Administrative Law Judge found that Lillie Tarpley Evans was the widow of the decedent as defined by the

Workmen's Compensation Act; that the aforementioned minor children were acknowledged illegitimate children of the decedent and entitled to benefits under the Act. On review by the full Commission, the Commission found that Lillie Tarpley Evans was not the widow of the decedent within the meaning of the Compensation Act, but found that the aforenamed children were the acknowledged illegitimate children of the decedent and were wholly dependent on him at the time of his death and were entitled to benefits under the Act. The circuit court, upon appeal, reversed as to the widow and held that Lillie Tarpley Evans was the widow of the decedent within the meaning of the Act and affirmed the Commission as to the aforesaid minor children.

Leona Cohns testified that she is the mother of the children here involved, and in addition she has seven other children. She said she was originally married to L. C. Cohns; that they were never divorced but that she had not lived with him for 18 years and that he died in 1965. She said she had lived with the decedent for about 18 years and was living with him at the time of his death in 1972. She said she had four children by the decedent including Dian, Wilma and Larry, the children here involved, as well as a fourth child Sandra Kay, who was adopted at eight months of age by her sister in Memphis, Tennessee. She said Dian, Wilma and Larry lived in the house with her and decedent; that Dian was born on July 13, 1956; Wilma on July 8, 1957, and Larry on October 15, 1959. She admitted that the delayed birth certificates of these children showed their father to be L. C. Cohns, and that this information was given to the registrar of birth certificates by her under affidavit. She said, however, that the doctor delivering the children suggested that she give the true name of her legal husband as the father of the children since she was still legally married to him, and that she simply followed the doctor's advice. The delayed birth certificates placed in evidence showed the one for Dian was applied for and issued in August, 1962; the one for Larry was applied for and issued in June, 1968; and the one for Wilma was applied for and issued in September, 1963.

Lillie Tarpley Evans testified that she was 79 years of age and lives in Memphis, Tennessee; that she married the decedent in 1935 and lived with him as husband and wife until 1957 when they concluded that they could no longer live

together. She said she never did obtain a divorce. She said that from 1957 until the decedent's death he never did support her but that her daughter supported her. She said she had not lived with the decedent for 18 years; that she was not dependent upon him for support; that he made no contribution toward her support since they separated in 1957; that she was able to take care of herself with the assistance of her daughter.

The testimony of all the witnesses is not abstracted but appellee Lillie Tarpley Evans' own testimony is substantial evidence that she and the decedent separated by mutual consent and had not lived together since 1957, and that she was not dependent upon him for her support during the intervening period between their separation and his death. If Lillie's testimony was correct as to the date she and the decedent separated, and Leona's testimony was correct as to the approximate 18 years she lived with the decedent and as to the birth dates of her children, then it is obvious that Leona started living with the decedent, and at least Dian was born, before he and Lillie separated.

Leona's testimony leaves much to be desired in attempting to establish the decedent as the father of the children here involved in the face of her affidavit to the contrary in her applications for the delayed birth certificates. There is substantial evidence, however, that Leona and her children here involved, lived with and were supported by the decedent.

We now come to the law in Arkansas as it applies to the evidence in this case. The rights of a dependent lawful widow and dependent legitimate children are not questioned or involved in this case. Consequently, our decision as to the rights of the claimants who are involved must depend, to a large extent, on statutory definitions. We shall first consider the claim of the appellee Lillie Tarpley Evans.

Ark. Stat. Ann. § 81-1315 (c) (Repl. 1960) provides as follows:

> Subject to the limitations as set out in section 10 [§ 81-1310] of this act, compensation for the death of an employee shall be paid to those persons who are wholly dependent upon him in the following percentage of the

average weekly wage of the employee, and in the following order of preference.

First. To the widow if there is no child, thirty-five (35) per centum, and such compensation shall be paid until her death or remarriage.
To the widower if there is no child, thirty-five (35) per centum, and such compensation shall be paid during the continuance of his incapacity or until remarriage.

Second. To the widow or widower if there is a child, the compensation payable under the First above, and fifteen (15) per centum on account of each child.

Third. To one child, if there is no widow or widower, fifty (50) per centum. If more than one child, and there is no widow or widower, fifteen (15) per centum for each child, and in addition thereto, thirty-five (35) per centum to the children as a class, to be divided equally among them.

Fourth. To the parents, twenty-five (25) per centum each.

Fifth. To brothers, sisters, grandchildren and grandparents, fifteen (15%) per centum each.

Section 81-1302 (1) defines widow as follows:

"Widow" shall include only the decedent's legal wife, living with or dependent for support upon him at the time of his death.

This language is clear and unambiguous. It disposes of Lillie's claim under her own testimony, given with commendable candor, as already set out. We are not unmindful of our decision in *Chicago Mill & Lbr. Co.* v. *Smith,* 228 Ark. 876, 310 S.W. 2d 803 (1958). The claimant in that case, as in the case at bar, was a "legal wife" at the time of the decedent's death. The Commission denied the widow's claim on the theory that she was not a dependent within the meaning of the Act. The circuit court affirmed the Commission and we reversed, not on the ground that the widow was dependent as a matter of law simply because she was the decedent's legal wife at the

time of his death, we reversed because there was no substantial evidence to support the Commission's finding that she was not dependent on the decedent at the time of his death. The evidence pertaining to dependency in *Smith* is not set out in our opinion and it is not now available to us for discussion.

Certainly we do not now say that a widow who was not living with her husband at the time of his death may nevertheless be dependent upon him for support and entitled to compensation benefits as his widow under the Act. We do say, however, that such dependency is a matter of proof and there was no proof of such dependency in the case at bar. As already pointed out, the proof was to the contrary. The Commission was right in denying the claim of the appellee Lillie Tarpley Evans, and the circuit court erred in reversing the Commission as to her claim.

We now consider the more difficult claim of the children. We are met at the threshold in this connection with the common law presumption, long valid in this state, that a child born to a legally married woman is the legitimate child of the husband and the presumption is one of the strongest presumptions known to the law. It is only rebuttable by the strongest type of evidence such as conclusive evidence of impotency of the husband, or nonaccess between the parties at the time of conception. The moral and social reasons for retaining this common law presumption in domestic relations and in the property laws relating to descent and distribution are too obvious and well known to justify comment, and our decisions on this point are so numerous and uniform we deem it unnecessary to cite them. Larson, in his work on compensation law, devotes § 62-22 to "Inroads into Common-Law Tests: Legitimacy," and points out some of the inroads by judicial decision but primarily by statutory enactment.

We deem it generally accepted that one of the primary reasons for workmen's compensation law is to protect the injured employee, or his dependents in case of death, from becoming public charges dependent upon charity rather than on remuneration from the industry responsible for the loss, and to spread the loss more evenly throughout industry.[1]

[1]See *J. J. Murphy & Son, Inc.* v. *Gibb,* 137 So. 2d 553; *Thuillez* v. *Yellow Transit Freight Lines,* 358 P. 2d 676; *Kotarske* v. *Aetna Cas. & Sur. Co.,* 244 F. Supp. 547; *Crilly* v. *Ballou,* 91 N.W. 2d 493; *Hubbard* v. *Midland Contractors,*

With this broad purpose in mind we now examine our statutory provision pertaining to the children involved in the case at bar.

Ark. Stat. Ann. § 81-1302 (j) (Repl. 1960) reads as follows:

> "Child" means a natural child, a posthumous child, a child legally adopted prior to injury of the employee, a step-child, an acknowledged illegitimate child of the deceased or spouse of the deceased, and a foster child. "Child" shall not include married children, unless wholly dependent upon the deceased.

Thus, it is clear that acknowledged illigetimate children of a deceased employee or the spouse of the deceased employee are also entitled to compensation benefits under § 81-1302 (j), *supra.*

Ordinarily, in workmen's compensation cases on appeal to this court, we are only concerned with whether there was any substantial evidence to sustain the Commission's findings or award. But in the case at bar the Commission found that the children here involved were the acknowledged illegitimate children of the decedent wholly dependent upon him at the time of his death and were, therefore, entitled to compensation benefits. The question before us on this appeal, therefore, goes beyond the mere question of whether there was substantial evidence to support the Commission's findings. The paramount question now before us in the case at bar is whether there was sufficient competent evidence to overcome the presumption against the illegitimacy of the children here involved and we conclude there was not.

The case at bar is easily distinguishable from *Stephens & Stephens and Rockwood Ins. Co.* v. *Logan,* 260 Ark. 78, 538 S.W. 2d 516, which is also being decided today. The quantity and quality of the rebutting evidence in *Logan* was much clearer, stronger and convincing than that offered

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*Inc.*, 131 N.W. 2d 209; *Smith* v. *Home Bldg. Contractors, Inc.*, 363 S.W. 2d 11; *Mahlum* v. *Broeder,* 412 P. 2d 572; *Ricciardi* v. *Damar Products Co.,* 211 A. 2d 347; *Stellmah* v. *Hunterdon Coop. G.L.F. Service, Inc.,* 219 A. 2d 616; *Cates* v. *Hunt Const. Co.,* 148 S.E. 2d 604; *Newell* v. *Taylor,* 321 P. 2d 294; *Jussila* v. *Dept. of Labor and Industries,* 370 P. 2d 582.

in the case at bar. The evidence of illegitimacy in the case at bar consisted solely of the testimony of the children's mother that the decedent, and not her husband, was the father of the children here involved. Her sworn affidavits to the contrary in obtaining delayed birth certificates certainly add nothing to the verity of her testimony. It might well appear that the drafters of our Compensation Act recognized the problems likely to arise in relation to innocent children wholly dependent on a deceased employee at the time of his death and for that reason spelled out in considerable detail exactly who is and who is not a "child" within the meaning of the Act.

This case was submitted to the Commission and decided on the single theory that the claimant-children were the acknowledged illegitimate children of the decedent wholly dependent upon him at the time of his death. The Commission apparently did not consider any of the other definitions of "child" under the Act. We hold that the evidence submitted was not sufficient to overcome the presumption against the illegitimacy of the children in this case and that the judgment of the trial court must be reversed as to the widow and as to the children also. As we have already stated, it is apparent that the claims of the children were presented to, and considered by, the Commission solely as claims of acknowledged illegitimate children of the decedent. It is entirely possible that the Commission would have reached the same results had the claims been considered as claims filed on behalf of foster children, or one of the other definitions for "child" set out in the Act. We conclude that the Commission should have the opportunity of reviewing the evidence in the light of all the definitions of "child" under the Act, and that this case should be remanded to the Commission for that purpose.

The judgment is reversed and the cause dismissed as to the widow. The judgment is reversed as to the children and this cause remanded to the circuit court of Arkansas County with directions to remand to the Commission for such further action pertaining to the claims of the children as the Commission deems necessary not inconsistent with this opinion.

The judgment is reversed and the cause remanded.

# ARKANSAS SAVINGS AND LOAN ASSOCIATION BOARD and SECURITY SAVINGS AND LOAN ASSOCIATION *v.* CENTRAL ARKANSAS SAVINGS & LOAN ASSOCIATION

75-293 538 S.W. 2d 505

Opinion delivered June 28, 1976

*Smith, Williams, Friday, Eldredge & Clark,* by: *William L. Patton Jr.* and *Hermann Ivester,* for appellants.

*Lester & Shults,* by: *Edward Lester,* for appellee.

CONLEY BYRD, Justice. This application for a savings and loan charter by appellee, Central Arkansas Savings & Loan Association, was before us in *Ark. S&L Bd.* v. *Central Ark. S&L,* 256 Ark. 846, 510 S.W. 2d 872 (1974) and in *Security S&L* v. *Central Ark. S&L,* 257 Ark. 1014, 521 S.W. 2d 220 (1975). On the first appeal we remanded the case to the Arkansas Savings and Loan Association Board because, in denying appellee's application, the Board had only stated conclusions and had failed to give findings of fact. On the second appeal appellant Security Savings and Loan Association, whose protest had been sustained by the Board, complained that its appeal to the Pulaski Circuit Court was erroneously transferred to the Faulkner Circuit Court. Following those decisions, on this appeal the Faulkner Circuit Court again reversed the action of the Board in denying appellee's application for a charter. For reversal, appellants, Arkansas Savings & Loan Association Board, hereinafter referred to as the Board, and Security Savings & Loan Association, hereinafter referred to as Security, contend that the findings of the Board are sustained by substantial evidence.

In making their contention, appellants take the position that, for purposes of determining whether the Board's administrative findings are supported by substantial evidence, we should be governed by the same rule of review as in cases involving jury verdicts. In this connection appellants state:

> "Because of this holding the evidence which tended to support a finding that a public need and probability of success did exist is irrelevant and was not included in the abstract."

With respect to judicial review of administrative findings our Administrative Procedure Act, Ark. Stat. Ann. § 5-713 (Supp. 1973), provides:

> "...
>
> (g) The review shall be conducted by the court without a jury and shall be confined to the record, except that in cases of alleged irregularities in procedure before the agency, not shown in the record, testimony may be taken before the court. The court shall, upon request, hear oral argument and receive written briefs.

(h) The court may affirm the decision of the agency or remand the case for further proceedings. It may reverse or modify the decision if the substantial rights of the petitioner have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:

(1) in violation of constitutional or statutory provisions;
(2) in excess of the agency's statutory authority;
(3) made upon unlawful procedure;
(4) affected by other error of law;
(5) not supported by substantial evidence of record; or
(6) arbitrary, capricious, or characterized by abuse of discretion."

The provisions of the federal Administrative Procedure Act were discussed in *Universal Camera Corp.* v. *National L. R. Bd.,* 340 U.S. 474, 71 S. Ct. 456, 95 L. Ed. 456 (1950), with reference to whether a review of an administrative decision based upon the substantial evidence rule could be predicated upon only the evidence supporting the administrative finding when viewed by itself. In holding that such a review should be on the record as a whole, the court said:

"Whether or not it was ever permissible for courts to determine the substantiality of evidence supporting a Labor Board decision merely on the basis of evidence which in and of itself justified it, without taking into account contradictory evidence or evidence from which conflicting inferences could be drawn, the new legislation definitely precludes such a theory or review and bars its practice. The substantiality of evidence must take into account whatever in the record fairly detracts from its weight. . . . "

Under the language of the Administrative Procedure Act, *supra,* we construe the language thereof to give to the courts the same type of review that is applied by the federal courts to the federal Administrative Procedure Act.

The order entered by the Board following the remand of the first appeal is as follows:

"The Board, upon review of the record, finds that the application should be denied for the following reasons:

. . .

3. There is not a public need at the present time for the proposed association and the volume of business in the areas in which the association would conduct its business is not sufficient to indicate a successful operation.

The Board hereby makes the following findings of underlying facts upon which this finding is based:

(a) Conway and Faulkner County are within the metropolitan Little Rock trade and market area and a substantial number of Faulkner County residents commute to work in Little Rock and Pulaski County.

(b) There is keen competition for home loans in Conway and Faulkner County by Security Savings & Loan Association of Conway ('Security'), Morrilton Federal Savings & Loan Association ('Morrilton Federal'), the two banks in Conway, savings and loan associations from the Little Rock area, and other institutions from the Little Rock area. The approval by the Federal Home Loan Bank Board of the branch office of Morrilton Federal will increase this competition. There is no need for additional competition for home loans and the volume of home loans is not sufficient to support additional competition.

(c) There is keen competition for savings deposits from Conway and Faulkner County residents by Security, the two banks in Conway, and thrift institutions in Pulaski County. Morrilton Federal has competed for savings deposits from Conway and Faulkner County residents to some extent in the past and will compete for such savings deposits to a much greater extent with the establishment of its branch office in Conway. Thrift institutions in Pulaski County obtain significant amounts of savings from residents of Faulkner

County who commute to work in Pulaski County during the normal operating hours for financial institutions. There is no need for additional competition for savings and the volume of savings is not sufficient to support additional competition.

(d) From the standpoint of the services offered to Faulkner County residents, and in light of the services provided to Faulkner County residents in the past, and in view of the relative geographic locations of Morrilton and Conway, the establishment of Morrilton Federal's branch office in Conway will be comparable to the establishment of a second association in Conway.

(e) The populations of Conway and Faulkner County are not large enough to support an additional association.

(f) With the establishment of an additional association the population per savings and loan association office in Faulkner County would be 10,524 compared to a range from a low of 12,180 to a high of 33,256 for the eight market areas covering the state as defined by Dr. Gene C. Lynch. Without the establishment of an additional association the population per savings and loan association office in Faulkner County will remain at 15,786, which figure falls within the existing range for the above market areas. (All population figures used in these findings are based on the 1970 census).

(g) With the establishment of an additional association the population per savings and loan association in Faulkner County would be 15,786, compared to a range from a low of 17,826 to a high of 39,908 for the above market areas. Without the establishment of an additional association the population per savings and loan association in Faulkner County will remain at 31,572, which figure falls within the existing range for the above market areas. The figures for population per savings and loan association are inflated because they do not take into account the fact the Morrilton

Federal's Conway Branch is comparable to a local association under the peculiar circumstances recited in finding D.

(h) The age group 15 to 24 makes up 24.9% of the population of Faulkner County and approximately one-third of the population of Conway while the corresponding figure for the state as a whole is 16.9%. The difference in these two figures is the result of the presence of three colleges in Conway. Persons in this age group do not, in general, utilize the services of savings and loan associations. For purposes of comparing population per office and per association in Faulkner County and in the above market areas the population figure for Faulkner is inflated by 8%.

(i) Security was formed and commenced business in 1961. Security's performance in attracting savings since its formation has been excellent. During the period 1965-1970 Security obtained savings deposits at a rate of 128% of the national average (based on the comparison of the amount of increased personal income that went into savings deposits in savings and loan associations for the nation as a whole and for Faulkner County). During the period 1966-1970 all savings and loan associations in Arkansas as a whole obtained savings at a rate equal to 124% of the national rate.

(k) In 1971 and 1972 the increase in Security's deposits was significantly more each year than it had been in any previous year. While the rate at which Security's deposits increased during these two years fell below the national average this can be attributed to a reduction in Security's advertising budget which has since been restored and the impossibility of accounting for deposits of local income in Pulaski County savings and loan associations and Morrilton Federal. Each dollar of local income in these institutions has the same significance as a dollar deposited in Security in making the local to national comparison.

(l) The establishment of Morrilton Federal's branch

office in Conway will place Morrilton Federal in a position to attract significant amounts of savings deposits from Faulkner County residents that it would otherwise be unable to attract.

(m) Per capita income for Faulkner County is $2,602 and for the state as a whole is $2,791.

(n) The performance of Security and Morrilton Federal in meeting home loan needs in Faulkner County has been excellent. Faulkner County residents who finance homes through institutions in Little Rock generally do so for personal reasons having nothing to do with the adequacy of services or amount of financing available locally.

(o) During the period 1968-1972 Security financed over 93% of the value of new residential construction in Conway, while savings and loan associations nationally financed 81% of the value of new residential construction.

(p) The two Conway banks actively seek home loans, primarily on a short term basis of five years or less. Persons obtaining home loans from the banks on these terms generally do so because they prefer such terms or for other personal reasons having nothing to do with the adequacy of services or amount of financing available from the savings and loan associations.

(q) Security's services regarding home loans are speedy and adequate and, except for an unusual period during which adequate amounts of money for home loans were unavailable on a national basis, Security has always had money available to lend to qualified borrowers.

(r) Interest rates charged by Security for home loans are competitive with other financial institutions which make home loans in Faulkner County.

(s) Morrilton Federal has filled a major portion of the loan needs of Conway and Faulkner County residents for many years, commencing a number of years prior

to the formation of Security in 1961. The establishment of Morrilton Federal's branch office in Conway will enable it to service a larger number and amount of loans.

(t) General economic conditions are highly unfavorable to the establishment of a new savings and loan association at this time. Conditions regarding interest rates are highly unfavorable to the inflow of deposits to savings and loan associations and conditions in the home construction industry are highly unfavorable to prospects for future building activity.

(u) The economic data presented by the applicant did not take into account the impact that Morrilton Federal's branch office in Conway will have on the Faulkner County economy, the extent to which the branch will fill the need for the services offered by savings and loan associations or the extent to which it will affect the applicant's chances for a successful operation. The economic data and statistics also inaccurately classify Morrilton Federal as an outside institution when it will provide the same services to Faulkner County residents as a local institution and has to some extent done so in the past.

(v) The economic data presented by the applicant contain a number of errors that make portions of it unreliable and raise doubts as to the other portions. The economic data presented by Security does not contain such errors and is entitled to greater weight.

(w) The opinions given by Dr. Lewis Amis on behalf of the applicant were not supported by a satisfactory explanation of the underlying facts and should not be given substantial weight. Dr. Amis established that he was not familiar with economic conditions in Faulkner County and his cross-examination raised serious doubts as to the validity of the economic data presented by the applicant, especially the statistics relating to mortgage loans.

(x) A sufficient basis for comparing the present application with applications for charters previously

granted was not established.

4. The operation of a new association in Conway, Arkansas, will not unduly harm any other existing association or federal savings and loan association or any other financial institution.

The Board hereby makes the following findings of underlying facts upon which this finding is based:

(a) The two banks in Conway did not contend that they would be unduly harmed by the establishment of the proposed association.

(b) The operation of a new association in Conway would result in existing and future deposits and future loans being spread among a larger number of financial institutions, but the operation of a new association in Conway would not result in undue harm to the service area in that the harm would not be severe enough to render the existing institutions incapable of functionally continuing operation.

. . .

IT IS THEREFORE ORDERED that the Application for Charter by Central Arkansas Savings and Loan Association be and it is hereby denied."

The record shows that a total of 59 stockholders subscribed and paid $231,150.00 in cash for 13,400 shares of stock in appellee. The subscribed savings accounts had increased to $1,120,345.00 at the date of the hearing of the application. Ten new industries and 14 new commercial establishments were opened for business in 1972. The 1960 census of Faulkner County showed a population of 24,303 while the 1970 census showed a population of 31,472, representing a 29.9% increase in the population of the county compared to a state-wide increase of 7.7%. Between 1960 and 1970 the personal income of the county increased from $30.3 million to $82.1 million. The total payroll for the same period for covered employment increased 94.3% or from $8.8 million to $25.1 million. Concurrently, the average covered payrolls for the manufacturing industry increased from $4.3 million to

$13.2 million, a 205.2% gain. For the same ten year period, retail sales increased from $18.3 million to $46.0 million. Income from governmental employment increased from $3.3 million to $11.8 million. In 1970 the total deposits in banks in the county were $40.9 million, and of those deposits, $22.6 million were in savings and time deposits. Total deposits in the banks had increased to $68,964,000 by December 31, 1972. The savings capital of Security increased from $5,759,-854 in 1967 to $12,045,000 by June 30, 1972. The number of persons on institutional and industrial payrolls increased from 1,709 in 1960 to 6,245 in 1971. The electrical connections inside the city of Conway increased by 190 in 1971 and by 100 in 1972. In Faulkner County, outside the city of Conway, there was an increase of 274 electrical connections in 1971 and of 393 in 1972.

Security is the only chartered savings and loan association in Faulkner County. Security's deposits were increased by $1,638,000 in 1971, and $2,801,000 in 1972. Dr. John Kane, professor of Economics at the University of Arkansas and former executive vice president of the McElroy Bank in Fayetteville, testified that in Boone County in 1972, the Harrison Savings and Loan Association increased its deposits by $5,346,000 and a second association in Harrison increased its deposits by $2,612,000. The First Federal Savings and Loan Association of Magnolia in 1972 increased its deposits by $3.75 million. The First State Savings and Loan Association of Mountain Home in 1972 increased its deposits $7,-671,000. First Federal Savings and Loan Association of Rogers in 1972 had an increase of $6,999,000. The deposits in First Federal Savings and Loan Association of Russellville did not quite increase $3 million in 1972, but a second association in Russellville had an increase of $1,564,000 for a total county increase of $4,765,000 in savings and loan deposits. The two associations in Searcy had an increase of $3,860,000 for the same year.

Table 13, 13A, 13B and 13C, attached as an appendix to this opinion, were introduced by Dr. Gene Lynch, who testified for Security. Table 15, shown in the appendix to this opinion, was introduced by Dr. Louis Amis who testified for appellee.

Security was chartered in 1961 with a capital of $250,000. After six months operation it had assets of $645,000, savings of $465,000 and first mortgage loans of $423,000. At the end of 1972 Security had total assets of $14,173,298, savings of $13,269,691 and first mortgage loans of $11,847,387. Security's undivided profits in 1972 were $129,000 after taxes.

George Shaw, Jr., testified that he was a director of Security. He owns 10% of the stock in the association, and his family owns another 10%. He testified that when Security started Morrilton Federal Savings and Loan Association conducted the principal savings and loan activity in Conway. That of Morrilton Federal's 100% of the market he would now say that Security has 70% and Morrilton Federal has 30%.

Arch Ford, a director and founder of Security, estimated that in 1972 Morrilton Federal made loans of about $1,600,000 to $1,800,000 in Faulkner County while Security made loans of about $2,500,000.

Between the date of the application for appellee's charter and the hearing date, Morrilton Federal obtained a federal charter for a branch bank in Conway. Security elected not to protest the application of Morrilton Federal for the branch bank.

In the first appeal we remanded this case to the Board because the findings of fact did not comply with the Arkansas Administrative Procedure Act, Ark. Stat. Ann. § 5-710 (Supp. 1973). In so far as here pertinent, that statute provides:

> "(b) In every case of adjudication, a final decision or order shall be in writing or stated in the record. A final decision shall include findings of fact and conclusions of law, separately stated. Findings of fact, if set forth in statutory language, shall be accompanied by a concise and explicit statement of the underlying facts supporting the findings. . . . "

In stating our reasons for remanding to the Board, we pointed out that the record contained "not only what appears to be basically factual testimony but also what appear to be

conclusions on the part of witnesses." A clear example of what happens when the Board does not analyze the testimony in connection with its fact findings can be demonstrated by the conclusions set forth in subsections (o) and (r), *supra*.

In subsection (o) the Board states that "Security financed over 93% of the value of new residential construction in Conway, while savings and loan associations nationally financed 81% of the value of new residential construction." This information could only come from the testimony of Dr. Lynch, who relied upon Tables 13, 13A, 13B and 13C. (See appendix). Since Table 13 represents only the residential construction done inside the city and since Table 13A represents the total loans made by Security both inside the city of Conway and outside of the city in Faulkner County, the 93% figure can only be computed by presuming that the total loans by Security from 1968 through 1972 were made only inside the city of Conway. Needless to say, the statement in subsection (o) of the Board's order is so erroneous that its error was admitted during oral argument.

In subsection (r) the Board states that "interest rates charged by Security for home loans are competitive with other financial institutions which make home loans in Faulkner County." In this connection George Shaw, Jr., a director of Security, after stating that Security's rates were competitive, stated:

> "I'm basing my statement that our rate was competitive with Morrilton Federal and the associations in Little Rock on the results of our loans here."

However, John Shock, a certified public accountant, testified that the loan on his home was not with Security because he was told that Security's interest rate was "8%, take it or leave it." Shock financed his home with Morrilton Federal at a lower rate. The testimony of John Shock is corroborated by that of Security's manager, who admitted that in a new subdivision containing 50 or 60 homes, Security only made loans on 10 homes in that sub-division. He stated that one reason for Security's not having more loans in the subdivision was its interest rate.

Security suggests that the granting of Morrilton Federal's branch charter should be considered as, in effect, creating another savings institution. However, Security's failure to protest Morrilton Federal's branch charter while protesting appellee's application places Security in the position of admitting that there is room for additional competition in the area but leaves it in the position of selecting its own competition. That the actions of Security speak louder than words on that issue can be seen from the testimony of its manager, Mr. Sly, as follows:

> "Q. Do you not believe that this will add to the competitiveness of Morrilton Federal?
>
> A. I don't think there's any question about it. I don't think it will hurt our savings. And this is — I don't know how to word it exactly. I worry more about our lack of savings than I do our availability of loans. I don't think Morrilton will hurt us on savings as much as maybe the banks would or another local savings and loan. But I think loans, they're going to get those anyway. I don't think there's going to be that much difference in what they have been doing just by opening an office here."

Needless to say, the statements of the Board, when viewed from the whole record as distinguished from the conclusions of certain witnesses, are such that they show an abuse of discretion in the consideration of the evidence before the Board.

To take each subsection of the Board's order and demonstrate how the Board has abused its discretion, including such things as comparing the population of Faulkner County to a market area covering some five counties, including Pulaski County — which is like comparing apples to oranges — would make this opinion longer than appellant's brief, which consists of 280 pages. What we have set forth demonstrates that the Board abused its discretion and also violated its statutory duty to make "a concise and explicit statement of the underlying facts supporting the findings." For the violation of the Board's statutory duty, we remanded this case on the first appeal. However, to remand again would

but reward the Board and Security by giving them another two years in which to delay the appellee's application for a charter. As pointed out by Mr. Justice Frankfurter, in *Universal Camera Corp.* v. *National L. R. Bd.,* 340 U.S. 474, 71 S. Ct. 456, 95 L. Ed. 456 (1950), "Reviewing courts must be influenced by a feeling that they are not to abdicate the conventional judicial function."

When we consider that the statistics show a steady and vigorous industrial growth in Faulkner County; that Security, while obtaining loans in new subdivisions at a rate of only one out of every five or six new homes constructed, had been continuously loaned up for the last six or seven years; and that Morrilton Federal was doing less than one-half of the business done by Security, we cannot find enough substantial evidence in the record to support the Board's finding that there was not a public need for and that the business in the area was not sufficient to support the successful operation of appellee.

Security also contends that the Board erred in finding that the operation of a new savings and loan association will not unduly harm any other existing association or other financial institution. We find no merit to this contention. In fact, there does not seem to be any substantial evidence to the contrary. The evidence of Security shows that it has had a steady increase in income and that its present annual income, after taxes, exceeds 50% of the original investment. Then too, there is the admission that Security only obtained one loan for each five or six homes built in a new subdivision.

Affirmed.

FOGLEMAN, J., dissents.

# APPENDIX

Table 13

RESIDENTIAL CONSTRUCTION
CONWAY, ARKANSAS 1968-1972

| Year | Units Authorized: One family | Multi-family | Total value |
|---|---|---|---|
| 1968 | 64 units | 44 units | $1,168,000 |
| 1969 | 66 | 13 | 847,000 |
| 1970 | 73 | 6 | 1,204,000 |
| 1971 | 102 | 8 | 2,004,000 |
| 1972 | 107 | 60 | 3,215,000 |
| Total 1968-1972: | 412 units | 131 units | $8,438,000 |

Table 13A

LOANS MADE IN FAULKNER COUNTY
(PRIMARILY CONWAY)
BY SECURITY SAVINGS AND LOAN

| Year | Loans |
|---|---|
| 1968 | $1,448,750 |
| 1969 | 1,102,600 |
| 1970 | 762,800 |
| 1971 | 2,128,100 |
| 1972 | 2,446,425 |
| Total | $7,888,675 |

Table 13B

VALUE OF NEW RESIDENTIAL CONSTRUCTION
IN THE UNITED STATES
AMOUNTS FINANCED BY SAVINGS AND LOAN
ASSOCIATIONS

| Year | Value of new residential construction (billions) | Loans closed by savings & loan associations (billions) | Percent financed by savings & loan associations |
|---|---|---|---|
| 1968 | $30.6 | $21.3 | 69.6% |
| 1969 | 33.2 | 21.8 | 65.6 |
| 1970 | 31.9 | 21.4 | 67.0 |
| 1971 | 43.1 | 39.5 | 91.6 |
| 1972 | 53.9 | 51.4 | 95.3 |
| Total | $192.7 | 155.4 | 80.6% |

Table 13C

VALUE OF NEW RESIDENTIAL CONSTRUCTION,
CONWAY, ARKANSAS
(THOUSANDS)

| Year | Value | Loans closed by Security Savings & Loan | Loans closed by Security Savings & Loan as a percentage of new Conway residential constr. |
|---|---|---|---|
| 1968 | $1,168 | $1,449 | 124.0% |
| 1969 | 847 | 1,103 | 130.2 |
| 1970 | 1,204 | 763 | 63.3 |
| 1971 | 2,004 | 2,128 | 106.1 |
| 1972 | 3,215 | 2,446 | 76.0 |
| Total | $8,438 | $7,889 | 93.4% |

Table 15

COMPARISON OF LOCAL SAVINGS AND LOAN MORTGAGE
LENDING TO OUTSIDE SAVINGS AND LOANS LENDING IN
FAULKNER COUNTY, 1967-1971

| Year | Local Savings & Loan | | Outside Savings & Loans | | All Savings & Loans | | Local as Percent of |
|---|---|---|---|---|---|---|---|
| | Number | Value | Number | Value | Number | Value | All Savings & Loans |
| 1967 | 50 | $ 687,750 | 19 | $ 301,550 | 69 | $ 989,300 | 69.5 |
| 1968 | 100 | 1,518,814 | 25 | 1,023,750 | 125 | 2,542,564 | 59.7 |
| 1969 | 75 | 1,173,300 | 40 | 613,861 | 115 | 1,787,161 | 65.7 |
| 1970 | 58 | 812,730 | 21 | 1,994,899 | 79 | 2,807,629 | 28.9 |
| 1971* | 49 | 934,650 | 219 | 6,701,597 | 268 | 7,636,247 | 12.2 |

*Through October 31, 1971

JOHN A. FOGLEMAN, Justice, dissenting. I might feel that I am doing no more than again voicing my protest previously expressed in such cases as *Arkansas Savings & Loan Association Board* v. *Corning Savings & Loan Ass'n,* 253 Ark. 987, 490 S.W. 2d 460; *Arkansas Savings & Loan Association Board* v. *Grant County Savings & Loan Ass'n,* 256 Ark. 858, 510 S.W. 2d 863, were it not for the fact that the majority has ignored our own statement as to substantial evidence review in favor of that of another court which is in decided conflict with our own rule. In *First Federal Savings & Loan Ass'n* v. *Union Fidelity Savings & Loan Ass'n,* 257 Ark. 199, 515 S.W. 2d 75, decided November 4, 1974, and where we were cognizant of the Administrative Procedure Act, we said:

> The appellant recognizes our rule that in this type case we affirm the Board's action if there is any substantial evidence to support its findings. *Morrilton Fed. S&L* v. *Arkansas Valley S&L,* 243 Ark. 627, 420 S.W. 2d 923 (1967). Furthermore, in determining if substantial evidence exists, we consider only the appellee's testimony or that evidence adduced which is most favorable to the appellee. *Baldwin* v. *Wingfield,* 191 Ark. 129, 85 S.W. 2d 689 (1935); and *Washington Natl. Ins.* v. *Meeks,* 252 Ark. 1178, 482 S.W. 2d 618 (1972). In the case at bar, when we consider the evidence with all reasonable inferences deducible therefrom in the light most favorable to the appellees, as we do on appeal, we are firmly of the view there is substantial evidence to support the Board's findings.

Not only is that authority ignored, the majority has acted to the contrary. While I will continue my protest as long as I feel that the courts are invading the province of other agencies, I submit that if our own approach to determining substantial evidence is followed in this case, the result reached by the majority is not possible.

I think I should also point out that there is a very significant difference between the statute considered in *Universal Camera Corp.* v. *National L.R. Bd.,* 340 U.S. 474, 71 S. Ct. 456, 95 L. Ed. 456 (1950), relied upon by the majority, and our own act. This decision in itself, was a departure from previous practice of that court. This, however, was accomplish-

ed by legislative mandate which was based upon dissatisfaction with the substantial evidence rule as it previously existed. It required that substantial evidence determinations be made by consideration of the record as a whole in both the Administrative Procedure Act and the Taft-Hartley Act. The United States Supreme Court frankly stated that these acts were demonstrative of a legislative mood, which must be respected by the judiciary, when expressed in legislation. But the "new legislation" upon which the court acted, after it had found that the Administrative Procedure Act actually contained the clear expression of legislative intention in both acts, is far different from our own Administrative Procedure Act. The federal act contained and still contains the critical language which required the change of stance of the United States Supreme Court. As recited in 5 USCA § 706, it reads:

> In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

Significantly, this language is absent from our Administrative Procedure Act, adopted after the United States Supreme Court decision. Its omission should mean that the General Assembly was satisfied with substantial evidence determinations as made under the traditional rule we so recently expressed. It seems to me that this court is in poor position to take such a drastic step based upon the authority of a case which simply recognized the legislative prerogative, particularly when our General Assembly deliberately omitted the mandate upon which that authority is based. The result of such action was aptly expressed in the cited case thus:

> We conclude, therefore, that the Administrative Procedure Act and the Taft Hartley Act direct that courts must now assume more responsibility for the reasonableness and fairness of Labor Board decisions than some courts have shown in the past. Reviewing courts must be influenced by a feeling that they are not to abdicate the conventional judicial function. Congress has imposed on them responsibility for assuring that the Board keeps within reasonable grounds. That responsibility is not less real because it is limited to enforcing

the requirement that evidence appear substantial when viewed, on the record as a whole, by courts invested with the authority and enjoying the prestige of the Courts of Appeals.

I respectfully submit that the majority has arrived at its conclusion only by picking fragments of testimony that would have supported a result contrary to that of the Board. This approach is even more revolutionary than would be the case if it had simply weighed the evidence on trial de novo. Even though done unconsciously, this is not the purpose of judicial review of administrative action. The effect of utilizing this type of review is to substitute the judgment of the court, which is without expertise on the subject, for that of the Board, which presumably is possessed of expertise. This approach was disavowed in *Arkansas Savings & Loan Board* v. *Southerland,* 256 Ark. 445, 508 S.W. 2d 326, where we reversed the action of the circuit court, which had done exactly what this court is doing in this case in reversing the action of the Board.

I do not agree with appellants that the finding of the Savings & Loan Association Board that the operation of a new savings and loan association in Conway will not unduly harm any other financial institution is not supported by substantial evidence, whether the Board's definition of undue harm was correct or not. However, I am unable to fathom the reasoning process by which the majority concluded that the Board erroneously found that there was no public need for the proposed savings and loan association and that the volume of business in the area in which the association would conduct its business was not sufficient to indicate a successful operation. The Board made numerous specific findings by which its conclusion was reached. The weakening or elimination of one of them does not destroy the foundation of substantial evidence on which the conclusion was reached. I submit that the majority has done nothing more than attempt to demonstrate the weakness of one or more of those numerous findings, as if the Board's conclusions were a three-legged stool, which would fall if one leg was sawed from under it. If those particular findings are eliminated, there is still a foundation for the ultimate holding. For instance, short of trial de novo by the courts, no amount of picking at minute details in

expert and other testimony will destroy findings of underlying facts (a), (b), (c), (d), (h), (i), (l), (m), (n), (p), (q), (r), (s), (t), (u), (v) and (x), all of which are supported by substantial evidence. These seem to be actually supported by a clear preponderance of the evidence. Furthermore, there is no proper approach for our saying that (w), a matter clearly within the province of the Board, was incorrect, arbitrary, capricious or an abuse of the Board's discretion. They simply found Dr. Lynch's testimony plausible and that of Dr. Amis entitled to little weight.

Morrilton Federal Savings & Loan Association had been in business 20 years and had 100% of the home loan market when Security Savings & Loan Association was founded. In the succeeding years, the ratio had become 70% by Security and 30% by Morrilton, excluding some 25% to 30% handled by other lending institutions. Morrilton had obtained approval of a branch office in Conway. The convenience of having this office will necessarily make this association much more competitive both in making loans and obtaining savings deposits, as many witnesses testified. In addition, there was testimony that the Morrilton association had stepped up its activities in Faulkner County and that three employees were actively soliciting business there. Obviously, there was basis for belief that the new branch office presented some of the aspects of a new savings and loan association in Faulkner County. The failure of Security to carry through on its protest of the branch office was explained and is understandable. Morrilton was already in business in Faulkner County and was seeking to retrieve business it had lost to Security. Security would have been in poor position to continue its protest.

I submit that there was evidence other than that pointed out in the majoity opinion, that Security's loan interest rates were competitive, even though there was some controverting evidence. But it would serve no useful purpose to go through the record and point out factors that subject the analysis made of the evidence in the majority opinion to question. I would point out that no statistical yardstick has been established for making the determinations intrusted to the Board. I must point out some significant factors that furnish a basis for the Board's action that have been ignored.

First, it was clearly shown that population figures relative to Conway and Faulkner Counties furnished a poor standard of comparison because college students comprise about one third of the population of Conway. Second, the growth rates of the county have declined. Third, Pulaski County institutions compete with Faulkner County institutions for both loans and savings dollars, and will continue to do so. Fourth, the banks in Conway are highly competitive for residential loans, because they are helpful in assuring that the borrowers will otherwise be their customers, and some borrowers prefer a one to five year loan with periodic payments no higher than on a long term loan, but with a "balloon" note for the bulk of the loan. This permits the borrower to readily renegotiate interest rates from time to time and to make larger payments of principal whenever advantageous to him. Fifth, home building was on a definite decline due to shortage and high cost of building materials and builders and developers were finding building of houses for the market less profitable. Probably the largest developer was phasing out its business. Others were building fewer houses. A trend to apartment living was noticeable. Sixth, the Quitman Bank and FHA and VA make residential loans in the county. Seventh, the attractiveness of putting savings into a savings and loan association was diminished because of money market conditions, which made other investments more attractive.

Every one of these factors was important to the determination of both public need and probability of success. They themselves furnish a very substantial basis for, not only the opinion of Dr. Lynch, an eminently qualified economist, but also for the findings of the Board, which was in these respects exercising its expertise.

I must also disassociate myself from the insinuation that the Board is acting to delay appellee's application.

I would reverse the action of the circuit court.

STEPHENS & STEPHENS and
ROCKWOOD INSURANCE CO. *v.*
Emma LOGAN et al, Appellees And
Henry Lee DUNN Jr., Cross-Appellant

75-333 538 S.W. 2d 516

Opinion delivered June 28, 1976
[Rehearing denied July 19, 1976.]

*Shackleford, Shackleford & Phillips,* for appellants.

*William E. Johnson,* for appellee and cross-appellant; *Henry Lee Dunn, Arnold, Hamilton & Streetman,* for appellees Rochelle and Blankenship; *Switzer, Switzer & Draper,* for Linda Carol and Davis Christy.

FRANK HOLT, Justice. This is a workmen's compensation case. In October, 1973, Eddie Lee Jackson, Oscar Logan and Elbert Davis were passengers in a pickup truck owned and driven by their employer Rogers Blankenship. Rogers had picked the three men up at their homes and they were on their way to a pulpwood cutting work site when the pickup truck collided with a school bus causing the immediate death of all four men. Rogers had purchased his father's pulpwood business and was supplying pulpwood to Georgia-Pacific through the account of appellant Stephens and Stephens. It is undisputed that at the time of the accident appellant Stephens had workmen's compensation insurance with appellant Rockwood. Numerous claims by the alleged dependents of the decedents were filed with the Arkansas Workmen's Compensation Commission against appellants.[1]

[1]The Commission's award to the dependents of Eddie Lee Jackson is not a part of this appeal.

At the request of Rockwood, W.R. Blankenship, father of deceased Rogers Blankenship, and his workmen's compensation insurance carrier, Hartford Insurance Company, were made parties respondent to the claims.

The Commission found that the appellant Rockwood was estopped to deny that it extended workmen's compensation coverage to Rogers Blankenship; Rogers Blankenship was an uninsured subcontractor of Stephens; and all the decedents were statutory employees of Stephens. The Commission also found that Rochelle Blankenship is the widow of Rogers Blankenship and Christie Joy Blankenship is his daughter, who are entitled to benefits; Emma Logan and Christie Lee Davis are not widows within the meaning and definition of the Workmen's Compensation Act and, therefore, are not entitled to benefits; Elbert Davis is survived by his acknowledged, illegitimate daughter, Linda Carol Davis, who is entitled to benefits; and Henry Lee Dunn, Jr., is not the child of Elbert Davis. The Commission further found that none of the claims were barred by the coming and going rule and Hartford Insurance Company had no policy in effect with W.R. Blankenship that extended coverage to the families of any of the decedents.

The circuit court affirmed the Commission's findings except it reversed the Commission's findings that Emma Logan is not the widow of Oscar Logan and Christie Lee Davis is not the widow of Elbert Davis. From this order comes this appeal. Henry Lee Dunn, Jr., cross-appeals from the court's order affirming the Commission's finding that he is not the dependent child of Elbert Davis.

We first consider appellants' contention that there is no substantial evidence to support the Commission's finding that appellees' decedents were not employees of W.R. Blankenship. We do not agree. Appellants recognize that the finding of the Workmen's Compensation Commission will be affirmed if there is substantial evidence to support it. We further observe that in determining if there is substantial evidence to support the factfinder, we need only ascertain that evidence, although contradicted, which is most favorable to the appellee. *Thrifty Rent-A-Car* v. *Jeffrey,* 257 Ark. 904, 520 S.W. 2d 304 (1975). In the present case there is testimony by Rogers Blankenship's father and his wife that Rogers had

bought the pulpwood operation from his father in February, 1973, under a rental purchase agreement. By the terms of the agreement, he was paying his father $200 a week on the equipment until a total of $30,000 was paid. Rogers applied for and got a Federal Employer's Identification Number in July, 1973, and began making his own payroll. He hired, fired and supervised the employees in his pulpwood operation. He had employed all three of the individuals who were killed in the truck with him. Edgar Stephens, sole owner of appellant Stephens & Stephens, testified that Rogers Blankenship was one of his pulpwood subcontractors. Stephens stated he knew that Rogers had bought or was buying this equipment from his father because Rogers' mother had so told him (Stephens) about a month before the accident. There is ample substantial evidence that Rogers Blankenship was not his father's employee and at the time of the fatal accident was the employer of the three men who were killed in the truck with him.

Appellants assert that the Commission's finding that they are estopped to deny coverage is not supported by substantial evidence. Appellants argue it is not relevant that Rockwood had consistently paid claims on subcontractors knowing they were subcontractors. We cannot agree.

We deem it necessary to discuss some background facts concerning the pulpwood industry in Ashley County. For at least the last ten years, Georgia-Pacific has purchased pulpwood from only two sources in Ashley County, appellant Stephens and another individual, Marcel Baker. Each was assigned a zone of operation in the county and sometimes a quota. Their subcontractors (such as Blankenship) would cut and deliver pulpwood directly to the Georgia-Pacific mill; however, payment was made either to appellant Stephens or Baker, as the case may be. When Georgia-Pacific paid either appellant Stephens or Baker, it withheld premiums for workmen's compensation insurance from the remuneration due the dealers based on the cords of wood delivered by the subcontractors. Georgia-Pacific would then pay these premiums directly to the Guy Nolley Agency, agent for appellant Rockwood. The dealer would then deduct the premium when he paid the subcontractor. It was estimated that the annual premium for workmen's compensation coverage for forty-two contractors-producers was $215,000.

W. R. Blankenship, Rogers' father, testified that in 1970 he made a verbal contract with appellant Stephens to cut and haul pulpwood to Georgia-Pacific through the Stephens' account. At the time of the initial agreement, Stephens advised him that he would pay him once a week for the wood produced and that workmen's compensation insurance would be deducted from the pay he received. Stephens told him that anyone who worked in connection with the cutting, hauling or loading of the pulpwood was covered under his (Stephens') policy of workmen's compensation insurance. When Blankenship sold the equipment to his son Rogers, he told his son that workmen's compensation insurance premiums were being withheld and Rogers and his men would be covered under Stephens' workmen's compensation policy. Stephens corroborated this understanding by testifying that he told his subcontractors he considered all of them and their employees as his employees for purposes of workmen's compensation coverage. He never made any distinction between the subcontractors and their employees when he reported any injuries to appellant Rockwood. Stephens himself had had no employees since 1964. In other words he carried workmen's compensation with appellant Rockwood for the benefit of his subcontractors and their employees. He considered Rogers Blankenship one of his subcontractors. Rogers' wife testified that when one of Rogers' men was injured, he would be referred to Edgar Stephens who handled the claim for them.

Harry Whatley, the adjuster for Rockwood in southern Arkansas, testified that he did all of the adjusting for Rockwood on the policies of insurance written for Stephens during the past ten to fifteen years. He knew as early as 1968 that Stephens was producing pulpwood exclusively through subcontractors. He said, as far as he was concerned, it didn't make one bit of difference whether the man that got hurt was a subcontractor or a producer or whether he was an employee of a subcontractor, as long as he was hurt while he was working and producing wood for Stephens. When various claim forms were sent to Whatley's office, he would correct them if necessary to show the name of Stephens & Stephens as the employer and listed the subcontractor as foreman.

Dale Schrock, claims supervisor for Rockwood, testified that Rockwood paid claims whether they were subcontractors or employees of subcontractors. As an examiner or

claims supervisor, he didn't make any distinction in their status in determining whether or not the claimant was covered. Rockwood had not denied a single claim filed by Stephens until this accident resulting in these death claims. It is undisputed that appellant Rockwood issued workmen's compensation policies to Stephens during the past ten years, accepted premiums thereon, and has consistently paid numerous claims on Stephens' subcontractors and their employees during this time without making any distinction between them. Some of these claims involved three of the four employees who were killed. There is evidence that the subcontractors and their employees were led to believe they had workmen's compensation coverage by what they were told, by the premiums deducted and paid.

The evidence is amply substantial to support the Commission's finding that appellants were estopped to deny coverage. See *Phoenix of Hartford* v. *Coney*, 249 Ark. 447, 459 S.W. 2d 558 (1970); *Hale* v. *Mansfield Lbr. Co.*, 237 Ark. 854, 376 S.W. 2d 670 (1964); and *Stillman* v. *Jim Walter Corp.* 236 Ark. 808, 368 S.W. 2d 270 (1963). Consequently, here, we find no merit in appellants' assertion that the Commission's finding that appellees' decedents were statutory employees of Stephens & Stephens is erroneous and unsupported by substantial evidence.

Neither can we agree with appellants' contention that the evidence is insubstantial to support the Commission's finding that the claims are not barred under the going and coming rule. Appellants argue that there is no evidence at all to prove Rogers Blankenship's death arose out of and in the course of his employment. Appellant argues further that the only possible way the claimant could escape the operation of the going and coming rule would be to invoke the dual purpose doctrine; it has not been proven that a business purpose would have been made had not the personal purpose, that is going to work, been accomplished. Also the record is totally bereft of any proof that Rogers Blankenship was transporting anything to the woods relating to the cutting operation other than giving his "own" employees a ride.

The testimony is undisputed that it was Rogers Blankenship's regular and customary practice to pick up part of his crew each morning and transport them to the work site

and home again. On the morning of the accident, Rogers had filled his truck's gas tank, picked up his men and was taking them out to the job site. He paid another employee an extra hourly wage to transport the rest of his crew to the job site and return them home. Each day Rogers carried ice for the water kegs, as well as extra gas and oil necessary for the equipment, which he transported to the job site. W. R. Blankenship testified that it was absolutely necessary for someone to buy the gas and oil, pick up the ice, water and other supplies which were needed for the day's operation. If Rogers did not do it, someone else would have to. The evidence is amply substantial to support the Commission's finding that the claims were not barred under the going and coming rule. See Larson, Workmen's Compensation, § 18.10 *et. seq.* (1972); *Blankinship Logging Co.* v. *Brown,* 212 Ark. 871, 208 S.W. 2d 778 (1948); and *Hunter* v. *Summerville,* 205 Ark. 463, 169 S.W. 2d 579 (1943).

Appellants assert, however, there is substantial evidence in support of the Commission's finding that appellee Christie Lee Davis, was not entitled to widow's benefits and, therefore, the trial court erred in reversing the Commission. We must agree. The Workmen's Compensation Act, Ark. Stat. Ann. § 81-1302 (1) (Repl. 1960), defines a widow as follows:

> 'Widow' shall include only the decedent's legal wife, living with or dependent for support upon him at the time of his death.

Appellants argue that in order to qualify for widow's benefits two separate elements must be proved: (1) that the claimant was the decedent's legal wife and (2) that she was either living with or dependent for support upon him at the time of his death. Appellant asserts that claimant, Christie Lee Davis, does not meet the statutory requirements that she was either living with or dependent upon the decedent at the time of his death and, therefore, has only met one of the criteria to be a widow entitled to benefits. Appellee Davis responds that Arkansas is one of those states which conclusively presume dependency based on the mere existence of the legal relationship, citing *Chicago Mill & Lumber Co.* v. *Smith,* 228 Ark. 876, 310 S.W. 2d 803 (1958). We must agree with appellants' position since we hold, as did the Commission, that *Chicago Mill* is not controlling in the case at bar. There

we observed "here, the husband and father was completely void of any sense of his family obligation." In the case at bar there is no evidence that Elbert Davis was insensitive to his family obligations. Christie testified that she had "completely separated" from Elbert in 1967 or 1968 and had not lived with him since that time. Since then she admits having two illegitimate children who were fathered by her "boyfriend," Henry Lee Dunn. She is gainfully employed and Henry contributes to her support. According to her she refused Elbert's support. She admitted that "[H]e has offered me money at times, but I would not accept it from him." Clearly, the facts of this case are distinguishable from *Chicago Mill*. There is ample substantial evidence to support the Commission's finding that Christie Lee Davis is not the widow of Elbert Davis within the meaning and definition of the Workmen's Compensation Act and, therefore, is not entitled to benefits.

Henry Lee Dunn, Jr., contends on cross-appeal that there is no substantial evidence to support the Commission's finding that he is not the son of Elbert Davis. Cross-appellant asserts that the presumption of legitimacy is so strong that it can only be overcome by "the clearest evidence" of either impotency or non-access. *Morrison, Admx.* v. *Nicks,* 211 Ark. 261, 200 S.W. 2d 100 (1947). Appellants recognize the strong presumption of legitimacy of a child during wedlock. However, they argue that the presumption has been overcome and, therefore, the finding by the Commission that Henry Lee Dunn, Jr., is not the son of Elbert Davis is supported by substantial evidence. We must agree with the appellants.

Christie Lee Davis, cross-appellant's mother, and Elbert Davis, decedent, were married in 1959. They had no children when they separated approximately nine years later. Elbert was killed in 1973 or about four years following their separation. Christie Lee testified that she had access to or sexual relations with Elbert, the decedent, up until she left him in November, 1968, which was about seven and one-half months before Henry, Jr., was born in July, 1969. However, this contradicts her earlier signed statement in which she said she separated from Elbert in late 1967 or early 1968. According to her testimony at the hearing, there is a "possible chance" that Elbert is the father. About a month following the last asserted separation, she admittedly began having sexual relations with Henry Lee Dunn. She admitted in her signed

statement that Elbert Davis was not the father of her son, Henry Lee Dunn, Jr. She testified that she had told the individual who took her statement that Henry Lee Dunn is the boy's father and she had told Elbert the boy was not his. Henry Lee Dunn, himself, signed a statement at the hospital when the child was born acknowledging the child was his. She also admitted that she told the nurse attending her at the hospital that Henry Lee Dunn was the father of the child. The birth certificate, signed by her doctor, reflects the child's name as Henry Lee Dunn. She, further, admitted that Henry Lee, the father, was living with her when the child was born and subsequently she had two other children by him. She agrees they are Henry Lee's children and she claims no benefits for them. Henry Lee supports all three of the children.

When we review that evidence which is most favorable to the appellee, as we must do on appeal, we hold the Commission's finding, that Henry Lee Dunn, Jr., is not the son of the decedent Elbert Davis, is supported by the clearest evidence of a substantial nature. Cf. *Richardson* v. *Richardson,* 252 Ark. 244, 478 S.W. 2d 423 (1972).

Appellants also contend that the Commission's finding that Emma Logan was not entitled to widow's benefits is supported by substantial evidence and, therefore, the court erred in overruling the Commission. The Commission found that they could assume that Emma Logan was the legal wife of decedent but that she was not living with nor dependent upon the decedent at the time of his death. As indicated, the Workmen's Compensation Act, Ark. Stat. Ann. § 31-1302 (1) (Repl. 1960), defines widow as:

> 'Widow' shall include only the decedent's legal wife, living with or dependent for support upon him at the time of his death.

In the present case appellee Emma testified that she married Oscar in 1947. Two years later they separated and remained separated for about twenty-five years. During this interval she was married to two other men. She had two children by one of these marriages. She never divorced Oscar nor had she ever received any papers stating that he had sued her for divorce. During the last three years preceding Oscar's accidental death, she lived "off and on" with him on weekends

at his residence or he would visit with her at her home in a nearby town. He contributed some to her support and without her knowledge he had included her in his 1970 and 1972 income tax returns.

The Commission found that *Chicago Mill & Lumber Co.* v. *Smith, supra,* is not applicable and we agree. As indicated, in *Chicago Mill* we observed the husband was insensitive to his marital obligations. Certainly, we do not believe that the legislature intended that a widow can claim benefits as a dependent when, as here, she abandons a marriage for twenty-five years during which time she marries two other men and has children by one of those marriages. This is true even though she testified that during the past three years she lived intermittently on weekends at his or her residence and he contributed some to her support. Suffice it to say that there is substantial evidence to uphold the Commission's finding that she was not the widow of Oscar Logan within the meaning and definition of the Workmen's Compensation Act.

Affirmed in part and reversed in part on direct appeal.

Affirmed on cross-appeal.

SMITH and JONES, JJ., concur.

FOGLEMAN, J., dissents.

J. FRED JONES, Justice. I agree with the majority opinion in this case but for additional reasons than those expressed by the majority. I consider dependency more important than genealogy when considering the claims of children in compensation death cases.

It is my view that in compensation death cases, no one except *dependents* of a deceased employee is entitled to compensation benefits under the Act. Ark. Stat. Ann. § 81-1315 (Repl. 1960). Subsection (c) of § 81-1315 reads as follows:

> Subject to the limitations as set out in section 10 [§ 81-1310] of this act, compensation for the death of an employee shall be paid to those persons who are wholly dependent upon him in the following percentage of the

average weekly wage of the employee, and in the following order of preference.

First. To the widow if there is no child, thirty-five (35) per centum, and such compensation shall be paid until her death or remarriage.
To the widower if there is no child, thirty-five (35) per centum, and such compensation shall be paid during the continuance of his incapacity or until remarriage.

Second. To the widow or widower if there is a child, the compensation payable under the First above, and fifteen (15) per centum on account of each child.

Third. To one child, if there is no widow or widower, fifty (50) per centum. If more than one child, and there is no widow or widower, fifteen (15) per centum for each child, and in addition thereto, thirty-five (35) per centum to the children as a class, to be divided equally among them.

Fourth. To the parents, twenty-five (25) per centum each.

Fifth. To brothers, sisters, grandchildren and grandparents, fifteen (15) per centum each.

Section 81-1315 (i) provides for partial dependents as follows:

(1) If the employee leave dependents who are only partially dependent upon his earnings for support at the time of injury, the compensation payable for such partial dependency shall be in the proportion that the partial dependency bears to total dependency.

(2) In any claim for partial dependency where the average weekly contributions for support were not such as to entitle all dependents to compensation in the aggregate sum of seven dollars [$7.00] per week, such dependents shall receive compensation for a period not to exceed 450 weeks, in an amount not to exceed the amount of average weekly contributions of the deceased

employee for the support of such dependents.

Of course, a widow legally married to, and living with, the decedent at the time of his death is made wholly dependent under § 81-1315 (c) as a matter of law by definition under § 81-1302 (4) (1) but not so with the children.

It is my view that a child must be wholly or partially dependent under § 81-1315 (c) or (i), *supra,* and, if it is dependent upon the deceased, it makes no difference under § 81-1302 (j) whether it is a natural child, a posthumous child, a preinjury adopted child, a step-child, an acknowledged illegitimate child of the decedent or spouse of the decedent, or a foster child. Conversely, if an employee decedent under the Act should leave surviving him a child or children in each of the above categories, none of them would be entitled to compensation benefits under the Act unless wholly or partially dependent upon the decedent at the time of his injury (§ 81-1315 [h]). *Proof* of dependency and the *burden of proof* are entirely different matters.

I am not unmindful of the language employed concerning the dependent children in *Chicago Mill & Lbr. Co.* v. *Smith,* 228 Ark. 876, 310 S.W. 2d 803, and the child in *Holland Const. Co.* v. *Sullivan,* 220 Ark. 895, 251 S.W. 2d 120. Certainly I would agree that a child may be wholly dependent upon its parent for support whether it is actually receiving support or not, as was the situation in *Chicago Mill, supra,* as I interpret our decision in that case. It is my view that actual contribution of support money is, at the most, only some evidence of dependency. I would indulge a rebuttable *presumption* of total dependency of a natural child of a deceased employee when the child is under 18 years of age, but that is as far as I could go under the law, as I interpret it.

I have no quarrel with the *Holland* decision under the law as it was when that case was decided. The 1939 Compensation Act, Act 319 of 1939, applied to *Holland,* and in the 1939 Act § 15 (c) simply provided as follows:

> (c) Subject to the limits prescribed in Section 15 (b) the following percentage of the average weekly wages of the deceased employee shall be paid as compensation for

death to the persons entitled thereto under this Act, and the following order of preference:

(1) To the widow if there is no child, thirty-five (35) per centum, and such compensation shall be paid until her death or re-marriage;

(2) To the widower if there is no child, thirty-five (35) per centum, and such compensation shall be paid during the continuance of dependency or until re-marriage;

(3) To the widow or widower if there is a child, the compensation payable under paragraph (1) or (2) as the case may be, and, in addition thereto, ten (10) per centum on account of each such child; in case of the death or re-marriage of such widow or widower, fifteen (15) per centum for each child;

(4) To the children, if there is no widow or widower, fifteen (15) per centum for each child, and in addition thereto, thirty-five (35) per centum to be equally divided between said children, and if there be only one child, he or she shall receive the entire fifteen (15) per centum, plus the additional thirty-five (35) per centum.

(5) To the parents, twenty-five (25) per centum to each, and such compensation shall be paid during the continuance of dependency;

(6) To brothers, sisters and grandchildren, fifteen (15) per centum for each brother, sister, or grandchild.

In § 2 (j) of the 1939 Act "child" was defined as follows:

"Child" includes a posthumous child, a child legally adopted prior to the injury of the employee, and a stepchild or acknowledged illegitimate child dependent upon the deceased, but shall not include married children unless wholly dependent upon deceased. "Grandchild" means a child as above defined of a child as above defined. "Brother" and "Sister" includes stepbrothers and step-sisters, half brothers and half sisters, and brothers and sisters by adoption, but shall not in-

> clude married brothers nor married sisters unless wholly dependent upon the deceased. "Child," "grandchild," "brother," and "sister" shall include only persons who at the time of the death of the deceased are under the age of eighteen (18) years.

These sections of the 1939 Act were all changed by the adoption of Initiated Measure No. 4 in 1948, Ark. Stat. Ann. §§ 81-1301 — 81-1349. Section 81-1315 (c) now appears as above set out and "child" is defined in § 81-1302 (j) as follows:

> (j) "Child" means a natural child, a posthumous child, a child legally adopted prior to injury of the employee, a step-child, an acknowledged illegitimate child of the deceased or spouse of the deceased, and a foster child. "Child" shall not include married children, unless wholly dependent upon the deceased.

Thus, married children were excluded from the definition of "child" under the 1948 Act but were placed back within the statutory definition of "child" if still totally dependent upon the decedent after marriage. The same applies to children above 18 years of age under (j) (3) if they are mentally or physically incapacitated.

Partial dependency as provided in § 81-1315 (i) (1) and (2) was not mentioned in the 1939 Act, and partial dependency is not involved in this case, but certainly there is no evidence in the record that Henry Lee Dunn, Jr. was dependent to any extent on the decedent at the time of his injury which resulted in death. I do not say that the *absence* of affirmative evidence of dependency standing alone should defeat Henry Lee's claim; I do say, however, that, in my opinion, the affirmative evidence that Henry Lee, Jr. was *not* dependent upon the decedent, with no evidence to the contrary, was alone sufficient to defeat his claim. Consequently, it is my view that whether Henry Lee, Jr. was illegitimate as a matter of proof or legitimate as a matter of unrebutted presumption, it makes no difference in this case. Regardless of who his father was, he was not a dependent of the decedent under the evidence in the record as I read it and he was not entitled to compensation as a dependent child under the com-

pensation law as I interpret it.

I cannot escape the feeling that there must have been some reason for, and purpose in, adding the total and partial dependency provisions in the 1948 Act when it did not exist in the 1939 Act; and, if the *Chicago Mill* and *Holland* decisions are interpreted to only require proof of age of the children and their relationship to the decedent to the exclusion of proffered evidence of nondependency, I would overrule those decisions to that extent. It must be remembered that parents may be dependents of employed children and entitled to compensation benefits under the Act as well as the other way around. If a 17 year old child is a dependent within the meaning of the Act simply by virtue of the relationship to its father, what about a father's claim for death benefits when wholly or partially dependent on the 17 year old child?

GEORGE ROSE SMITH, J., joins in this concurrence.

JOHN A. FOGLEMAN, Justice, dissenting. I concur in all of the majority opinion except that part relating to the cross-appeal on Henry Lee Dunn, Jr. I must take exception to that portion and to the approach taken in the concurring opinion. First, I should say that even though I would probably agree philosophically with the approach taken by my brother Jones in his concurring opinion, it seems to me to have been foreclosed by the interpretation given Ark. Stat. Ann. §§ 81-1302 (j), 81-1315 (c) and 81-1315 (d) (Repl. 1960) in *Chicago Mill & Lumber Co.* v. *Smith,* 228 Ark. 876, 310 S.W. 2d 803, where we said:

> *** This section of the Act [81-1302 (j)] is fairly open to the construction that unmarried children are entitled to compensation although the deceased parent was not supporting them at the time of his death, but married children are not entitled to compensation unless they were wholly dependent on deceased.
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> *****
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> It would be possible to construe this provision of the Act [81-1315 (c)] as depriving a widow or child of any compensation when, as here, the husband and

> father was completely void of any sense of his family obligation. But it is a rule that remedial legislation shall be liberally construed. We believe the Legislature used the term "wholly dependent" in the sense of applying to those ordinarily recognized in law as dependents, and this would certainly include wife and children. ***
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> In *Holland Construction Co.* v. *Sullivan,* 220 Ark. 895, 251 S.W. 2d 120, in construing the 1940 Workmen's Compensation Law it was held that the child of a deceased natural parent was entitled to compensation, although he had not been dependent on the natural parent — in fact, the child had been adopted by another person, who was supporting him. Appellant contends that the 1948 Workmen's Compensation Act amended the 1940 Act to the extent that the child of a deceased parent cannot recover when the parent at the time of his death was not contributing to the support of the child. True, the Act could be so construed, but such a construction would leave unsolved the meaning of Ark. Stat. § 81-1302 (j), which says that a married child does not come within the definition of "child" unless wholly dependent. Nor do we think that § 81-1315 (c), dealing with partial dependency, precludes recovery by the wife and children who are dependents within the usual meaning of the word. There is no contention in this case that the mother or children are capable of taking care of themselves. For all the record shows, they perhaps are the objects of charity.

Then we followed *Holland Construction Co.* v. *Sullivan,* 220 Ark. 895, 251 S.W. 2d 120, where we held that a child was a dependent of his natural father, even though he had been adopted by another, regardless of the fact that there was no *actual* dependency of the child upon his natural father, before the change in statute in 1949 mandated that result. In that case, we said:

> Thus, there is entirely absent from the 1939 Workmen's Compensation Law, any statement either (a) that the act of adoption takes a child out of the terminology of "child" of the natural father, or (b) that actual dependency must be proved as regards a natural child

> under 18 years of age. In fact, the Act looks entirely to the opposite conclusion: because in Sec. 81-1302 (j) [Ark. Stat. Ann. 1947], a stepchild or an acknowledged illegitimate child must be shown to be dependent on the deceased; and a married child is not included unless wholly dependent on the deceased. The requirement of *proof of dependency* for stepchildren, acknowledged illegitimate children and married children, indicates rather clearly that dependency does not have to be proved as regards a natural child under 18 years of age. Likewise, under § 81-1315 (d) [Ark. Stat. Ann. 1947], as above quoted, it is stated that the dependence of a child will terminate at 18 except for a physically or mentally incapacitated child. The statement—that a physically or mentally incapacitated child may be found to be dependent after 18—indicates that no proof of dependence need be made by any natural child who is under 18 years of age.

Changes in the law since this case was decided have not made its precepts less applicable. There is no longer a requirement that a stepchild or an acknowledged illegitimate child be wholly dependent upon the deceased, as there was in the 1939 law. Cf. Ark. Stat. Ann. § 81-1302 (j) (1947) and Ark. Stat. Ann. § 81-1302 (j) (Repl. 1960). Children over 18 years of age are still not dependents unless physically or mentally handicapped. See Ark. Stat. Ann. §§ 81-1302 (j) (3) and 81-1315 (d) (Repl. 1960). Furthermore, in *Sullivan,* we cited with approval a Delaware holding, which in turn quoted from a Pennsylvania decision, that a legitimate child is entitled to workmen's compensation benefits from the employer of the child's deceased parent, irrespective of *actual* dependency. So "genealogy" is, after all, more important than dependency as our act has been written and interpreted.

While the majority gives lip service to the presumption of legitimacy, I find no precedent for the casual treatment given it in finding somehow that there was support for the commission's findings "by the *clearest* evidence of a substantial nature." [Emphasis mine.]

In this case the commission failed to properly apply the presumption that has been said to be one of the strongest

known to the law, i.e., that a child born during wedlock is the child of the husband. *Thomas* v. *Barnett,* 228 Ark. 658, 310 S.W. 2d 248. The general rules as to burden of proof in common law actions for personal injuries and in civil actions generally, ordinarily apply to workmen's compensation proceedings. *Bradshaw* v. *Claridy,* 213 Tenn. 297, 375 S.W. 2d 852 (1964). See also, *Pannell* v. *State Compensation Commissioner,* 126 W. Va. 725, 30 S.E. 2d 129 (1944). The presumptions applied in common law and civil cases are also commonly applied in workmen's compensation cases. See, e.g., *Brynildsen* v. *Mt. Vernon Novelty Curtain Co.,* 239 App. Div. 566, 268 N.Y.S. 600 (1933); *RCS Lumber Co.* v. *Sanchez,* 136 Colo. 351, 316 P. 2d 1045 (1957). The general principle as to presumptions as to legitimacy and the burden of proof to rebut it which is applicable in other cases is likewise applicable in workmen's compensation cases. *Hooley* v. *Hooley,* 141 Ind. App. 101, 226 N.E. 2d 344 (1967); 2 Workmen's Compensation Law, Larson, 11-37, § 62.22. Evidence to rebut the presumption of legitimacy must be clear, cogent and convincing. *Hooley* v. *Hooley,* supra; *Ash* v. *Modern Sand & Gravel Co.,* 234 Mo. App. 1195, 122 S.W. 2d 45 (1938).

By application of such presumptions, it has been held in workmen's compensation cases that the presumption of legitimacy may be overcome by evidence that the husband could not have had access to the mother when, in the course of nature, the child must have been conceived. *Hooley* v. *Hooley,* supra; *Ash* v. *Modern Sand & Gravel Co.,* supra; *Smith* v. *National Tank Co.,* 350 P. 2d 539 (Wyo., 1960). Even in compensation cases, in order to overcome the presumption of legitimacy, it has been held, on the basis of rules in other civil cases, that it must be shown conclusively that the lawful husband could not have had intercourse with the wife at the beginning of any reasonable period of gestation. *Ash* v. *Modern Sand & Gravel Co.,* supra.

We have said that the presumption may be overcome by sufficient evidence of impotency or entire absence of the husband at the time when the child, in the course of nature, could have been begotten. *Earp* v. *Earp,* 250 Ark. 107, 464 S.W. 2d 70. The presumption may be overcome only by the *clearest* evidence that the husband was impotent or without access to the mother. *Thomas* v. *Barnett,* supra. We have said

that it must be plainly proved that it was impossible that the husband could have been the father. *Jacobs* v. *Jacobs,* 146 Ark. 45, 225 S.W. 22. This may be done by blood tests or by showing that the husband could not have had access to the mother. *Richardson* v. *Richardson,* 252 Ark. 244, 478 S.W. 2d 423; *Jacobs* v. *Jacobs,* supra.

This degree of proof was not even remotely approached in this case. There was no evidence which could possibly have afforded a basis for overcoming the presumption other than the testimony of Christie Lee Davis. She testified that she and Elbert Davis lived in Crossett until the last of November, 1968, having then been separated a week or two. She said she would come and go and that he would come to Hamburg where she was and go back to Crossett and that the final separation was in the last part of November. Both continued to live in Ashley County until his death. She said that he continued to "come around her" until his death. Henry Lee Dunn was born on July 14, 1969, six to seven months after the separation. She started seeing Henry Lee Dunn, Sr. in December, 1968. She said that only Elbert Davis could be this child's father, but on another occasion said that he "could have" been. She said she had sexual relations with Davis right up to the time of the separation, and had not during the preceding six months had sexual relations with anyone else. The physician's records showed that this child's birth was normal.

We have said that when the husband resided within thirty miles of the place the wife lived at all times within the period in which the child could have been begotten, it is a matter of common knowledge that access of the husband is not impossible. *Scott* v. *State,* 173 Ark. 625, 292 S.W. 979.

It is true that the credibility of this witness was suspect because of the fact that she had made conflicting and contradictory statements, but still her testimony is the only evidence that could have been the basis for rebuttal of the strong legal presumption. Discounting her testimony because of her obvious interest would strengthen, rather than weaken, the presumption.

Whatever adults may have said about the paternity of Henry Lee Dunn, Jr., he has never been consulted or given an

opportunity to speak. Because he cannot, the strongest presumption known to the law was afforded for the protection of those like him, and no one else. It seems capricious to sweep it away on the unsatisfactory evidence presented. A liberal interpretation and application of the Workmen's Compensation Act calls for better treatment of this helpless minor. I would reverse the judgment of the circuit court and the action of the commission on the claim of Henry Lee Dunn, Jr.

Carolyn Dianne ZACHRY *v.* STATE of Arkansas

CR 75-131 538 S.W. 2d 25

Opinion delivered July 6, 1976

*Raffaelli & Hawkins,* by: *Louis J. Raffaelli, Ted Capeheart* and *Tackett, Moore, Dowd & Harrelson,* for appellant.

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

CARLETON HARRIS, Chief Justice. Appellant, Carolyn Dianne Zachry, was charged with capital felony murder in the robbery-slaying of her husband, Curtis Eugene Zachry. She was found guilty by a jury, which sentenced her to life imprisonment without parole. From the judgment of conviction so entered, Mrs. Zachry brings this appeal, arguing seven points for reversal.

Appellant first contends that "there was insufficient evidence upon which to base a jury verdict and court judgment finding appellant guilty of capital felony murder."

Appellant's husband, Curtis Eugene Zachry, was found dead from gunshot wounds on the morning of January 9, 1975; he had also been robbed. As a result of subsequent police investigations, appellant was taken into custody at the Texarkana police station on January 21, 1975, and she gave a statement, written down by state policeman James Lester, that was introduced into evidence at her trial. In this statement, appellant first mentioned indignities that she had suffered during the last few years of her marriage, referring to being forced to engage in oral sex, constant beatings, and the fact that Zachry would not allow her to visit her parents. Zachry, however, was unwilling to let her obtain a divorce, and in October, 1974, she contacted Monroe Lindsey by telephone, telling him that she wanted to "get rid" of her husband and inquiring what it would cost. According to appellant, he answered that he would have it done for $5,000 and she met him about a week later and gave him this amount in cash. Subsequently, some few weeks later, when nothing had been done, she again reached Lindsey and he told her that the person that he had contacted had "skipped" and that she would have to come up with some more money. Mrs. Zachry said she was contacted by a man named Lumpkin and that this man told her he would kill her husband for $5,000 (Lumpkin said that Lindsey had talked with him), but that she told him to "forget about it." According to appellant, in the early part of December, 1974, she was contacted at her home by Charlie Bean, who came to her home alone. She said that Bean told her that he would take the con-

tract for $5,000 and would not have to be paid until after her husband had been killed. Appellant stated that she replied that she needed a few days to think about it, and about a week later offered to pay him $200.00 to "forget it," but that Bean insisted on going through with the job. She said that he came to her house, got the $200.00, another heavyset man with gray in his hair, being with him; that Bean told her that she could not "get out of the deal" and that the killing would be accomplished on Christmas Eve; however, she stated that she talked him out of killing her husband on Christmas Eve.

Appellant said that on January 8, 1975, around 7:30 P.M., the telephone rang and a man asked for "Eugene," her husband. She called the latter to the telephone and heard him advise the party on the other end of the line that he would see him after he was dressed. Thereafter, Bean (she did not see him but recognized his voice) came to the house and her husband advised that he was going with this man to buy some land and kissed her. "Eugene left with the man and I knew what was fixing to happen."

After about three hours, she called Herb McCandless, her husband's business partner, and told him that Eugene had not returned and that she was worried. McCandless called the police and the next morning she was advised by the Chief of Police that her husband had been killed. Mrs. Zachry stated that she received a call from Charlie Bean during the afternoon, was told that if she opened her mouth, "she would get it too" and Bean said that he needed $1,000. She told him that she would leave this amount in her car at Chez Sue Beauty Shop and that she did leave this amount in an envelope in an automobile; when she returned to her car, the money was gone and she had not since been in contact with Charlie Bean.[1]

[1]In a second confession, written by Mrs. Zachry on February 1 and 2, she went into much greater detail (26 pages), and with reference to the $1,000.00, she stated that she had given it to her mother to give to Bean. She also stated in this second confession, and contended on trial, that her mother, Mrs. Bessie Tolleson, had instigated the plan to murder Zachry, and that her own subsequent statements were attempts to "cover" for her mother. However, she could not give any reason why her mother would have wanted Zachry killed. In addition, she said in both the second statement, and at the trial, that Bean intimidated her into silence by threatening to kill her and the children.

At the trial, the state also produced witnesses whose testimony confirmed appellant's statement about payments to Lindsey and Bean. Bill Brown, President of the Bank of Ashdown, testified that appellant borrowed $2,000.00 from his bank on October 29, 1974, taking the proceeds in cash. Ms. Mary Lou Moore, an employee of First Federal Savings and Loan Association in Ashdown, testified that on the same date appellant made a withdrawal of $3,244.55, taking the proceeds in the form of two checks only after being informed that she could not have them in cash. Likewise, the $200.00 check, endorsed and apparently cashed by Charles Bean's wife, Frances Bean, was introduced; an officer of the Ashdown bank testified that after it had been cashed appellant came to the bank and picked it up personally, rather than letting it clear through normal channels.

William ("Big Bill") Lumpkin, Sr., also testified for the state. Lumpkin said that appellant asked him, in December 1974, to kill her husband or to find someone who would do so, offering him a total of $5,000.00. Lumpkin stated that he told appellant "I would see if I could find someone." Lumpkin also testified that appellant told him that she had paid Monroe Lindsey $5,000.00.

The state's chief witness was Charles Watson Bean, the admitted killer of appellant's husband. Bean was arrested on January 21, 1975, and gave his statement to police that day. At the trial, Bean testified that he met appellant in December 1974, near her house, and that appellant told him that she had paid Lindsey $5,000.00 to "do it," but that Lindsey was not going to "do it." Bean stated that he "told her that I would see if I could get it done for her," and that she told him "to proceed to do it immediately." Bean "was to be paid $5,000.00." He said that he and appellant had other meetings to discuss the planned killing, and that appellant even offered to let him kill Zachry in their home, showing Bean through the house, but Bean said that he told her "there was no way that it could happen with children there or in the house. And she said she would try to make arrangements to have the children at her mother's house, and at this time, it was beginning to be urgent — just wanted it to happen that night." According to Bean, "Dianne kept asking that it just happen as soon as possible."

Bean testified that he requested Jimmy Lee Dyas to help him kill Zachry, but that when appellant could not pay the $5,000.00 before the murder occurred, he and Dyas agreed to go ahead and carry out the "contract" for $10,000.00 to be paid after Zachry's death. When Bean met again with appellant, he "asked her that if she would give me $100.00, then that would more or less close the deal and would involve her as well as me in case she decided to put me on the spot. After she had paid $100.00, she would have been as involved as much as I would. She didn't have a hundred dollars on her, so she said, 'I can give you a $200.00 check.' " At Bean's request, Mrs. Zachry made the check out to her mother, Mrs. Tolleson, who then endorsed it. Bean testified positively that appellant never indicated that the $200.00 was a payment to abandon the killing, but to the contrary she was anxious for the plan to be carried out, stating at one point that if Bean did not hurry and do it, she would kill Zachry herself.

Bean stated that he and Dyas drove to appellant's house on the afternoon of January 8; sitting in a car in appellant's driveway, they had just begun to converse with appellant about their plans when "she noticed that her father-in-law was over at the place of business just east of her house . . . . she asked that we leave that he would probably come in there and we did meet him halfway out of the driveway." (The state also called the father-in-law, Loyce Zachry, who testified that he saw Bean and Dyas at appellant's house on January 8; when he asked her who the men were, appellant told him "that's two tile men from Texarkana" looking for her husband, and "then she changed the subject right quick.") Bean said that in this conversation they told appellant " we were going to try to do it that night"; at no time did appellant ever ask them not to kill her husband. Bean also stated that appellant told him and Dyas that her husband "usually carried a lot of money on him and that she wanted it to look like robbery or thought that would be the best thing and that we were to keep his rings if that were true as part-payment of doing it."

Continuing with his testimony, Bean said that he and Dyas drove in Dyas' automobile, to the Zachry home on the night of January 8, and persuaded Zachry to accompany them by pretending interest in buying some real estate listed

with Zachry's agency. After driving to a remote location in Little River County, one of the men told Zachry to empty his pockets, that he was being robbed, and then asked him to get out of the car. Bean said that both he and Dyas were armed, but that Zachry charged at him; in the scuffle Bean emptied his pistol into Zachry. After the fight he shot Zachry one more time, with Dyas' pistol. The men then took Zachry's jewelry and money and drove back toward Texarkana. They stopped once, Bean said, when he called appellant and "told her we had done what we agreed to do and she asked me how long it would be before she should notify them and I told her just to use her own judgment."

Bean said that he called appellant several days after the killing "and asked her when she was going to have some money for us, and she said she would have $1,000.00 for us if that was all right." Bean later met appellant's mother at a Texarkana K-Mart store and received a thousand dollars in cash in an envelope. Bean lost $200.00 of this payment, which apparently fell from the envelope in his car, but he split the remaining $800.00 with Dyas. (The state produced a witness, Bill Brown, President of the Bank of Ashdown, who corroborated that appellant had given his bank a note for $1,-500.00 on January 16, 1975, putting the proceeds in her checking account; on the same day appellant wrote and cashed an $850.00 check in a Texarkana bank.)

McCandless, after receiving the call from appellant that her husband was missing, with a man named Eddie Woodruff, began a search for Zachry. Appellant had also called Albert C. Moore, owner of a fishing camp near the scene of the killing, telling him that her husband had been gone for 18 hours, that she was uneasy about him, and according to Moore, asked him to check around camp to see if he had been down there. Moore discovered the body early on the morning of January 9. It is apparent that the evidence offered by the state was more than sufficient to justify the jury in reaching its conclusions.

It is asserted that the court erred in admitting into evidence the statement referred to under Point 1, said statement being a violation of her constitutional rights. We do not agree. The trial court held extensive hearings on the ad-

missibility of this statement, given by appellant at the Texarkana police station on January 21 and written down by state policeman James Lester, and ruled that it was admissible. Appellant's version of the events that transpired before and during the time the statement was given conflicted with the testimony of every other witness, and was not corroborated by any other witness. Appellant's attack on the voluntariness of the statement is based on allegations that an unknown police officer at the station told her that she might be prosecuted only as an "accessory," which she interpreted to indicate some lesser degree of culpability; that she was not advised of her constitutional rights until after she gave the statement, and that she was under the influence of drugs when the statement was given.

Sheriff Marlin Surber, who took appellant to the station, testified that he stayed with appellant during most of the time that she waited for questioning (a period that he estimated as no more than 30 minutes), and that he never heard anyone mention the term, "accessory," to appellant. Appellant herself testified only that she was listening to a conversation among some unidentified officers, and "I asked when I overheard the conversation if we were being charged with an accessory, and he said, 'Yes, ma'am, I believe so.' " Appellant also stated that she had gone to a doctor the previous night, and had received a shot and some pills to help her relax, and that she was still "drunk" from this medication when she gave the statement the next day. No doctor corroborated this statement, nor was there any testimony about the identity of the drugs in question or their effects.

Both James Lester and Danny Sewell, the interrogating officers, testified that appellant was fully apprised of her constitutional rights before the statement was given, and that they also told her that she was a suspect in the homicide. Appellant signed a rights form, introduced at the hearing, that shows that the officers informed her of her rights at 10:30 A.M., before the statement was taken. Neither of the officers noticed anything abnormal about appellant's condition, and both testified that she became upset only when they told her at the beginning of the interview that she was a suspect. Lester and Sewell also said that appellant never asked for an attorney, and that she never indicated that she wanted the

questioning to cease.

The statement itself shows that it was taken in an interview that began at 10:30 A.M. and concluded at 11:45 A.M. and was signed by appellant, who initialed each page and every correction. Appellant herself admitted that the statement accurately reflected what she told the officers.

In reviewing a trial court's ruling on the admissibility of a statement by a defendant, this court makes an independent determination based on the totality of the evidence, but reverses the trial court only when its ruling is clearly against the preponderance of the evidence. *Degler* v. *State,* 257 Ark. 388, 517 S.W. 2d 515. There is no question but that the preponderance of the evidence sustains the trial court's decision.

Appellant asserts that the state's case rested wholly on the testimony of two accomplices, Charles Bean and Bill Lumpkin, and that the state failed to adduce sufficient independent evidence to sustain appellant's conviction. This point obviously repeats appellant's first contention, that the evidence was insufficient, and does not merit extended discussion.

In the instant case, as appellee points out, the state presented undisputed proof that the crime was committed, establishing the *corpus delecti.* Appellant made a voluntary statement on January 21, identifying herself as the perpetrator of the plan to kill Zachry, and detailing the circumstances under which she acquiesced as her husband left their home on January 8 with Bean and Dyas. The state documented the bank transactions by which appellant obtained the sums of money involved in the scheme. Zachry's father testified that he saw appellant talking with two men on the afternoon of the day of the killing, and further stated that when he asked about the men, appellant said they were two "tile" men and quickly changed the subject.[2] After the killing, appellant called Moore, who lived in the area where she knew that Bean and Dyas has taken her husband, and asked him to look for Zachry in that area. She also told the sheriff

[2]The witness subsequently identified the two men as Bean and Dyas.

that she thought her husband had been robbed, but she made absolutely no mention of Bean, Dyas or Monroe Lindsey.

The applicable rule of law is well established. "The test of sufficiency of corroboration has been stated to be whether, if the testimony of the accomplice is eliminated from the case, the testimony of the other witnesses be sufficient to establish the commission of the offense and the connection of the accused therewith." *Prather* v. *State,* 256 Ark. 581, 509 S.W. 2d 309. There is no question in this case but that the state presented sufficient evidence to establish the commission of the offense, and appellant's connection therewith, even if the testimony of Lumpkin and Bean is eliminated.[3]

It is asserted that "The Court Erred In Permitting The State, Over Appellant's Objection, To Cross-Examine The Defendant-Appellant From A Statement Illegally And Unconstitutionally Obtained and Ruled Inadmissible."

Appellant, while confined in the Howard County Jail, also wrote a 26 page narrative statement (previously mentioned in a footnote) on February 1-2, 1975. Although the trial court held that this statement was also admissible, the state elected not to use it in its case-in-chief. When appellant testified in her own defense, however, the trial court permitted the prosecuting attorney to cross-examine appellant about the February 1-2 statement, as a prior inconsistent statement, and afforded appellant an opportunity to explain any discrepancies. The trial court refused to allow the prosecuting attorney to introduce the entire statement at that point because the state had rested its case without proffering it.

It should first be noted that under the standard of *Degler* v. *State, supra,* the February 1-2 statement does not appear to be inadmissible. Appellant testified that she wrote the statement only because she received promises of leniency and

[3]Actually, with respect to Lumpkin, it is questionable that he was an "accomplice." The record does not reveal that he was charged with any offense, nor does it indicate that he committed any overt act toward carrying out a conspiracy. This court pointed out in *Johnson and Keeling* v. *State,* 259 Ark. 773 (1976), "the burden is on the defendant to show that a witness is an accomplice."

favorable treatment from a state policeman at the Howard County jail, but the policeman, Sergeant Carroll Page, denied that he had made any promises. The trial court's decision that the statement was voluntary does not appear contrary to the preponderance of the evidence. Of course, no error could arise from cross-examination about an admissible statement.

Even if it is conceded, *arguendo,* that the statement was involuntary and inadmissible, this court has previously rejected a contention identical to appellant's argument, in *Rooks* v. *State,* 250 Ark. 561, 466 S.W. 2d 478, a decision premised on *Harris* v. *New York,* 401 U.S. 222. Therefore, even if the statement had been inadmissible, the trial court committed no error by permitting the state to use it in cross-examining appellant.

It is next contended that the court erred in refusing to give appellant's requested instruction on conspiracy.

Appellant requested an instruction, refused by the trial court, that stated a conspiracy to commit a felony is only a misdemeanor if the conspirators do not commit the felony. The proffered instruction followed the language of Ark. Stat. Ann. § 41-1201 (Repl. 1964). Appellant now contends that the refusal to give this instruction was error, since appellant's "defense in part to the charge filed against her by the State concerned her withdrawal from any conspiracy prior to the death of her husband."

The trial court correctly refused the instruction. In its interpretation of the statute that is now codified as § 41-1201, on which appellant relies for this instruction, this court held that the statute makes a conspiracy a prosecutable misdemeanor *only* when the object of the conspiracy is not accomplished. When the purpose of the conspiracy is achieved — as it was in the instant case — then the conspiracy is merged in the greater offense, and § 41-1201 becomes inapplicable. *Elsey* v. *State,* 47 Ark. 572, 2 S.W. 337. Appellant's requested instruction was, therefore, an incorrect statement of the law with regard to the facts of this case, and the trial court committed no error by rejecting it.

It is next urged that since the office of State Police Sergeant Carroll Page at the Howard County jail was "bugged," appellant was denied privileged and confidential communications with her attorneys.

Before the trial, appellant's counsel discovered a hidden microphone leading to a recording device in a desk in a room at the Howard County jail. In this room appellant and counsel had held several conferences. Appellant moved to dismiss the information against her, alleging that the illegal electronic surveillance vitiated all criminal proceedings to that point. At a hearing on this motion, Sergeant Page, who owned the equipment, testified that he used it solely to record statements from victims and witnesses who might be afraid to talk before an open recorder; Page also stated that the equipment had never been used in connection with appellant's case. Moreover, appellant's counsel admitted that no one forced him to use the room in which the equipment was located; that the machine was not in operation when he discovered it, and that he had no evidence that it had ever been used to record a conference between him and appellant. Actually, it is not contended that any conversations were "bugged." At any rate, the record contains not one scintilla of evidence that any type of electronic surveillance was ever conducted in this case. Accordingly, appellant's contention that she was denied privileged and confidential communications with her attorneys is without merit.

Finally, it is vigorously urged that the state made deals with Bean and Lumpkin, and refused to disclose same at appellant's trial, which was "illegally prejudiced."

It might first be stated that Lumpkin is not even mentioned in appellant's argument at all, and there are no facts in the record which could, in any way, support such an allegation. The argument is all directed to a so-called "deal" with Bean. While appellant argues that there was a "deal" which was not disclosed to the jury, the record is contrary to such an assertion. Bean testified that he had been told by the prosecuting attorney that if he testified in behalf of the state, this fact would be taken into consideration, but he was also told that under no circumstances would the prosecutor ever recommend that he receive less than life imprisonment. The

witness also emphatically stated that he had never been promised that he would not be sent to the electric chair. The transcript contains five and one-half pages relating to this matter, including statements by counsel for the defense and the state, and a vigorous cross-examination of the witness by appellant's attorney. *The entire proceeding took place in front of the jury,* so there certainly is nothing to the argument that the jury was not informed of any inducements made to Bean. As already stated, the only actual inducement appearing in the record is that Bean was told that his willingness to testify would be taken into consideration. Of course, the credibility of a witness is a matter for the jury to pass upon, and since the jury heard the entire discussion and testimony relating to a so-called "deal," we can see no possible prejudice.

Appellant filed notice of appeal, and 41 days (according to appellant) after Mrs. Zachry's conviction, Bean pleaded guilty to first degree murder and was sentenced to life imprisonment. Thereafter, appellant filed a motion with this court asking that a supplemental record of the proceedings held on the day Bean pleaded guilty be ordered included in the transcript on his appeal. We denied this motion, but granted an alternate motion for appellant to file an out-of-time motion for a new trial. This motion was denied and such denial of this motion is also included in this appeal.

After reviewing the proceedings of the sentencing of Bean, we agree with the trial court that there is "nothing inconsistent between the transcript filed in this [main] case and the [transcript of] sentencing of Charles Watson Bean." That is, there is nothing to substantiate appellant's contention that Bean, at the time he testified, had been promised that the death penalty would not be sought, or that he would receive no more than life imprisonment. This court observed, in *McDonald* v. *State,* 249 Ark. 506, 459 S.W. 2d 806, that an inducement to testify, even if one is shown, "does not affect the competency of [the witness's] testimony, for we have held that it goes only to the witness's credibility." The federal courts have reached the same result. In *United States* v. *Vida,* 370 F. 2d 759 (6th Cir.), *cert. denied,* 387 U.S. 910, a similar argument was rejected when the court stated that it was not impressed with the contention "that the use of the testimony of an unsentenced accomplice deprives one who stands trial

of due process or fair treatment. [Citations omitted.] We find no disagreement with the text that 'the fact that a witness hopes or expects that he will secure a mitigation of his own punishment by testifying on behalf of the prosecution does not disqualify him.' " See also *United States* v. *Brill,* 350 F. 2d 171 (2d Cir.), *cert. denied,* 382 U.S. 973. In the words of the United States Supreme Court, in *Lisenba* v. *California,* 314 U.S. 219, "[t]here is no adequate showing that there was a corrupt bargain with [the witness], and the practice of taking into consideration, in sentencing an accomplice, his aid to the State in turning state's evidence can be no denial of due process to a convicted confederate."

As already set out, the jury heard every contention relative to a "deal" advanced by appellant at the time of trial and apparently concluded that the assurance given to Bean that the fact he testified would be given consideration, did not impair his credibility.

We have also examined the record for every objection made, and find no reversible error.

Affirmed.

FOGLEMAN, J., concurs.

JOHN A. FOGLEMAN, Justice, concurring. I concur, but base my agreement on the sustaining of the motion for a new trial on a different basis from that of the majority opinion. The trial court properly held that the motion for new trial should be denied because it was not timely filed. This was jurisdictional. I agree with the trial court, as evidenced by my dissenting opinion to the granting of appellant's motion to be permitted to file the motion for new trial. See *Zachry* v. *State,* 259 Ark. 42B. This jurisdictional defect cannot be cured by this court's "reinvesting jurisdiction."

Kenneth BINNS *v.* Earl VICK et al

76-69 538 S.W. 2d 283

Opinion delivered July 6, 1976

*John Wright,* for appellant.

*Shaver, Shaver & Smith,* by: *Tom B. Smith,* for appellees.

GEORGE ROSE SMITH, Justice. The executors of the will of Pearl Vick filed this petition for a construction of its residuary clause, which reads: "All the rest and residue of my estate,

whether real, personal or mixed, I give, devise and bequeath [to] Kenneth Binns to distribute among my relatives as he sees fit." The probate court held that the testatrix intended to create a trust, but the beneficiaries were so indefinite that the attempt failed; so the residual estate passed to Miss Vick's heirs, by intestacy. For reversal Kenneth Binns contends (a) that no trust was intended, (b) that if a trust was intended it did not fail, and (c) that the bequest should be construed as an outright gift to him.

In considering the situation that existed when the testatrix made her will, we adhere to this familiar rule of law: "We must look to the will to determine the testator's intention, but in getting this view we should place ourselves where he stood, and should consider the facts which were before him in deciding what he intended by the language which he employed." *Eagle* v. *Oldham,* 116 Ark. 565, 174 S.W. 1176, 1199 (1915). Such extrinsic evidence is admitted not to show what the testator meant, as distinguished from what the words of the will express, but to show the meaning of the words that he used. *Ellsworth* v. *Ark. Nat. Bank,* 194 Ark. 1032, 109 S.W. 2d 1258 (1937).

Pearl Vick made her will a few months before she died at the age of 84, survived by a brother, two sisters, and the descendants of eight other brothers and sisters. She devised her only real property, a half interest in a house, to two nephews, A.O. Vick, Jr., and the appellant, Kenneth Binns, who were named as executors. There were a few specific bequests to others including two rings and a television set. An electric fan was left to Kenneth. According to Kenneth's candid testimony, his aunt's only other possessions were her clothes, to which the residuary clause presumably applied. What Miss Vick never knew was that she was entitled to an inheritance of about $6,000, which was paid to her estate after her death. By the petition now before us the executors of Miss Vick's will asked the probate court to determine the disposition of that money.

The trial judge's decision was right. Kenneth, in disputing his aunt's intention to create a trust, argues that since the will was drafted by an attorney, the absence of any reference to a trust shows that none was intended. Not so. It

is an elementary rule of law, doubtless known to the attorney, that a trust may be created without the use of the words "trust" or "trustee." *Thomason* v. *Phillips,* 192 Ark. 107, 90 S.W. 2d 228 (1936); *Cockrill* v. *Armstrong,* 31 Ark. 580 (1876). More important, the attorney must have expected the residuary clause to apply only to the testratrix's personal effects, such as her clothing. In the circumstances there was no occasion for him to waste time and expense in creating a formal trust.

We must, however, apply the language of the residuary clause to the situation that actually arose. Ark. Stat. Ann. § 60-409 (Repl. 1971). Laying aside the possibility of an outright gift to Kenneth, which we shall discuss in a moment, an intended trust is the most reasonable and most practical inference from the language of the will. The question then arises, what did the testatrix mean by her direction that Kenneth distribute the property "among my relatives as he sees fit"?

The word "relatives," when used in a will, is ordinarily construed in either of two ways. It may be taken to mean the testator's legal heirs, in which case the bequest is valid. Or it may be taken to mean all persons related to the testator, in which case the bequest usually fails for uncertainty. The authorities are examined in the annotation following *Hahn* v. *Bernheim,* 57 A.L.R. 1169, 82 Mont. 198, 266 Pac. 378 (1928).

Here Kenneth is not entitled to a reversal upon either interpretation. If the word "relatives" was used in its broad sense, the trust fails, as the probate judge held. If it was used in its narrow sense, Kenneth can claim no beneficial interest in the estate. He is not an heir at law of his aunt, his mother having survived her sister, the testatrix. Here it should be emphasized that there is no appeal by the testatrix's heirs or other relatives or by the co-executors of the will. Kenneth alone comes to this court, as an individual, and thus cannot prevail without showing that the judgment is pecuniarily prejudicial to him. No such showing is made.

Finally, the residuary clause cannot fairly be construed to express an intent to make an outright gift to Kenneth. The transfer of the property to Kenneth, "to distribute among my

relatives as he sees fit," is not another way of saying, "I leave all my residuary estate to Kenneth for his own benefit." There had already been a specific bequest of a fan to Kenneth. That provision would have been unnecessary had the testatrix meant for all the residuary estate to go to Kenneth. It is also argued that the testatrix's language is merely precatory, but we think it to be imperative under the reasoning of our earlier cases. See *Cockrill* v. *Armstrong, supra; Gregory* v. *Welch,* 90 Ark. 152, 118 S.W. 404 (1909).

Affirmed.

BYRD, J., dissents.

Pamela SCHRUM, by Her Mother and Next Friend, Irene Craig GAITHER *v.* Elbert Glen BOLDING et ux

76-28 539 S.W. 2d 415

Opinion delivered July 6, 1976

[Rehearing denied September 13, 1976.]

[redacted]

*Eubanks, Files & Hurley,* for appellant.

*Howell, Price, Howell & Barron,* for appellees.

JOHN A. FOGLEMAN, Justice. This tragic case involves the infant child of adolescent parents and the problems of society in endeavoring to make the best of the means at hand to suitably provide for its future. It reaches us on appeal from a final decree of adoption and the denial of the minor mother's petition to annul an interlocutory decree. We find merit in her contention that the probate court erred in failing to set aside the interlocutory order and reverse.

This child, Terry Lynn Schrum, was born in Bartlesville, Oklahoma on February 20, 1974 to Tim Schrum and Pamela Schrum. Pamela was born April 14, 1958 and was married to Tim on September 21, 1973. They have been separated more than once. They first separated in May, 1974. After a brief stay in a crowded apartment with her mother's friend, Pamela took the baby in June or July, 1974, and moved into the home of the adopting parents, Glen and Eloise Bolding, with her friend and their daughter, Connie, while Mrs. Bolding was in the hospital.

There is considerable conflict in the testimony about the circumstances and events leading up to a trip on September 16, 1974 to the office of appellees' attorney, by Mrs. Bolding, and Tim and Pamela Schrum, where the parents executed an entry of appearance in the adoption proceeding and their consents to adoption. Pamela testified that she had been

physically assaulted and threatened by her husband when she objected to his proposal that the Boldings be permitted to adopt their young baby. She also said she went along because she was afraid of him, because she had no means of supporting the baby since her husband had refused to do so, and because Mrs. Bolding threatened to call the welfare department to take the child away from her and place him where Pamela could never see him if she did not consent to the adoption. Much of this testimony is controverted, but evidence of Pamela's reluctance to agree to the adoption and her being upset after she had told her sister and mother what had been done on the same day she signed the entry and consent is not substantially controverted. Shortly after the signing of the consent Pamela moved away from the Bolding residence, either because of her dissatisfaction or because she was asked to leave (contrary to promises allegedly made her) depending upon whose version of the matter is accepted. To say the least, Mrs. Bolding was aware of Pamela's dissatisfaction with the arrangement within approximately one month after the consent was signed. Mrs. Gaither, Pamela's mother, said that, when Pamela asked whom to call, she referred her to the only attorney she knew. The petition was filed by this attorney (who later withdrew) six weeks after the entry of the interlocutory order.

The petition for adoption and entry of appearance and consent were filed on September 18, 1974, the day on which an interlocutory decree of adoption was entered. On October 31, 1974, Pamela, by her mother as next friend, filed her petition to annul the adoption, alleging that she was coerced by her husband to sign a consent to the adoption. She prayed that the interlocutory order be rescinded and all action on the matter nullified and that the child be returned to her. During the course of the proceeding, Pamela's father, Billy Bob Sullivan, was appointed guardian ad litem to defend for her. After a hearing on October 3, 1975, the probate court entered its final decree of adoption on October 17, 1975, finding that Pamela's consent was valid, that the evidence was insufficient to show that fraud was practiced on her or that she was overreached, that the statutory procedure for waiver, entry of appearance and consent to adoption was complied with, that Pamela's attempted revocation of consent was made after this interlocutory decree was entered, that more than six months

had expired since the entry of the interlocutory decree, that it was in the best interest of the baby that her mother's request for withdrawal and quashing of her consent be denied, and that a final decree of adoption should be entered. The probate court further found that the minority of the mother did not bar or vitiate her consent and that the adoption laws had been substantially complied with.

Appellant questions the jurisdiction of the probate court over her person, saying that the failure to set aside the interlocutory order deprived her of due process of law under the state and federal constitutions. While it is true that substantial compliance with adoption laws is generally sufficient to satisfy due process requirements, we must agree with appellant that, by reason of the fact that no process was served on her prior to the entry of the interlocutory order on the same day the petition was filed, the interlocutory decree should have been set aside.

Ark. Stat. Ann. § 56-104 (Repl. 1971) requires that all persons whose consent to adoption is required be made defendants by name and notified of the proceedings by summons in the manner required by law in chancery proceedings. Of course, parents are in the category of necessary parties. Ark. Stat. Ann. § 56-107 (Repl. 1971). Such a party is allowed 30 days to answer. § 56-104. The hearing on the petition is to follow expiration of the time for filing answer. Ark. Stat. Ann. § 56-108(Repl. 1971). In this case Pamela Schrum was not a named defendant and she was not served with process in any form. Service of summons would certainly be required in a chancery proceeding. See Ark. Stat. Ann. §§ 27-215, 27-336 (Repl. 1962). Furthermore, no judgment may be rendered against an infant until after a defense by a guardian. Ark. Stat. Ann. § 27-825 (Repl. 1962). A guardian ad litem cannot be appointed until after service of process. Ark. Stat. Ann. § 27-826 (Repl. 1962). Proof cannot be taken prior to the appointment of a guardian, in the absence of a statutory guardian, in order that the appointed guardian may have the opportunity of attending when proof is taken. *Dudley* v. *Dudley,* 126 Ark. 182, 189 S.W. 838. Judgment rendered against an infant without the appointment of a guardian ad litem, however, is not void, but is

irregular and reversible as voidable, in a proper proceeding. *Sauve* v. *Ingram,* 200 Ark. 1181, 143 S.W. 2d 541. In other words, failure to have a defense by guardian is error and would be basis for reversal of a judgment on appeal, or would require the setting aside of the judgment on motion before appeal. *Sauve* v. *Ingram,* supra. Of course, after the expiration of the term at which the judgment is rendered, one attacking a judgment on these grounds would be barred unless the infancy of the defendant appeared in the record. Ark. Stat. Ann. § 29-506 (Repl. 1962). After expiration of the term, the attack would have to be made under Ark. Stat. Ann. § 29-508 (Repl. 1962); *Ingram* v. *Raiford,* 174 Ark. 1127, 298 S.W. 507. A decree without service of process and defense by a guardian is clearly erroneous, but not necessarily subject to collateral attack. *Haley* v. *Taylor,* 39 Ark. 104; *Woodall* v. *Delatour,* 43 Ark. 521; *Morris* v. *Edmonds,* 43 Ark. 427; *Robinson* v. *Cline,* 255 Ark. 571, 501 S.W. 2d 244. See also, *Cannon* v. *Price,* 202 Ark. 464, 150 S.W. 2d 755; *Davie* v. *Padgett,* 117 Ark. 544, 176 S.W. 333.

The substitute for service of process was Pamela's entry of appearance. But a minor cannot waive the service of process. In *Moore* v. *Wilson,* 180 Ark. 41, 20 S.W. 2d 310, we so held, quoting the following from Ruling Case Law:

> An infant can neither acknowledge nor waive the regular service of process upon him, though in some instances a regular service of summons slightly irregular in form was held to be a substantial compliance with the statute, and sufficient to give jurisdiction. ***** It is held in most of the cases that the lack of service of the infant is a fatal, because jurisdictional, defect, and cannot be cured by the appointment of a guardian ad litem, and his making actual defense for the infant, and this ruling seems consistent with the lack of power on the part of the guardian to bind the infant by his admissions or stipulations. A few courts have held, however, that even a lack of legal service does not render the judgment void, if the infant appeared, a guardian was appointed, and a proper defense was in fact made.

There was not the slightest suggestion that this principle

applied only to actions for damages or that it did not apply to statutory proceedings where the governing statutes did not specify otherwise. We do not take *Martin* v. *Ford,* 224 Ark. 933, 277 S.W. 2d 842 to hold to the contrary. There the questions raised with reference to notice and the lack of appointment of a guardian for the minor mother were by-passed because, when she appeared and testified, after her mother, as next friend, had filed an intervention protesting the adoption, she was of full age. This is not the case here. Furthermore, when the interlocutory decree was entered, nothing in the record disclosed that Pamela was a minor. It is clear that a guardian could not possibly have attended the hearing when the temporary order of adoption was entered.

The importance of these procedural requirements in this case is based upon the effect of the interlocutory decree. Prior to its entry, a consent to adoption may be withdrawn under appropriate circumstances, because there must be valid consent at the time of its entry. *Martin* v. *Ford,* supra; *Combs* v. *Edmiston,* 216 Ark. 270, 225 S.W. 2d 26. The lapse of time between the consent and the attempted revocation is an important circumstance. But the adoption is said to be effective at the time of the interlocutory order and the validity of consent is to be determined as of the date of that order. *A* v. *B,* 217 Ark. 844, 233 S.W. 2d 629. While it has been held that consent can be withdrawn after the interlocutory order, it is clear from these cases that a much stronger showing is required than on a withdrawal before entry of the order. *Martin* v. *Ford,* supra.

It also seems obvious that the burden of proof of validity of consent is different before and after the interlocutory decree. It is required that the court, at the time of entry of the temporary or interlocutory order, find from the evidence that there has been proper service of process as required by Ark. Stat. Ann. § 56-108 (Repl. 1971), that there is proper consent to the adoption, and that the adopting parent is morally, physically and financially fit to have custody of the adopted person. Ark. Stat. Ann. § 56-108 (Repl. 1971). Clearly the burden of proof on all these points would be on the petitioner. It is at least implied that one objecting to the adoption between the entry of the interlocutory decree and the final decree would bear the burden of proof, i.e., to show good

reason for setting aside the interlocutory order, which is otherwise effective as the adoption. *A* v. *B,* supra; *Williams* v. *Nash,* 247 Ark. 135, 445 S.W 2d 69.

This shifting of the burden of proof brings into play constitutional due process requirements, which have been held applicable to adoption proceedings. *Armstrong* v. *Manzo,* 380 U.S. 545, 85 S. Ct. 1187, 14 L. Ed. 2d 62 (1965). To hold that the order based upon entry of appearance here was not erroneous and voidable in view of the prompt attack made by the minor parent through her mother and next friend would violate constitutional due process requirements of Art. 2, § 18 of the Arkansas Constitution as well as the Fourteenth Amendment to the United States Constitution. The attack was made in the only manner available to appellant, because the interlocutory order was not appealable. Ark. Stat. Ann. § 56-111 (Repl. 1971).

We must reject appellee's arguments that Pamela was no longer a minor because she was emancipated by Ark. Stat. Ann. § 55-401 (Repl. 1971). It was not the intention of that act to remove the disabilities of minority. It was only designed to emancipate married women from disabilities attendant upon their marital status, i.e., it permitted her to enjoy all rights as though she were a femme sole. See *Harrod* v. *Myers,* 21 Ark. 592, 76 Am. Dec. 409. Marriage does not relieve a male of all his disabilities of minority. *Shinley* v. *Ricks,* 234 Ark. 767, 354 S.W. 2d 547. There is no reason why it should relieve a female of all such disabilities. *Harrod* v. *Myers,* supra.

Since we find error in this respect, we do not consider other questions raised or further discuss the effect of this decision upon them. The locus of the burden of proof in this case, where so much depends upon credibility, demands that we refrain from directing the judgment to be entered. It is clear that both the final and the temporary decree must be reversed because proper service of process was not had. There will be no necessity for new service, because an actual appearance has been made as effectively as the minor can do so and, in addition, both her mother, as next friend and her father, as guardian ad litem are before the court and acting in her behalf.

In remanding the case to the trial court for further proceedings, we cannot help expressing our concern for the welfare of this helpless baby. While we do not ordinarily say so in cases such as this, we feel very strongly that in this case the trial court should require a report by the Child Welfare Division under Ark. Stat. Ann. § 56-105 (Repl. 1971).

The decrees are reversed and the cause remanded for further proceedings consistent with this opinion.

BYRD, J., dissents from that portion of the opinion pertaining to the Welfare Division report.

Walter SKELTON, Assistant Director of
The Department of Finance and Administration
*v.* B. C. LAND COMPANY, Inc.

75-378 539 S.W. 2d 411

Opinion delivered July 6, 1976
[Rehearing denied September 13, 1976.]

*James R. Cooper, H. Ray Hodnett, Robert G. Brockman, Jack East III* and *James R. Eads Jr.*, for appellant.

*Gordon, Gordon & Eddy* and *Partlow & Mayes*, for appellee.

CONLEY BYRD, Justice. Following our decision in *Skelton v. B. C. Land Co.*, 256 Ark. 961, 513 S.W. 2d 919 (1974), denying a net operating loss carryover to B. C. Land Co., appellant Walter Skelton, Assistant Director of the Department of Finance and Administration, filed a certificate of indebtedness and caused an execution to be issued thereon on February 3, 1975. On March 31, 1975, the Govennor signed Act 676 of 1975. Section 1 of Act 676 provided that, for income tax purposes, an acquiring corporation would succeed to any net operating loss carry-over that the acquired corporation could have claimed — *i.e.* it brough the Arkansas income tax law in conformity with the provisions of § 381 and § 382 of the Internal Revenue Code. Sections 2 and 4 of Act 676 provide as follows:

> SECTION 2. The provisions of this Act shall apply to all corporate income returns for income years beginning on or after January 1, 1975, and to all corporate income tax returns filed for years prior to January 1, 1975 which are pending on the effective date of this Act and on which the taxes have not been paid.
>
> . . .
>
> SECTION 4. It is hereby found and determined by the General Assembly that the present corporate income tax law does not permit one domestic corporation which acquires the assets of another domestic corporation to succeed to the net operating loss carry-over of the acquired corporation under any circumstances; that the absence of any such authority creates a serious hardship on some acquiring corporators and that provision should be made as soon as possible for permitting such acquiring corporations to succeed to the net operating loss carry-over of the acquired corporations under specified conditions, and that this Act is designed to accomplish this purpose. Therefore, an emergency is hereby declared to exist and that this Act being

necessary for the immediate preservation of the public peace, health and safety shall be in full force and effect from and after its passage and approval."

Pursuant to a petition filed by appellee on April 2, 1975, the trial court entered a final order on August 20, 1975, holding the certificate of indebtedness to be void. For reversal, appellant makes the following contentions:

"I. Act 676 of 1975 is not applicable to the appellee because his tax return was not pending on the effective date of the Act.

II. The appellee has failed to meet his burden of proof showing his entitlement to this tax deduction.

III. Act 676 of 1975 is inapplicable to the appellee because the rights of the State had vested prior to the effective date of the Act and therefore those rights are protected from legislative invasion."

Under points I and II, *supra,* appellant takes the position that appellee's income tax return was not pending on the effective date of Act 676, *supra.* In this connection appellant would have us construe the phrase "which are pending on the effective date of this Act" to exclude all corporate income tax returns that had become res judicata in the courts. However, Section 2 does not refer to court litigation but to income tax returns. Furthermore, in making this contention appellant ignores the cardinal principle that in construing remedial legislation the courts should do so with appropriate regard to the spirit which prompted its enactment, the mischief sought to be abolished and the remedy proposed, *United States* v. *Colorado Anthracite Co.,* 225 U.S. 219, 32 S. Ct. 617, 56 L. Ed. 1063 (1912) and *Peet* v. *Mills,* 76 Wash. 437, 136 P. 685 (1913). When the provision with respect to pending corporate income tax returns is construed with respect to the mischief sought to be abolished and the remedy proposed, we must agree with the trial court that appellee's corporate income tax return, uoon which a certificate of indebtedness had been filed and an execution issued, was "pending on the effective date of the Act" within the meaining of Section 2 of Act 676, *supra.*

Little need be said as to appellant's contention that appellee has not proven its entitlement to the provisions of Section 2 of Act 676, *supra*. Since appellant has agreed that appellee meets all of the criteria established in Section 1 of the Act, there is no dispute as to the facts.

In making the argument that Act 676 of 1975 was inapplicable to appellee because the rights of the State had become vested prior to the effective date of the Act, appellant relies upon cases involving only the rights of private individuals, *Files, Auditor* v. *Fuller,* 44 Ark. 273 (1884). However, the general rule applicable to individuals does not apply to retroactive legislation impairing a state's own rights, *Greenaway's Case,* 319 Mass. 121, 65 N.E. 2d 16 (1946) and *People ex rel. Clark* v. *Gilchrist,* 243 N.Y. 173, 153 N.E. 39 (1926). A state has no vested rights which are immune from its legislative control, 16 C.J.S. *Constitutional Law* § 243 (1956).

Affirmed.

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

ELSIJANE T. ROY, Justice, dissenting. I cannot agree with the majority opinion in its determination that the appellee's income tax returns were pending on January 1, 1975.

In construing statutes courts must give words their ordinary and usually accepted meaning in the common language. *Phillips Petroleum Co.* v. *Heath,* 254 Ark. 847, 497 S.W. 2d 30 (1973), and *Hicks* v. *Ark. State Medical Board,* 260 Ark. 31, 537 S.W. 2d 794 (1976).

The ordinary meaning of the word "pending" is "in the period before the decision or conclusion of; remaining undecided; awaiting decision or settlement; unfinished." Random House Dictionary of the English Language, 1967. Another definition is "begun, but not yet completed; during; before the conclusion of; prior to the completion of; unsettled; undetermined; in the process of settlement or adjustment." Black's Law Dictionary, Fourth Edition.

These same definitions have been accepted by the

courts. *U.S.* v. *2049.85 Acres of Land,* 49 F. Supp. 20 (1943); *State* v. *Faircloth,* 34 N.M. 61, 277 P. 30 (1929); *Fireman's Fund Ins. Co.* v. *Jackson,* 161 Ga. 559, 131 S.E. 359 (1926).

In *Davis* v. *Britt,* 243 Ark. 556, 420 S.W. 2d 863 (1967), we stated: "It would appear evident that if the case is 'pending' there would have been no final judgment."

"An action is pending so long as it is still open to *modification, appeal,* or *rehearing,*" i.e., until final judgment is rendered. (Italics supplied.) 1 C.J.S. Action, § 142, p. 1421.

None of the above avenues of relief remained open to appellee, so this cause could not have remained pending. The judgment was final in every sense of the word when the petition for rehearing was denied on October 14, 1972. The majority bases its opinion on the unsound premise that even though the cause has been finally adjudicated the income tax returns were pending. The issues involved and all substantive matters in connection with the income tax returns had long since been resolved. They had been *finally* and completely adjudicated. The only thing pending was payment of the tax due by appellee for the years 1969 and 1970. Not having met the criterion of "pending tax returns" appellee is not entitled to the benefit of the net loss carry-over provision on its 1969 and 1970 returns.

Furthermore, to view the matter in any other light involves the more serious issue of illegal classification. While the legislature has considerable discretion in establishing classifications for the purpose of taxation, this discretion does not extend to setting up a classification which relieves from the tax burden here involved all who have not paid the tax and placing in another category the taxpayers who long ago paid the amounts due on their 1969 and 1970 income tax returns under the loss carry-over provision in effect at that time.

The United States Supreme Court has held many times that states in the exercise of their taxing powers, are subject to the requirements of the Equal Protection Clause of the Fourteenth Amendment. In *Allied Stores of Ohio* v. *Bowers,* 358

U.S. 522, 79 S. Ct. 437, 3 L. Ed. 2d 480 (1958)[1], the Court stated:

> But there is a point beyond which the State cannot go without violating the Equal Protection Clause. The State must proceed upon a rational basis and may not resort to a classification that is palpably arbitrary. The rule often has been stated to be that the classification "must rest upon some ground of difference having a fair and substantial relation to the object of the legislation." *Royster Guano Co.* v. *Virginia,* 253 U.S. 412, 415; *Louisville Gas & Electric Co.* v. *Coleman,* 277 U.S. 32, 37; *Airway Electric Appliance Corp.* v. *Day,* 266 U.S. 71, 85; *Schlesinger* v. *Wisconsin,* 270 U.S. 230, 240; *Ohio Oil Co.* v. *Conway,* 281 U.S. 146, 160.

The classification established in this case is arbitrary, discriminatory and has no reasonable relation to an impartial administration of the Arkansas income tax laws.

The majority opinion also states appellant's citations involve "only the rights of private individuals" and that "the general rule applicable to individuals does not apply to retroactive legislation impairing a state's own rights." The opinion also declares that "a state has no vested rights which are immune from legislative control." However, citizens and taxpayers of this state do have rights involved in this case. One is the right to demand that tax burdens be imposed fairly and impartially and that taxes owed be collected in a nondiscriminatory manner. To waive collection from appellee on the sole basis of refusal to pay the assessment while collecting from other taxpayers under the old loss carry-over provision of the statute is to place a stamp of approval on the most obvious kind of special legislation and put a premium on delay in payment of taxes instead of a penalty.

For the foregoing reasons I respectfully dissent.

Justice GEORGE ROSE SMITH and Justice FOGLEMAN join in this dissent.

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[1]Cited with approval in *Kahn* v. *Shevin,* 416 U.S. 351, 94 S. Ct. 1734, 40 L. Ed. 2d 189 (1974).

Pete LOWREY Jr. *v.* Lucy LOWREY

76-75 538 S.W. 2d 36

Opinion delivered July 6, 1976

*William R. Wilson, Jr.,* P.A., for appellant.

*Daggett, Daggett & Van Dover,* for appellee.

CONLEY BYRD, Justice. The issue in this appeal is whether the trial court erred in awarding appellee Lucy Lowrey, as part of her property rights under Ark. Stat. Ann. § 34-1214 (Repl. 1962), a one-third interest in a pending Jones Act claim of appellant Pete Lowrey, Jr. The trial court, upon the award of divorce to appellee, awarded "as her statutory interest, one-third of all proceeds derived either by judgment or settlement from the suit of Pete Lowrey, Jr. v. Canal Barge Lines Inc." and directed appellant to execute an assignment.

We reverse the action of the trial court for the reasons set forth in *Southern Farm Bureau Casualty Insurance Company* v. *Wright Oil Company, Inc.,* 248 Ark. 803, 454 S.W. 2d 69 (1970) and *Fenney* v. *Fenney,* 259 Ark. 858, 537 S.W. 2d 367 (1976). See also *In re Schmelzer,* 350 F. Supp. 429 (S.D. Ohio 1972). Under those authorities an unliquidated personal injury claim does not constitute personal property for purposes of assignment or by operation of law in matters of bankruptcy. Consequently, we conclude that such a personal injury claim does not constitute personal property within the meaning of Ark. Stat. Ann. § 34-1214.

Appellee's suggestion that the assignability of the unli-

quidated personal injury claim was raised for the first time on appeal is not supported by the record.

Reversed and remanded for entry of a judgment not inconsistent herewith.

MERCANTILE BANK, Administrator With The Will Annexed *v.* Douglas PHILLIPS, Rosa Lee PHILLIPS, Lee GLASCO and Lela GLASCO

75-357 538 S.W. 2d 277

Opinion delivered July 6, 1976

*Stephen R. Bigger* and *Alexander, Nicholson & Smith,* by: *Richard S. Smith,* for appellant.

*Frierson, Walker, Snellgrove & Laser,* by: *G. D. Walker,* for appellees.

FRANK HOLT, Justice. This is an accounting action brough in behalf of certain relatives of Mrs. Gertrude Sharpe, deceased, in the name of the appellant which is administrator of her estate. This case presents the question of the validity of various inter vivos gifts during 1972 and 1973 totalling $59,-738.65 and $6,000 on January 2, 1974, allegedly made to the appellees (and the two children of the Phillipses) by the deceased. These gifts were allegedly made during the last twenty-three months of her life. She was seventy-six years old at the time of her death, February 16, 1974. Appellees are the deceased's niece, Lela Glasco, her husband Lee Glasco, their daughter Rosa Lee Phillips and her husband Douglas Phillips. A general power of attorney was executed by the

deceased to Douglas Phillips on January 26, 1971, and in that capacity he handled the transactions in question which occurred during the interval of March 16, 1972, and January 2, 1974. The accounting hearing was brought by appellant seeking a judicial declaration that the alleged inter vivos gift transfers were invalid based upon (1) breach of fiduciary duty by misappropriation and overreaching, (2) lack of comprehension by reason of mental incompetency, (3) undue influence, and (4) lack of the deceased's intent or delivery concerning the alleged gift transfers.

The chancellor found and decreed that:

> Gertrude P. Sharpe was mentally competent until the last few weeks of her life and then had lucid intervals; that none of the defendants exerted undue influence or overreaching over Gertrude P. Sharpe as to any transfers of property within the meaning of the law; that the gifts made to Douglas Phillips, Rosa Lee Phillips, Jennifer Lyn Phillips, John D. Phillips Jr., Lee Blasco and Lela Glasco by Gertrude P. Sharpe in her life, **** were valid legal gifts from Gertrude P. Sharpe in her lifetime **** with the following two exceptions:
>
> (1) . . . . the said jewelry were not valid gifts inter vivos or gifts cause mortis, and consequently, the aforesaid jewelry must be turned over to the Plaintiff, Mercantile Bank as Administrator . . . .
>
> (2) That the $3,000.00 check drawn by Mrs. Gertrude P. Sharpe on November 3, 1969, made payable to Douglas Phillips with a notation, "Loan" and endorsed by the said Douglas Phillips, is not barred by the three-year Statute of Limitations and there is insufficient corroboration of Douglas Phillips' testimony to show that the debt had been forgiven . . . .

The complaint of the appellant was otherwise dismissed and hence this appeal. Appellees cross-appeal from the decree with respect to the $3,000 check.

Since the appellant's contentions and arguments made under points 7, 8 and 9 are so related, we will discuss them

first and together in order to prevent repetition. The thrust of appellant's argument is that the deceased did not have sufficient mental competency during the last 23 months of her life to be capable of exercising competent judgment regarding the questioned gift transfers; appellees, being in a fiduciary relationship, have not met the burden of establishing no undue influence or overreaching and, therefore, the chancellor erred in finding the gifts in question were valid, legal gifts. We cannot agree.

It is not disputed by the appellees that a fiduciary relationship existed between appellee Douglas Phillips and the deceased at the time of the alleged gifts. Neither do the appellees question the rule in *Barrineau* v. *Brown,* 240 Ark. 599, 401 S.W. 2d 30 (1966), and our similar decisions relied on by appellant; i.e., a donee who has a fiduciary relationship to the donor has the burden of proof, by clear and convincing evidence, to overcome the presumption of invalidity of a gift when it stems from such a relationship.

There is volunimous testimony, both lay and expert, regarding the deceased's mental capacity. There was some testimony that she was not the same after her husband passed away in 1965 and some testimony that indicated a change after her only child was killed in 1949. There was a great deal of testimony by some of her relatives and others, including a daytime and nighttime attendant, that during the two years preceding her death in February, 1974, she was at times confused, disoriented and had difficulty recalling facts. She was repetitious in her conversations and actions and was irrational in her behavior. Several witnesses said at times she was just like a child and was not competent to engage in business transactions. There was medical evidence she suffered from cerebral arteriosclerosis (hardening of the arteries) which resulted in senility.

There was an abundance of testimony that most of the time she was entirely rational and able to transact business. Lewis Goad, president of her bank and a friend for more than thirty years, testified "[S]he needed help in her business but I agree, that given sound help and advice there was no reason why she couldn't transact business." The assistant cashier of her bank, who observed the deceased at the bank for twenty-

seven years, testified she would characterize her behavior "[J]ust as normal as any elderly person could be." The pastor of her church testified that she attended church regularly until she became ill in January, 1974. She was active in her Bible class. He visited her in her home once or twice a month and saw her occasionally about town. During the times he observed her "as far as mental judgment and competency are concerned I would say that by and large that she knew who she was, where she was and what she was doing."

Several witnesses, who saw her regularly including some of her neighbors for many years, testified that they considered Mrs. Sharpe as being rational, normal, mentally alert and competent. Her personal physician, Dr. Swingle, who had treated the deceased for twenty years and saw her socially, testified that up until the last two years of her life she was 100% lucid. From September 1, 1973, until January 28, 1974, he saw her about seven times professionally and socially on occasions. During that time he considered her 80% lucid until she was hospitalized for a physical illness on the latter date. He also testified on cross-examination that "I believe that Mrs. Sharpe was lucid enough to retain in memory, without prompting from another person, the extent and condition of the property she had disposed of by will, inventory and gifts and bequests. . . . . It was my opinion that Mrs. Sharpe was lucid and same and had no defect of reasoning as far as I could ascertain." According to him she was an exceptional physical and mental specimen until the latter part of 1973.

The appellees, Mr. and Mrs. Glasco, had lived across the street from the Sharpes since 1946. Mrs. Sharpe's husband gave the Glascos $4,500 for the purchase of their home in 1964. Mrs. Glasco is Mrs. Sharpe's neice. During these many years they were very attentive to her every need. When Mrs. Sharpe broke her hip and arm in 1969, she lived with them approximately three months. The appellees, Douglas and Rosa Lee Phillips, lived in a nearby town. Mrs. Phillips is the Glascos' daughter and Mrs. Sharpe's great neice. They, likewise, were constantly solicitous and attentive to Mrs. Sharpe. There was uncontradicted testimony she considered the Glascos and the Phillipses to be her children and the Phillipses' children, John and Jennifer, her grandchildren. A

close friend and neighbor to the deceased and her husband for many years and who saw her regularly testified as abstracted:

> I just don't see how the relationship of the Glasco and Sharpe family could be any better. They were very close and looked after them day and night. . . . I would say she looked on them as the only family she had left to look after her, as her children. . . . Well, she had, as I said, her good days and bad days in her memory, but when she was at herself she was at herself, and she never failed to talk sense when I talked to her and when I saw her and visited her. . . . I don't know what Mrs. Sharpe would have done without the Glascos and the Phillipses. I really don't.

In referring to John and Jennifer Phillips, this friend said Mrs. Sharpe "talked about she was going to educate the children. . . . It was just like they were her own children." This is supported by a letter from Mrs. Sharpe in February, 1972, to her bank authorizing the use of certain funds to educate the Phillipses' children.

Appellee Douglas Phillips is an insurance agent, a C.L.U., with training and experience in business matters. After Mrs. Sharpe's husband died in 1965, she relied upon him, without any remuneration to him, in the conduct of her business affairs. Her property interests were extensive and reflect total assets of $627,584.84 (real estate $273,000, cash, $500 car, and securities $354,084.84). The attorney, who prepared the legal instrument in January, 1971, giving appellee Phillips a general power of attorney, testified that both Mrs. Sharpe and Douglas Phillips were in his office and there was a discussion as to what she wanted. He then drafted the document, read and explained it to her. She executed in his presence. As abstracted, "[I]t appeared to me that Mrs. Sharpe completely understood it and I thought that it would meet the purposes for which they came." Appellee Douglas testified that the deceased directed him to make the gifts in question during the last two years of her life as part of an overall estate tax gift plan and he considered her competent to make the gifts. Several witnesses testified without contradiction that Phillips' reputation in the community for

truthfulness, honesty and integrity was good. One witness said as abstracted "I would say that very well describes his reputation. His integrity is beyond question I would say."

Appellee Douglas Phillips' testimony is corroborated by Grover Freeman, a C.P.A., who testified that following Mrs. Sharpe's husband's death in 1965 and on various occasions during the last few years of her life, he discussed with her the subject of gift and estate problems and the advantages of having a program of gifts to alleviate her estate taxes. As abstracted, "I would say that Mrs. Sharpe was aware of the tax problems involved in the estate taxes as a result of her husband's estate tax situation. . . . I recommended that she might consider making some gifts to the people that she might be considering in her will [appellees are made beneficiaries in Mrs. Sharpe's 1967 will] anyway to take it out of the estate to save estate taxes. . . . I made the recommendation to her to purchase these bonds [government bonds] and save taxes. This was part of the estate planning that I did with her. I do not recall any other recommendations I made to her besides these gifts and bonds, and generally that was the extent to our conversation in that regard. She bought $100,000 worth of bonds. . . . In 1970 she was considering estate taxes and means of avoiding or reducing them. I made the recommendations regarding the gifts at that time. I think she understood generally what was being said to her. . . . I might say this, that Mrs. Sharpe had no trouble understanding and following through on a suggestion that she buy $100,000.00 of Federal Government Bonds at a favorable price to alleviate estate taxes. I didn't have to explain that twice." In further corroboration, there were five quarterly gift tax returns signed by her covering the period of gifts from March 16, 1972, until December 31, 1973. These five returns identified in detail the gifts which total $59,-738.65. A gift of $3,000 each to John and Jennifer was made on January 2, 1974. Since she died in February, 1974, no gift tax return for that quarter was made.

In summary, the inventory of Mrs. Sharpe's estate consisted of $627,584.84 in total assets. In her 1967 will she made various specific bequests to her relatives and charities. Among these was an interest in her home to the Glascos and $10,000 to the Phillipses. However, by specific bequests and

the residual clause of her will, the vast part of her estate was left to her brother, sisters and numerous other relatives. Her accountant testified that he had disucssions about a gift tax program with her for the purpose of alleviating her estate taxes. It appears that following these discussions, the gifts in question were made. Five quarterly gift tax returns were filed in 1972 and 1973 detailing the names of the donees, the amounts and the dates of the gifts. It is undisputed that they were signed by Mrs. Sharpe and approved by her accountant. Over one-half of the amount of the questioned gifts were made to the Phillipses' children, John and Jennifer, regarded by her as her grandchildren. It appears one or both of them were college students. There was testimony by a disinterested witness and a letter from Mrs. Sharpe to her bank indicating her desire to educate John and Jennifer. It is further undisputed that the appellees were kind to Mrs. Sharpe and took painstaking care of her every need for many years. She regarded them as her children.

The finding of the chancellor on a fact question will not be disturbed by us on appellate review unless the finding is against the preponderance of the required evidence. *Nutt* v. *Strickland,* 232 Ark. 418, 338 S.W. 2d 193 (1960). In *Murphy* v. *Osborne,* 211 Ark. 319, 200 S.W. 2d 517 (1947), we aptly said "the chancellor saw each witness when he testified. The chancellor observed the demeanor on the witness stand, the inflection in the voice and the hesitancy or rapidity of the words flowing from the mouth of the witness. The chancellor thus had an opportunity to see more than the mere words on the printed page which, alone, come to this court." In the case at bar the chancellor had the advantage of seeing and hearing the witnesses in resolving the disputed issues. Therefore, when we consider this together with all the evidence, we cannot say his finding as to competency, undue influence and overreaching is not supported by clear and convincing evidence.

We next consider appellant's contention that the chancellor erred in allowing the appellees to introduce appellee Douglas Phillips' answers to appellant's interrogatories. Appellant argues that the answers contained inadmissible self-serving declarations and hearsay. We perceive no prejudice because the interrogatories were offered

"expressly not for evidentiary purposes" but solely for the purpose of proving they were made and to constitute a waiver of the dead man's statute. In *Motors Insurance Corporation* v. *Lopez,* 217 Ark. 203, 229 S.W. 2d 228, this court said:

> A statement made out of court is not hearsay if it is given in evidence for the purpose merely of proving that the statement was made, provided that purpose be otherwise relevant in the case at trial.

Appellant also asserts that the chancellor erred in holding that the appellees' introduction of appellee Douglas Phillips' answers to appellant's interrogatories constituted appellant's waiver of the dead man's statute, Arkansas Constitution (1874), Schedule 2, which provides in pertinent part:

> . . . . in actions by or against executors, administrators or guardians in which judgment shall be rendered for or against them, neither party shall be allowed to testify against the other as to any transactions with or statements of the testator, intestate or ward, unless called to testify thereto by the opposite party.

Appellant argues that when the appellee Douglas Phillips' answers are introduced on behalf of appellees, it cannot truly be said that he was "called to testify by the opposite party," and, consequently, no waiver of the dead man's statute resulted by the use of the interrogatories. Appellees respond that by the use of the interrogatories directed to appellee Douglas Phillips, the appellant waived any disqualification of Phillips as a witness. We agree. *Smith, Administratrix* v. *Clark,* 219 Ark. 751, 244 S.W. 2d 776; *Hood, Executrix* v. *Welch,* 256 Ark. 362 (1974); and *Tenny* v. *Porter,* 61 Ark. 329, 33 S.W. 211 (1895).

We next consider appellant's assertion that the court erred in admitting hearsay testimony of appellee Lee Glasco and appellee Douglas Phillips regarding conversations with the deceased's husband, A. J. Sharpe, who died in 1965. Appellant argues that the testimony of Glasco and Phillips concerning Sharpe's generosity was incompetent as hearsay and irrelevant since the question of whether or not Sharpe

was a generous man is not an issue. We review chancery cases de novo and consider only such testimony as is competent. *Newsom* v. *Reed,* 177 Ark. 177, 6 S.W. 2d 10 (1928). Suffice it to say, here we consider the evidence sufficient without considering the asserted incompetent testimony.

Appellant next contends that the chancellor erred in permitting appellee Douglas Phillips' "almost carte blanc leeway in incorporating discussions that Phillips alleges ensued with deceased since most of Phillips' testimony violates the substance and spirit of the hearsay rule and/or the dead man's statute." Appellant argues that since virtually all the substance of Douglas Phillips' testimony is founded upon unreliable self-serving recapitulations of his conversations with deceased, "it would serve little purpose to enumerate practically all the pages of his direct examination testimony that incorporates pervasive hearsay as well as violations of the Dean Man's Statute." That part of the argument relating to the dead man's statute is repetitious and was disposed of earlier in this opinion. As to that portion of appellant's argument referring specifically to certain conversations as self-serving declarations and hearsay, suffice it to say that we deem other evidence sufficient without considering the asserted examples of inadmissible evidence.

Appellant next asserts that the court erred in admitting picture film strips that had been spliced and edited by appellee. The film in question was a motion picture reel prepared by appellees for trial from several boxes of film which the Phillipses and Glascos had taken over a period from Easter, 1956, to Christmas, 1965, showing occasions of visits of the two families with Mr. and Mrs. Sharpe. Appellant argues that the motion picture "may not" accurately show what they are represented to portray because the film was spliced and edited without any unbiased supervision; fabrication is "entirely possible" since there is no practical way to determine exactly what was deleted; and to allow such edited and spliced films involving remote occasions as distant as 1956 is so unreasonable as to constitute abuse of the trial court's discretion. We cannot agree. Here there is no evidence that the films do not represent an accurate reproduction or that they convey a false impression. Counsel for appellant was given an opportunity to view any edited

portions of the film in appellees' possession and to supply any films that it felt were relevant. The pictures were properly admitted. *Sloan* v. *Newman,* 166 Ark. 259, 266 S.W. 257 (1924).

Neither can we agree that the chancellor erred in refusing to allow into evidence portions of Dr. Schoettle's deposition. It is asserted that the court rendered inadmissible relevant admissions against interest allegedly made by appellee Lee Glasco. The evidence about which appellant is concerned is a medical history of the deceased taken from a hospital admissions record which was made when deceased was admitted to the hospital on January 28, 1974. It appears the record itself was not offered into evidence. Suffice it to say that the authenticity of the hospital record was not properly established by any testimony under oath. Further, the portion asserted as being relevant is admittedly based upon the mere assumption of Dr. Schoettle, the deponent.

On cross-appeal it is contended that the trial court erroneously held that the claim based upon the $3,000 debt of appellee Douglas Phillips was not barred by the three year statute of limitations. Ark. Stat. Ann. § 37-206 (Repl. 1962). The thrust of cross-appellant's argument is that the check given by Mrs. Sharpe to Phillips for $3,000 marked "loan" did not constitute a written contract and since more than three years expired before appellant's action was commenced, the chancellor erred in not holding the suit was barred. We cannot agree. Appellee Phillips was given power of attorney before the three year statute of limitations had expired. In this fiduciary capacity he was her business advisor and she relied upon him in the conduct of her affairs. Therefore, he is estopped to invoke the statute of limitations. See *Leach* v. *Moore,* 57 Ark. 588, 22 S.W. 173 (1893); 51 Am. Jur. 2d, Limitation of Actions, § 452; 45 ALR 3d 630.

Affirmed on direct and cross-appeal.

BYRD, J., dissents.

CONLEY BYRD, Justice, dissenting. The law correctly places upon a fiduciary the obligation to show by clear, cogent and convincing evidence that his self dealings with the trust property were authorized. Regarding the checks which

appellee wrote to himself or his family and on which Mrs. Sharpe filed gift tax returns to the Internal Revenue, I cannot say that the chancellor erred; although the issue is close. However, I cannot agree with the majority that appellee discharged his burden of proof as to the checks written to himself or his family on which no gift tax returns were made. We have in the record only the testimony of appellee that those checks were gifts. Surely the majority is not saying that the fact that appellee was kind to and considerate of Mrs. Sharpe corroborated his testimony. If that be the majority's view, then all embezzlements by a kind and considerate fiduciary should be considered gifts.

For the reasons stated, I respectfully dissent.

ARKANSAS STATE GAME AND FISH COMMISSION *v.* Harley D. GILL et al

75-388 538 S.W. 2d 32

Opinion delivered July 6, 1976

*William H. Donham,* for appellant.

*George E. Pike* and *Macon, Moorhead & Green,* by: *J. W. Green Jr.,* for appellees.

FRANK HOLT, Justice. This case involves the eminent domain power of the appellant under Amendment 35 of the Arkansas Constitution (1874). Appellant brought suit in the circuit court to condemn 143.76 acres of appellees' lands pursuant to the authority of that Amendment. The land sought to be condemned is adjacent to approximately 34,000 acres of land (the Bayou Meto Wildlife Management Area) owned and managed by appellant. During the duck hunting season, appellant annually floods a portion (a green tree, artificial reservoir) of the Bayou as a wintering habitat for the migratory mallard duck. The water impoundment is later released in mid-February of each year to prevent damaging the green timber in appellant's artificial reservoir. As a result of this annual seasonal flooding, approximately 20 to 40 acres of appellees' lands are sometimes flooded, damaging their crops. Appellant, in its complaint and declaration of taking, alleged that appellees' lands are necessary, useful and convenient in the exercise of its control and management of the wildlife management area. The appellee landowners filed a motion to strike the declaration of taking on five grounds: (1) the taking is contrary to Amendment 35 to the Arkansas Constitution for the reason that the taking is not in the public interest; (2) the taking is contrary to the finding in *Hampton* v. *Arkansas State Game and Fish Commission,* 218 Ark. 757, 238 S.W. 2d 950 (1951); (3) the taking is not necessary to carry out the statutory and constitutional purposes of the Commission; (4) appellee landowners would be irreparably damaged for which they have no adequate remedy at law; and (5) the purpose of the taking is to avoid building dams, levees, or other structures to prevent flooding of appellees' lands. On appellees' motion the action was transferred to chancery court. After hearing the evidence, the chancellor dismissed the complaint and declaration of taking, finding in part:

> There is really very little difference between the facts of this case and, certainly, the facts that existed and the purposes that were present and involved in the Hampton case. It can be said that the Game and Fish Commission is seeking to condemn the defendants' lands to make it a part of the Bayou Meto Wildlife Management Area to improve the, basically, duck hunting and duck killing capabilities of this area, and that, the Supreme Court says, it cannot do. **** So, Ground No. 1., the

> Court holds that ultimately, even though the witnesses for the plaintiff were not trying to deceive the Court, the Court believes they gave their testimony in utmost good faith, but when they have testified that the purpose is to improve the habitat of this area, the Court must pursue that further than they did and, as stated, and to repeat, that is in the opinion of this Court for the purpose of improving that quality of the habitat so that the duck shooting in that area can be and will be enhanced, and that is not permitted under Arkansas Law according to the Hampton case.

Appellant asserts that the evil sought to be corrected is that the Commission cannot fully operate its green tree artificial reservoir without flooding the appellees' private lands lying adjacent to the Bayou Meto Wildlife Management Area. Therefore, the acquisition is for the purpose of acquiring such lands in order to fully utilize the waterfowl habitat previously acquired for the W.M.A. Appellant candidly admits that it is asking this court to either overrule or distinguish *Hampton, supra,* from the case at bar. Appellant further correctly recognizes that this court is reluctant to overrule previous decisions except for clear and demanding cause.

In *Hampton, supra,* the Arkansas Game and Fish Commission, pursuant to Amendment 35, sought to condemn 1,320 acres of land to become part of the Bayou Meto Wildlife Management Area. The chancery court sustained the Commission's authority to exercise eminent domain there. On appeal we reversed saying:

> So here the State cannot, under the guise of a game refuge, take the property of private citizens and then convert the property to a public hunting ground to satisfy the sporting instincts of other citizens. A careful study of the entire Amendment No. 35 shows that it is not the duty of the Commission to acquire lands by eminent domain in order to establish shooting grounds where the public may kill migratory fowl. That is the basic question in this case; and we hold that the Commission does not have such power.

In the case at bar the chancellor found the same situation to exist as in the *Hampton* case; namely, the Commission was attempting to improve the habitat of the Bayou Meto area for the purpose of enticing migratory mallard ducks to this public hunting ground for the purpose of hunting and killing ducks. We think the evidence clearly preponderates in support of the chancellor's finding. In fact, appellant agrees that it "has no quarrel with the finding of the court below that the direct purpose of the taking was to improve the quality of the habitat for ducks, but that the purpose of improving the habitat was to attract more ducks to the Bayou Meto Wildlife Management Area where regulated public hunting is allowed." The thrust of appellant's argument, as indicated, is that we should "either outright reverse the rule established therein or distinguish it from the case at bar." We must decline appellant's persuasive argument to overrule the longstanding precedent established by *Hampton*. Neither can we agree with appellant that *Hampton* is distinguishable from the case here. Nor can we agree that *Hampton* is overruled by our decision in *State Game & Fish Comm.* v. *Hornaday,* 219 Ark. 184, 242 S.W. 2d 342 (1951).

We deem it unnecessary to discuss appellant's additional contention that the chancery court was without jurisdiction to substitute an alternative remedy (building a levee with pumps to prevent flooding) to the eminent domain proceeding initiated by appellant.

Affirmed.

SMITH, FOGLEMAN, and BYRD, JJ., dissent.

JOHN A. FOGLEMAN, Justice, dissenting. I respectfully dissent, but I cannot join with those who would overrule *Hampton* v. *Arkansas State Game & Fish Comm'n,* 218 Ark. 757, 238 S.W. 2d 950. On the record before the court in that case it seems to me that the court was right. Amendment 35 does not authorize the exercise of the power of eminent domain to acquire lands on which to establish a public duck hunting project. That was the only question presented and the only one decided. In *Hampton,* the complaint alleged that the Commission had the obligation, duty, authority and responsibility of acquiring, developing and maintaining hunting and fishing

facilities for the use and benefit of sportsmen and that the taking was in the discharge of that duty. Clearly, it does not have that duty but no other purpose for the taking in *Hampton* was alleged or proved. The landowner's challenge was that the Commission did not have the power to condemn the lands for the purposes stated in the complaint and that the Commission did not have the obligation, duty, authority or responsibility of acquiring, developing or maintaining public hunting facilities. It was stipulated at the beginning of the trial that the question to be presented to the court was whether the Commission had the right to condemn the lands "for the purposes shown by the pleadings and proof for such condemnation." The decree in the chancery court recited the stipulation. The executive secretary of the Commission testified that the number one purpose of the plan in its inception and execution was "duck hunting and shooting." The report of the Commission's Coordinator of Federal Aid stated that the Commission's greatest possible accomplishment was in the "acquisition of suitable areas for public hunting, that "we are now ready for the final push which will make one public hunting ground an accomplished fact." "The only possibility . . . is through the purchase of public hunting areas," and "In the spring of 1946, an investigation was made of the possibility of establishing a public shooting ground in the Bayou Meto area . . . The area is physically well adapted for use as a duck hunting area and has an excellent reputation in this respect."

As the court said in *Hampton,* a public shooting ground can hardly be likened to a hatchery, sanctuary, refuge or reservation. It was conceded in *Hampton* that only one-fourth of the area would ever be used as a refuge. The opinion concluded:

> . . . A careful study of the entire Amendment No. 35 shows that it is not the duty of the Commission to acquire lands by eminent domain in order to establish shooting grounds where the public may kill migratory fowl. That is the basic question in this case; and we hold that the Commission does not have such power.

This is a different record indeed. In the declaration of taking, it was alleged that the public use for which the property was taken was to facilitate the control and mangement of a

wildlife management area. On the face of the pleadings the taking was for purposes stated in Amendment 35.

Bill Gaines, Real Estate Officer for the Commission, who has a bachelor's degree in biology with special courses in wildlife management, forestry and surveying, testified about the purposes of the taking, as did Lawrence N. Owens, District Game Biologist for the Commission. Their testimony may be summarized:

> There is a green tree reservoir on the Bayou Meto Wildlife Management Area, which is controlled by two levees, the upper Vallier School levee and the lower Vallier School levee. The upper levee has very little watershed and is utilized to keep water off the Gill property, holding that reservoir to 551.53 acres. The normal pool elevation to afford an adequate waterfowl habitat in the winter in the upper area (1,243 acres) is 1,785 feet mean sea level, but when the water reaches this level, it overflows on the Gill property and another tract. The Commission would like to maintain an area of 3,566.67 acres as a green tree reservoir, and would use all the Gill land, other than that upon which the water would spread, as a buffer zone for excess runoff and excess water in the area. The acquisition of this piece of property is necessary, useful or convenient for the use of the Commission in the exercise of its duties for the following reasons:
>
> > The acquisition of this piece of property from a management standpoint of managing the green tree reservoir for a wildlife and waterfowl habitat, this property is necessary to act partially as a buffer zone when you have high flows into the area and not capable of letting the water out of the basin quick enough and getting on this private land and also a portion of it to be a permanent pool for waterfowl habitat without hampering of the management of the entire upper green tree reservoir.
>
> Without the acquisition of this property it would be almost futile to even attempt to manage a green tree reservoir in the upper Vallier School area. The terrain is

so flat that raising the water level six inches increases the size of the green tree reservoir from 551 acres to 1,-243 acres, but managing the green tree reservoir here is almost useless because private property is damaged when water is raised to the higher level. The maximum manageable green tree area includes a portion of the Gill property. The primary purpose is not to grow grain on the Gill property but to acquire fee title so the management of the Bayou Meto Wildlife Management Area can be carried out. The purpose of having water in the green tree reservoir is to provide winter habitat for waterfowl, principally ducks. No designated area is set aside in the Wildlife Management Area for hatching and raising ducks. Part of it, the Wrape plantation, consisting of 500 acres, is closed to duck hunting, except for the last three days of the season. The rest of the area is closed to duck hunting for half of each day, so that ducks will remain in the area throughout the winter. Constant harassment would cause them to leave. Some mallards remain in Arkansas throughout the winter.

The waterfowl is dependent upon wintering grounds as much as upon rearing ponds in Canada and the northern part of the United States. Providing for them to remain and feed in the winter is part of conservation. Arkansas, along the Mississippi River and in the Stuttgart area, has been a traditional mallard winter ground during migration. Because the area is a basin which floods, it has been used primarily for waterfowl management. The primary purpose is to attract ducks during the winer months and the provision of hunting along with that is within the realm of good, scientific game management. The overall purpose is management. The side effect is hunting.

Mallards attracted to the area from the Mississippi flyway remain until about the middle of February. The spillways are then opened. Only about five per cent of the Bayou Meto Wildlife Area — the green tree area — is flooded for waterfowl. A primary purpose of the green tree area is duck hunting, which is a tool in conservation to keep the waterfowl population in balance. The Wildlife Management Area surrounds the Gill property

on three sides. The combined area of the upper and lower green tree reservoirs was designed to flood between 7,000 and 9,000 acres. The area was primarily set up for a wintering habitat for waterfowl, not for hunting.

Amendment 35 to the Arkansas Constitution charged the Commission with the duty of control, management, conservation and regulation of birds, game and wildlife resources of the state. §§ 1 and 8, Amendment 35. Traditionally, waterfowl have been a resource of this state. Providing a winter habitat for them is a proper function of the Commission in the control, management, conservation and regulation of the migratory waterfowl which are birds, game and a wildlife resource. The evidence shows that a winter habitat is as essential in the conservation and management of this wildlife resource as nesting grounds. The evidence also shows that hunting is necessary to maintain the proper population balance as a conservation measure. If summer or winter habitats are overpopulated, it stands to reason that this wildlife resource will suffer. There was no evidence in *Hampton* that conservation or propagation was promoted by intermittent shooting, or a thinning out process, as there is here. The primary purpose here is not acquisition of a public duck shooting facility. *Hampton* is easily distinguished.

I would reverse the decree and remand for further proceedings.

CONLEY BYRD, Justice, dissenting. To me the case of *Hampton* v. *Arkansas State Game & Fish Commission,* 218 Ark. 757, 238 S.W. 2d 950 (1951), was overruled by *State Game & Fish Commission* v. *Hornaday,* 219 Ark. 184, 242 S.W. 2d 342 (1951). If the Game and Fish Commission can use the power of eminent domain to make a lake for fishermen to fish, I fail to understand the logic that prevents the Commission from using the same power of eminent domain to provide a lake for duck hunters to hunt. Amendment 35 to the Arkansas Constitution does not make the distinction.

For the reasons stated, I respectfully dissent.

GEORGE ROSE SMITH, J., joins in this dissent.

STATE of Arkansas *v.* Joe Lawrence CASHION et ux

CR 76-29 539 S.W. 2d 423

Opinion delivered July 6, 1976
[Rehearing denied September 13, 1976.]

*Jim Guy Tucker,* Atty. Gen., by: *B. J. McCoy,* Asst. Atty. Gen., for appellant.

No brief for appellees.

FRANK HOLT, Justice. This is an interlocutory appeal by the state pursuant to Arkansas Rules of Criminal Procedure, 16.2 (d) and 36.10 (1975). The trial court held that the description "and curtilage and appurtenances contained in the description of the premises to be searched as stated on the face of the search warrant is of no legal consequence." The court then "ordered that any and all evidence contained in any out building or on any premise other than the residence and the area [a garden] observed by [the officer] be suppressed." We make it clear that the only issue presented is whether the words "and curtilage and appurtenances" were a sufficient description in a search warrant to allow the search of a chicken house located 20 to 40 feet from the described residence or farmhouse and a hay shed located 300 feet from the house and 25 to 30 feet from a barn described in the search warrant. It appears that no evidence (marijuana) was found in the barn.

It is well established that only unreasonable searches

and seizures are prohibited by our State (Art. 2, § 15) and Federal (Fourth Amendment) Constitutions. *Wickliffe & Scott* v. *State,* 258 Ark. 544, 527 S.W. 2d 640 (1975); and *Carroll* v. *United States,* 267 U.S. 132 (1924). The degree of particularity required of a description in a search warrant is governed by the facts and circumstances of each case. *Easley* v. *State,* 249 Ark. 405, 459 S.W. 2d 410 (1970); and *Perez* v. *State,* 249 Ark. 1111, 463 S.W. 2d 394 (1971).

Here the search warrant contained a description of a farmhouse with a red barn and also the additional words "and curtilage and appurtenances." Pursuant to this description, the officers searched the farmhouse and the other buildings adjacent thereto, all within 300 feet of the described house. In *Walker* v. *U.S.,* 225 F. 2d 447 (5th Cir. 1955), the court said:

> The barn here searched was a domestic building constituting an integral part of that group of structures making up the farm home. Every case must be decided upon its own peculiar facts, and we hold that, under the facts here, this barn was a part of the curtilage. In *Taylor* v. *United States,* 1931, 286 U.S. 1, 52 S. Ct. 466, 76 L. Ed. 951, the house searched was a metal garage adjacent to the dwelling house; in *Robinson* v. *United States,* 6 Cir. 1948, 165 F. 2d 752, the search was a smokehouse; and in *Walker* v. *United States,* 5 Cir. 1942, 125 F. 2d 395, 396, the search was of a shed consisting of a chicken house and garage, which stood fifty to sixty feet from the dwelling house; in each instance it was considered that the curtilage was involved.

See also *Rosencranz* v. *United States,* 356 F. 2d 310 (1st Cir. 1966); *United States* v. *Meyer,* 417 F. 2d 1020 (8th Cir. 1969); and 68 Am. Jur. 2d, Searches and Seizures, § 78. Cf. *Durham* v. *State,* 251 Ark. 164, 471 S.W. 2d 527 (1971). In the case at bar we hold the description of the farmhouse, barn, "and curtilage and appurtenances" was sufficient to authorize the officers to search the chicken house and hay shed on the farm.

Reversed and remanded.

# G. B. CHRISTMAS et al *v.* Mary Shelton RALEY et al and MURPHY OIL CORPORATION et al

75-377 539 S.W. 2d 405

Opinion delivered July 6, 1976
[Rehearing denied September 13, 1976.]

*Keith, Clegg & Eckert,* by: *Oliver M. Clegg* and *Ned A. Stewart Jr.,* for appellants.

*Smith, Stroud, McClerkin, Conway & Dunn,* by: *Hayes McClerkin,* for appellees and intervenor-appellees.

ELSIJANE T. ROY, Justice. Appellees Mary Shelton Raley, et al. and intervenor-appellees (intervenors) Murphy Oil Corporation and American Petrofina Company of Texas (Petrofina) sought a declaratory judgment that two oil fields, unitized on a field-wide basis by order of the Arkansas Oil and Gas Commission (Commission), consonant with Ark. Stat. Ann. §§ 53-115(c)(1) et seq., had terminated as units. Appellees and intervenors requested an order cancelling as clouds on their title the oil and gas leases upon which the units were created.

Appellees are the owners and lessors of the mineral acreage in the units here involved, known as the Genoa and

Genoa-Tokio Units. Intervenors are lessees of this mineral acreage who acquired their leases in 1973 and 1974 subsequent to creation of the units by the Commission. Appellants G. B. Christmas et al. are either lessees or the assigns of lessees of the acreage upon which the units are based, and had acquired the original mineral leases to the land. The Genoa Unit was created by the Commission on February 16, 1962, and the Genoa-Tokio Unit on October 17, 1963. Both fields are devoted to the extraction of hydrocarbon compounds by a water injection secondary recovery technique and both may, for practical purposes, be treated as one field.

Concurrently with the creation of the units by the Commission agreements were drafted which stipulated the rights of the respective parties in relation to the unit operations. Appellees and intervenors rely upon Article 18.1 of the unit agreements (UA) to support their termination claims. It provides:

> The term of this agreement shall be for the time that Unitized Substances are produced in paying quantities and as long thereafer as Unit Operations are conducted without a cessation of more than ninety (90) consecutive days, unless sooner terminated by Working Interest Owners in the manner herein provided.

Appellants denied that the units and/or the leases on which the units were based terminated; questioned the chancellor's jurisdiction to act in this case; pled estoppel, waiver, laches and limitations; affirmatively sought an order cancelling the leases of intervenors as clouds on their title to the unit and sought damages against both groups for disturbing their peaceful possession of the units.

The chancellor held that the Genoa-Tokio Unit was terminated on November 1, 1967; that the Genoa Unit was terminated on April 1, 1973; that the leases were terminated on April 1, 1973; that jurisdiction was present. He granted the cancellation order sought by appellees and intervenors removing the cloud on their titles. He denied the cancellation order sought by appellants and also denied the damages sought by appellants. From the rulings adverse to them appellants have appealed.

Appellants first urge that the chancellor lacked jurisdiction, contending that jurisdiction was exclusively in the Commission. We find no merit in this contention. The nature of the relief requested by appellees and intervenors was in the main equitable in nature.

In *Spartan Drilling Company* v. *Bull,* 221 Ark. 168, 252 S.W. 2d 408 (1952), the issue of chancery jurisdiction was raised, and we held:

> . . . [T]hat the jurisdiction granted to the Oil and Gas Commission in its supervisory capacity over oil and gas production is not exclusive, and that appellees had the right to maintain the instant suit.

We also stated in *Spartan:*

> It is not infrequent that a dual remedy, one in the judicial and another in the administrative forum, may be available to the same party for the enforcement of the same right. 42 Am. Jur., Public Administrative Law, § 252.

Furthermore, appellants waived any objection to chancery court jurisdiction by affirmatively seeking relief, i.e. cancellation of the leases of the intervenors and damages from both appellees and intervenors. See *Nichols* v. *Lea,* 216 Ark. 388, 225 S.W. 2d 684 (1950).

Appellants also contend that the chancellor erred in holding that the Genoa Unit[1] terminated on April 1, 1973, and in holding that the leases on which the unit was based likewise terminated on April 1, 1973.

It is the duty of the court to construe a contract according to its unambiguous language without enlarging or extending its term. *New York Life Insurance Company* v. *Dandridge,* 202 Ark. 112, 149 S.W. 2d 45 (1941); *American National In-*

[1]Appellants' brief states ". . . considering the rather small size of the Genoa-Tokio Unit in relation to the Genoa Unit, Appellants will devote no time in this Brief to the Genoa-Tokio Unit as a Unit separate and apart from the Genoa Unit."

*surance Company* v. *Hamilton,* 192 Ark. 765, 94 S.W. 2d 710 (1936).

In addition thereto, the contract must be construed against the party who had same drafted, in this instance appellant Christmas. *Yellow Cab Company of Texarkana* v. *Texarkana Municipal Airport,* 230 Ark. 401, 322 S.W. 2d 688 (1959); *W. T. Rawleigh Company* v. *Wilkes,* 197 Ark. 6, 121 S.W. 2d 886 (1938). In light of these authorities we review the record herein.

The Commission's records indicate that water commenced being injected into the Paluxy Formation, Young Sand, Genoa Unit in the month of July, 1962, and that by September of 1963 maximum production had been obtained from the unit which was in excess of 25,000 barrels of oil per month. From June of 1968, the production records indicate a sharp decline in production from the unit. Commencing in June of 1968, there was no production for a period of nine months, in 1969 very little production. Since December, 1971, no water has been injected into the formation and from June 1972, through May of 1973, there was no production from the Genoa Unit.

Landowners holding approximately 600 acres of the mineral ownership of the units testified as to the present status of the various wells indicating little or no production on their property for approximately the last five years. The following testimony is illustrative of that found throughout the extensive record of the trial.

School officials of Genoa Central School District testified that none of their wells had been operative for several years and that there had been *a period of five years in which they have received no royalty payments.* The testimony of Mr. and Mrs. Bassett clearly indicates there *had been no production under their leases since the year 1971.* The testimony of Cole Young indicated there *had been no production on* his property since 1971, and for this reason and others he had attempted to notify Christmas to vacate the premises and had contacted an attorney and the Commission regarding termination of his lease. The Commission advised him that it could not do anything about it — that he would have to go to court.

An expert independent consulting engineer, Tom G. Calhoun II, testified that production in paying quantities in the Genoa Unit ceased in June, 1968. Calhoun's testimony further reflected that initially the Genoa Unit water flood project was successful but that its economic life ended in 1968; though resumed to a limited extent in the latter part of 1969, operations were not profitable after the 1968 date. His expert opinion was that due to the nature of the Paluxy Formation, the Genoa Field can no longer be operated as a water flood secondary recovery program. Since the testimony of Mr. Calhoun is unrefuted, his testimony must be given strong weight by the court. *Blair* v. *Clear Creek Oil and Gas Company,* 148 Ark. 301, 230 S.W. 286 (1921).

Jack Denson, petroleum engineer for Petrofina, testified that the Genoa Unit was not capable of a secondary recovery program as it existed in March, 1975.

The unrefuted testimony is that production in "paying quantities" from the Genoa Unit ceased in 1968 and that subsequent thereto there have been two periods of cessation well in excess of "ninety days." The Commission's records of the Genoa-Tokio Unit indicate that a period of approximately six years existed in which there was no production of unitized substances from the unit.

There was no evidence introduced which would show that the non-production is temporary; nor is there any evidence to indicate that Christmas, as the operator of the unit, was using reasonable diligence to maintain production in the units, or in connection with any individual lease. The lessors are being injured substantially, and it must be presumed from the facts and circumstances presented at trial and contained within the record that the lessee abandoned the units and the individual leases during the periods of non-production.

A lessee must act for the mutual benefit of both lessor and lessee; *Smart* v. *Crow,* 220 Ark. 141, 246 S.W. 2d 432 (1952); *Ezzell* v. *Oil Associates, Inc.,* 180 Ark. 802, 22 S.W. 2d 1015 (1930); and if such is not evident, the involved leases should be cancelled.

The UA also contains the following language in paragraph 3.5:

> Nothing herein shall be construed to result in the transfer of title to the Oil and Gas rights by any party hereto to any other party or to Unit Operator. *The intention is to provide for the cooperative development and operation of the Tracts and for the sharing of Unitized substances as herein provided.* (Italics supplied.)

Consequently an analogy can be made with the implied covenant to develop as it applies to oil and gas leases. We recognized the implied covenant to develop in *Ezzell* v. *Oil Associates, Inc., supra.* In *Zappia* v. *Garner,* 259 Ark. 794, 536 S.W. 2d 714 (1976), we quoted from *Miller* 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.
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> . . .
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> . . . 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.

The purpose of the execution of the UA is clearly set forth; the obligation created by the UA was for secondary recovery through the injection of water; and, in this instance, the operator and majority owner of the units involved ceased injecting water into the formation comprising the Genoa Unit in December, 1971, and in the formation comprising the Genoa-Tokio Unit some time during the year 1967.

Appellants also argue that:

> They are entitled as a matter of law to have this Court assume that in holding the Unit did not terminate prior to April 1, 1973, the Chancellor, for sound legal reasons, concluded that Article 18.1 did not operate so as to terminate the Unit prior to April 1, 1973. And to the extent Article 18.1 did not operate so as to terminate the Unit prior to April 1, 1973, it could not have operated so as to terminate the Unit on April 1, 1973. * * *
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> Absent Article 18.1 to justify the Chancellor's April 1, 1973, Unit termination date, there is nothing in this record, legal or factual, to justify Unit termination on this date. This renders the Chancellor's decision in this regard arbitrary and it cannot stand.

We find no merit whatever in this contention. The foregoing legal authorities and evidence from the record amply support the finding of the chancellor that the units and the leases terminated under the terms of Article 18.1 of the UA and also under the implied covenant to develop contained in Article 3.5 of the UA. Appellants are in no position to complain because under the facts the chancellor could have determined the date of termination as prior to April 1, 1973. This date was the end of an eleven-month period with no production. Appellants have not been prejudiced by the April 1, 1973 date in that they had the opportunity for potential use of the leases a longer period of time than would have been possible if the chancellor had determined the leases terminated at an earlier date.

Appellants contend the action of appellee Young in barring appellant Christmas from entering on the property estops him from claiming unit termination.

Cole Young testified that when he moved on the property in 1969 the inefficient operations of appellant Christmas had practically ruined the land. Among the things he complained of in a registered letter to Christmas[2] are the

[2]The letter, dated March 27, 1972, went unanswered for approximately a year.

following: The condition of the pipe being used looked like a sifter there were so many holes, causing it to leak excessively; timber land was destroyed; slush pits had formed; cable, pipe and equipment were scattered all over the property.

Young denied ever barring Christmas' entry, but stated he advised him that he wanted his place cleaned up before operations were resumed. The chancellor heard the testimony and resolved this issue adversely to appellants. We cannot say his determination is against the preponderance of the evidence.

Appellants also urge that appellees and intervenors were precluded from making leases adverse to the Unit Operators. The gist of this argument is that intervenor Petrofina discovered the Day's Creek Field in midsummer of 1972. Thereafter it commenced subsurface studies in the vicinity of the Genoa Unit. According to its geologist, Bob B. Davis, in July or August of 1973 the company decided to extend its seismic work through the Genoa Unit to tie its "shot line" to an abandoned well drilled some years before by Carter Oil Company.

With this in mind permission of appellant Christmas was obtained to cross the Genoa Field Unit. According to Davis, permission was received from appellant Christmas, as Unit Operator, on the condition that Christmas would be furnished with a copy of the information obtained. This information was not furnished as promptly as Christmas thought it should have been and since the property had been entered with his permission appellants contend appellees and intervenors were estopped from making leases adverse to the Unit Owners.

A party claiming estoppel must prove it strictly, and facts constituting an alleged estoppel cannot arise through argument or inference as nothing can be supplied by intendment. *Ford Motor Credit Company* v. *The Exchange Bank & Trust Company,* 251 Ark. 881, 476 S.W. 2d 208 (1972).

Further, a party claiming estoppel must prove he has relied in good faith on wrongful conduct and has changed his position to his detriment. *American Casualty Co.* v. *Hambleton,*

233 Ark. 942, 349 S.W. 2d 664 (1961). The record is bare of any conduct on the part of appellees and/or intervenors which caused appellants to change their position to their detriment. The alleged acts relied on by appellants to give rise to the doctrine of estoppel occurred from August 1973 through March 1974, four months or more after April 1, 1973, the date the trial court determined that appellants' legal interest in the units and the leases that comprise same had terminated. Estoppel may be urged for the protection of a right, but it can never create a right. Appellants manifest an interest in the leases which was not apparent during the period they enjoyed the exclusive leasehold rights, and they cannot now be heard to complain of intervenors acquiring the same interest, since appellants' inaction resulted in termination of their leases.

Appellants contend the court erred in excluding the deposition testimony of Frank B. Aumiller, an independent lease broker employed by Petrofina to acquire oil and gas leases in Miller County. The objections to admission were that at trial no evidence was introduced as to Aumiller's out-of-state residence and further that appellants made no effort to have a subpoena issued for the deponent's attendance at trial. Since the parties stipulated that Aumiller was from Mississippi there appears to be merit in this contention of appellants. However, no showing of prejudice resulted from the exclusion of the testimony, since Aumiller's testimony dealt only with the issue of damages and the action complained of took place well after the time the leases terminated. Error without prejudice is not grounds for reversal. *Bridges* v. *Arkansas Motor Coaches, Ltd., Inc.,* 256 Ark. 1054, 511 S.W. 2d 651 (1974).

Appellants further advance as error the chancellor's denial of their request for damages against appellees Young and Albert Bassett[3] and intervenor Petrofina[4] because of Young's refusal to allow Christmas to continue operations on his property. We have previously discussed the alleged refusal of Young.

[3]Bassett in conjunction with Young allegedly impeded Christmas's operations on the Young property.

[4]Petrofina acquired a lease from Young on the property in October, 1973.

The burden of proving damages is on the party claiming damages. *St. Louis, Iron Mountain & Southern Railway Co.* v. *Saunders,* 85 Ark. 111, 107 S.W. 194 (1908). Appellants seek to use the testimony of appellees' witness, Jack Denson, to prove their damages. Denson testified that in his opinion it would cost $209,450 to return the central water injection plant to operating condition. The testimony of several witnesses indicates that the salt water injection pumping station had not been used since 1971. Young's testimony indicates that in 1969 when Young moved on the property the problem existed. The preponderance of the evidence indicates this condition was caused by lack of maintenance by Christmas or his employees, and so there could be no resulting liability against Young, Bassett or Petrofina.

One seeking to recover damages from the alleged wrongful conduct of another must prove not only the wrongful conduct but also that the alleged wrongful conduct caused the injury. *Jonesboro Coca-Cola Bottling Company* v. *Young,* 198 Ark. 1032, 132 S.W. 2d 382 (1939). There is a lack of causal connection between the acts complained of and the damages sought by appellants.

Furthermore, there must be proper proof of the damages sustained, otherwise no damages can be awarded. The evidence of damages must be such as to allow findings from established facts and not by conjecture. *Missouri & Arkansas Railway Company* v. *Treece,* 210 Ark. 63, 194 S.W. 2d 203 (1946). Damages herein were not proved with the required degree of specificity, and appellants failed to carry the burden of showing that the alleged wrongful conduct caused the injury.

The chancellor's decree is affirmed.[5]

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[5]On motion of appellants the court on May 9 dismissed with prejudice appellants' counterclaim for damages against Murphy Oil Corporation.

# Lloyd E. YARBROUGH et al *v.* ARKANSAS STATE HIGHWAY COMMISSION et al

76-29 539 S.W. 2d 419

Opinion delivered July 6, 1976
[Rehearing denied September 13, 1976.]

*Williams & Gardner,* for appellants.

*Thomas B. Keys* and *Chris Parker,* for appellees.

ELSIJANE T. ROY, Justice. The Highway Beautification Act of 1965 (23 U.S.C. § 131 et seq.)[1] requires states to provide "effective control" of outdoor advertising devices along certain highways or suffer a reduction of 10% in the amount of federal-aid Highway funds otherwise available. Billboards along federal-aid highways can only be erected, after the passage of state-conforming legislation, in accordance with an agreement established between the state and the Secretary of Transportation.

To conform to this federal requirement, the Arkansas

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[1]When the bill was initially presented to Congress, President Lyndon B. Johnson stated:

> In a nation of continental size, transportation is essential to the growth and prosperity of the national economy.
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> But that economy, and the roads that serve it, are not ends in themselves. They are meant to serve the real needs of the people of this country. And those needs include the opportunity to touch nature and see beauty, as well as rising income and swifter travel. (71 Mich. L. Rev. 1296).

legislature enacted statutes[2] authorizing the Arkansas State Highway Commission (hereafter Commission) to enter into a regulatory agreement with the Secretary of Transportation, and authorizing the Commission to establish a permit and enforcement mechanism for carrying out the provisions of the statutes. The Commission thereafter adopted a draft agreement and a series of regulations which were approved by the Secretary of Transportation January 29, 1972.

Appellants challenge the above statutes and regulations, appealing from the trial court's determination that they are valid. Appellant Lloyd Yarbrough owns and operates a large cold storage and open market facility located on Interstate 40 just south of Clarksville, Arkansas. He is engaged in the business of buying, selling and growing fruit, vegetables and other produce. Yarbrough, pursuant to lease agreements, has placed advertising devices on lands owned by appellants Johnny Wilhelmsen and Ozark Real Estate Company.

It is uncontradicted that the signs in question were erected after the effective dates of both the federal and the state enactments; that no permits were sought as required; and that the signs are in violation of the statutory requirements. However, appellants contend the statutes are unconstitutional and seek a declaratory judgment to this effect.

Appellant Yarbrough first urges the Commission should be enjoined from ordering the signs removed because of lack of notice to him. The record reflects the required legal notice of 30 days was given by the Commission to appellant-landowners and also that appellant Yarbrough had actual notice. Furthermore, removal of the signs was deferred pending determination of the case on the merits, so we find this contention without substance.

Appellants urge there is an unlawful delegation of legislative power to the Commission in authorizing it to promulgate the regulations. We do not find this to be true. The legislature declared the purpose of the statutes, and the scope of authority delegated to the Commission is well defin-

[2]Act 640 of 1967, amended by Act 999 of 1975 (Ark. Stat. Ann. §§ 76-2501 et seq. (Supp. 1975) ).

ed. Pursuant thereto authorized regulations have been promulgated by the Commission. We find the administrative standards prescribed by the legislature have been carried out by the regulations which are valid, adequate and reasonable.

Appellants specifically contend that the legislation is violative of Article 2, § 22 of the Arkansas Constitution and that they have been denied due process and equal protection of law.

This Court recognizes Article 2, § 22 protects individual property rights, but the individual's use and enjoyment of property is always subject to reasonable regulations in order to preserve the welfare of the public at large.

In the case of *Board of Adjustment of Fayetteville* v. *Osage Oil & Transportation, Inc.*, 258 Ark. 91, 522 S.W. 2d 836 (1975), issues similar to appellees' contentions were raised, and we held *inter alia* that:

> The basic power of a municipality to regulate the size and location of billboards and other commercial signs has been sustained in so many jurisdictions that it would be a waste of time and effort to cite the cases. Such regulations have been upheld upon many grounds, including the promotion of traffic safety, the control of potentially hazardous structures, and the fundamental considerations of city planning and city beautification that underlie the zoning concept itself. * * *

In the case of *Markham Advertising Company, Inc., et al.* v. *The State of Washington, et al.*, 73 Wash. 2d 405, 439 P. 2d 248 (1968), reh. denied 393 U.S. 1112, 89 S. Ct. 854, 21 L. Ed. 2d 813 (1969), the court held a statute regulating outdoor advertising was not an unconstitutional exercise of police power as it promoted the convenience and enjoyment of public travel, protected public investment in the highways, attracted visitors to the state and conserved the natural beauty of areas adjacent to the highways.

In *General Outdoor Advertising Co.* v. *Dept. of Public Works*, 289 Mass. 149, 193 N.E. 799 (1935), the court held that the regulation of outdoor advertising along the highway was a

valid exercise of the police power, stating *inter alia:*

> It is, . . . , within the reasonable scope of the police power to preserve from destruction the scenic beauties bestowed on the Commonwealth by nature in conjunction with the promotion of safety of travel on the public ways and the protection of travellers from the intrusion of unwelcome advertising.

To the same effect see *Ghaster Properties, Inc.* v. *Preston,* 176 Ohio St. 425, 200 N.E. 2d 328 (1964), and *New York State Thruway Authority* v. *Ashley Motor Court, Inc.,* 10 N.Y. 2d 151, 218 N.Y.S. 2d 640, 176 N.E. 2d 566 (1961).

In *Village of Belle Terre* v. *Boraas,* 416 U.S. 1, 94 S. Ct. 1536, 39 L. Ed. 2d 797 (1973), the United States Supreme Court, quoting from *Berman* v. *Parker,* 348 U.S. 26, 75 S. Ct. 98, 99 L. Ed. 27 (1954), held that:

> * * * The concept of the public welfare is broad and inclusive . . . . The values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful, as well as healthy, spacious as well as clean, well balanced as well as carefully patroled.

At least 49 of the 50 states have enacted legislation in compliance with the Highway Beautification Act. See 71 Mich. L. Rev. 1296, 1328.[3]

Appellants charge that Ark. Stat. Ann. §§ 76-2501 et seq. (Supp. 1975) abridge the equal protection clause by providing compensation for the owners of outdoor advertising devices, or property leased for outdoor advertising purposes, existing prior to the effective date of the statute, without

[3]The one exception, South Dakota, brought suit to compel the Secretary of Transportation to pay $3,361,546.60 of federal-aid highway funds, withheld for noncompliance for the fiscal year 1973, to which the state otherwise would have been entitled. The court entered a summary judgment upholding the Secretary's determination and refusing to order payment of the money to South Dakota. *South Dakota* v. *Volpe,* 353 F. Supp. 335 D.C. (1973).

providing compensation for individuals who erect such devices after that date. We find this contention without merit since the legislation became effective January 29, 1972, with the signing of the federal/state agreement and according to appellant Yarbrough's own testimony he erected his signs in June, 1975.

The equal protection clause does not prohibit all statutory classification. In *Reed* v. *Reed,* 404 U.S. 71, 92 S. Ct. 251, 30 L. Ed. 2d 225 (1971), the Court stated:

> * * * A classification "must be reasonable, not arbitrary, and must rest on some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike."

The equal protection clause prohibits invidious discrimination and does not require identity of treatment. *Clark* v. *Dwyer,* 56 Wash. 2d 425, 353 P. 2d 941 (1960); *Williamson* v. *Lee Optical of Oklahoma, Inc.,* 348 U.S. 483, 75 S. Ct. 461, 99 L. Ed. 563 (1955); and *Walters* v. *City of St. Louis,* 347 U.S. 231, 74 S. Ct. 505, 98 L. Ed. 660 (1954).

In view of the very real difference in the legal interest of the owners of prior nonconforming uses and later illegally initiated uses, the classification herein is reasonable and valid and appellants have no standing to complain.

Appellants also argue that the Commission's regulations deny them equal protection of law because they discriminate against agricultural pursuits. The statutory scheme contemplated an exemption for those areas which were already heavily commercialized or industrialized and sought to prevent areas devoted mainly to agricultural activities or forestry land from becoming glutted by signs which would obstruct the view and detract from the beauty of the landscape. Few aesthetic features will be found in zoned or unzoned commercial or industrial areas, while rural and residential areas are more likely to include places of scenic beauty and historic interest. This classification to preserve pastoral scenery and eliminate disharmonious advertising has a substantial, fair and reasonable relation to the object of the legislation. *Reed* v.

*Reed, supra.*

In recognizing the validity of different classifications in the *Osage Oil* case, *supra,* this Court said:

> * * * The on-site business signs and the off-site outdoor billboard fall into different categories, are erected for different purposes, and are subject to different regulations. * * *
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> The outdoor advertising sign, on the other hand, is not maintainable as a matter of right; such signs have been prohibited altogether. See the extended discussion in *General Outdoor Adv. Co.* v. *Department of Public Works,* 289 Mass. 149, 193 N.E. 799 (1935). * * *

Appellant's final contention is that irreparable injury will be suffered by the peach and apple growers of Johnson County if they are denied the right to advertise and the general public will be damaged by not knowing where purchases of this sort may be made. Appellant Yarbrough testified as to the volume and value of sales for overripe peaches and the need for the "illegal" signs to advertise his produce in order to make quick sales, but he failed to give any comparison figures or to make any reasonable projection of losses causing irreparable injury. We find that he has not been denied the right to advertise, but the right has been limited by valid restrictions. Testimony at the trial indicated the possibility of "on premise" signs and use of space available near appropriate exits, but these admittedly had not been explored by appellant Yarbrough at the time of the trial. Furthermore, appellants had no vested right to capitalize on the flow of traffic over Interstate 40. In view of lack of proof on this issue of damages and our determination that the legislation herein is constitutional, appellants must also fail on this contention.

For the foregoing reasons the decree is affirmed.

Bill WILKENS and Helen WILKENS
*v.* STATE of Arkansas

CR 76-31 538 S.W. 2d 298

Opinion delivered July 12, 1976

*Jeff Duty,* for appellants.

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

CARLETON HARRIS, Chief Justice. A jury convicted appellants, Bill and Helen Wilkens, of possession of stolen goods, and fixed punishment at 14 years for each in the

Department of Correction. From the judgment so entered comes this appeal. It is asserted that the convictions are not supported by substantial evidence; that the trial court erred in excluding certain evidence, and that the prosecuting attorney was permitted to ask questions during cross-examination which constituted prejudicial error. We proceed to a discussion of these points.

Two witnesses testified with regard to the relevant elements of the offense. Rimer Clark, a Benton County deputy sheriff, stated that he searched appellants' home pursuant to a search warrant (the validity of which is not challenged), on March 7, 1975, and found the television in what appeared to be appellants' "living room," connected to an electrical socket and apparently in use. The deputy removed the set and returned it to the sheriff's office, where it was identified as property stolen from Horace Holland's residence in Madison County on November 11, 1974.

The owner, Horace Holland, testified that his home was burglarized on November 11, 1974, with the television and several other items missing. Holland said that he had paid $550.00 for the set, two years before the theft, and that he valued it at $300.00 when it was stolen.

Appellants and one of their employees testified that the television set was brought to the premises by Jack Humphrey, a friend and former employee of the appellants, who left it there. The Wilkinses stated they were not aware that the television had been stolen, and that they did not buy it from Humphrey. The defense offered by appellants will be more fully discussed under the next point. The testimony, if believed by the jury, was sufficient to sustain the conviction.

Although the defense was permitted to offer testimony that the Wilkenses were unaware that the television was stolen, that they did not buy it, and that Wilkens later told Humphrey that he would have to remove the set because appellants were getting ready to move, the court would not permit Mrs. Wilkens to testify concerning statements by Humphrey relative to his reason for bringing the television to their premises.

Appellants then proffered the testimony of Mrs. Wilkins to the effect that Humphrey had told her that the television belonged to him and his wife; "that they had been separated and were going back together and that he wanted to leave [the television] there until the reconciliation could be arranged and so indicated to her that it was his property, he and his wife's property." Counsel further offered to prove by Mrs. Wilkens that Humphrey had "indicated" to her "that this property was his property," and "that it was her impression at all times that the property belonged to Jack Humphrey." The trial court sustained the state's objection to this proffer, ruling that Mrs. Wilkens could not testify about what someone else had told her, and that appellants would have to produce the witness, Humphrey.

Appellants testified that a subpoena had been issued for Humphrey, but had been returned with a notation that he could not be located, and such subpoena does appear in the record. It is vigorously contended that the exclusion of this testimony deprived them of an opportunity "to explain the circumstances and reasons for the possession."

The proffered evidence was not admissible as far as establishing the truth of the statement made, but we think, under our cases, that Mrs. Wilkens should have been permitted to testify to the facts proffered as a matter of showing her reason, and motive, in accepting the television. In *Daniels* v. *State,* 168 Ark. 1082, 272 S.W. 833, this court pointed out that it was a matter for the jury to determine the reasonableness and sufficiency of the explanation given by the accused of his possession of the stolen property, and in *Stewart* v. *State,* 214 Ark. 497, 216 S.W. 2d 873, we again mentioned that the possession of the property justified an inference that such possession was a guilty one "and may be of controlling weight unless explained by circumstances or accounted for in some other way consistent with innocence."

Of course, it is purely a matter for the jury to determine the weight of testimony offered, but we are of the view that the trial court should have permitted Mrs. Wilkens to offer her reasons for accepting the television from Humphrey, such reasons, if believed by the jury, being consistent with innocence.

It is asserted that the court erred in permitting the prosecuting attorney to ask appellants whether they were guilty of other criminal offenses. Most of the questions asked appellants related to whether they were guilty of being in possession of certain items of stolen property, the questions specifically mentioning the property and the person from whom such property had been stolen. To each question appellants answered in the negative. A large number of such questions were asked. The rule is stated in *Black* v. *State,* 250 Ark. 604, 466 S.W. 2d 463, where we said:

> "We have held that one cannot be asked if he has been indicted, or charged, or accused, of other crimes, but for the purpose of testing credibility, one may be asked if he has been convicted of a particular offense, or if he was guilty of some particular offense. The state is bound by the answer that the witness gives."

Particular complaint is made about two questions asked; in one instance the prosecutor asked Mr. Wilkens if he was guilty of arson, which was answered, "No." and the prosecutor then added to his question whether appellant was guilty of "burning your own home?" In another instance, the question propounded was, "Are you also guilty of the crime of being in possession of stolen property recently stolen from Mr. Bill Rollins and being in your possession one crystal earrings, one jet drop earrings, etc."

In the first instance, it appears only that the prosecutor was endeavoring to comply with our directive that the question be specific, *i.e.,* relate to some particular offense. The second question, containing the phrase, "being in your possession" appears improperly worded and in the nature of testimony by the prosecutor, but there could have been no prejudice, since Mrs. Wilkens herself admitted that the articles in question had been recovered from the auction house that she and her husband operated.

As previously stated, there were a number of these questions asked (seven or eight) and appellants appear to be arguing that the questions were not asked in good faith, but that the interrogation was solely for the purpose of inflaming the jury against the appellants. However, there is no showing

whatsoever that the questions were not asked in good faith, and certainly there is no rule of law that limits the number of such questions, so long as the interrogation complies with our requirements, and is made in good faith. Actually, Mrs. Wilkens admitted being in possession of several of the items inquired about. The court did not err in permitting these questions.

Because of the error heretofore discussed under Point 2, the judgment is reversed, and the cause remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

Ralph Wayne CONOR *v.* STATE of Arkansas

CR 76-40 538 S.W. 2d 304

Opinion delivered July 12, 1976

*Jim D. Spears* and *Sam Sexton Jr.,* for appellant.

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

GEORGE ROSE SMITH, Justice. Upon a charge of possession of marihuana with intent to deliver, Ralph Wayne Conor was found guilty and was sentenced to three years' imprisonment. For reversal he argues that the trial court should have sustained a pretrial motion to suppress as evidence a quantity of marihuana and a pistol, assertedly obtained by means of an illegal search of an automobile.

At about 1:20 p.m. on March 21, 1975, a Fort Smith police officer received an anonymous telephone call. The caller said that at a certain car washing establishment there was a Lincoln Contenental automobile with Louisiana license plate 177A368. He said that the car was occupied by two armed black males and asked the officer to look into the matter. The officer passed the information on to the radio dispatcher, who broadcast it.

An hour or more later two officers in a police car spotted the automobile in question and stopped it. It was then oc-

cupied by two black males and a black female. The officers directed the three to get out of the car. As the female was alighting a pistol fell to the ground from beneath a coat in her lap. The officer informed all three that they were under arrest. The officers then searched the car, finding marihuana in an envelope on the floor and a larger quantity of marijuana in the trunk.

Under the "fruit of the poisonous tree" principle the admissibility of the evidence depends upon the validity of the warrantless search, which in turn depends upon the existence of probable cause for the warrantless search. Probable cause exists when the facts and circumstances within the arresting officers' own knowledge or of which they have reasonably trustworthy information are sufficient to convince a reasonably cautious man that an offense has been or is being committed. *Draper* v. *United States,* 358 U.S. 307 (1959). Here the arresting officers had no personal knowledge about the commission of an offense. Of course they were entitled to act upon the collective knowledge of the police, *Jones* v. *State,* 246 Ark. 1057, 441 S.W. 2d 458 (1969), but the radio broadcast of the tipster's information could add nothing to its original trustworthiness.

The State concedes that the carrying of a pistol is at most a misdemeanor and is actually permitted when one is upon a journey. Ark. Stat. Ann. § 41-4501 (Repl. 1964). Thus at the outset there was no certainty that the occupants of a car from Louisiana were necessarily committing an offense by carrying a pistol. That was a circumstance to be considered.

The pivotal question, however, is the reliability of the information upon which the officers acted. The identity of the anonymous caller remains unknown. In contrasting such an informant with one who discloses his identity the Supreme Court has said: "The informant was known to [the officer] personally and had provided him with information in the past. This is a stronger case than obtains in the case of an anonymous telephone tip." *Adams* v. *Williams,* 407 U.S. 143 (1972). In *United States* v. *Calovich,* 392 F. Supp. 52 (W.D. Mo. 1975), the court examined the point at length and concluded that a warrantless arrest and a warrantless search cannot be

justified simply because an anonymous tip proves to be accurate.

That is really all we have here. The facts verified by the officers — that is, the identification of the Lincoln car and its occupancy by two black males — did not suggest in any way whatever that an offense was being committed. The one incriminating fact, that the men were armed, was not verified until the officers had put the men under restraint by directing them to get out of the car. We do not in the least imply that in this case the officer who initiated the broadcast had not actually received an anonymous telephone call. But, unlike the situation in which the informant is known, the officer's testimony cannot be corroborated or disputed. Hence, if this arrest must be upheld on the basis of sufficient probable cause, any officer may arrest anyone at any time and justify his action by attributing it to an anonymous telephone call. The protection afforded by the Bill of Rights is not to be so readily circumvented.

The State also argues that the arrest was permissible under the "stop and frisk" rule recognized in *Terry* v. *Ohio,* 392 U.S. 1 (1968). Here, however, the officer candidly testified that the vehicle was stopped only because of the anonymous tip. The typical stop-and-frisk situation is so fundamentally different from the halting of a moving vehicle on the basis of an anonymous telephone call that we see no reason to discuss the distinction at length.

Reversed.

ARKANSAS STATE GAME AND FISH COMMISSION et al *v.* A. F. STANLEY et al

75-272 538 S.W. 2d 533

Opinion delivered July 12, 1976

*William H. Donham,* for appellants.

*McMath, Leatherman & Woods,* for appellees.

JOHN A. FOGLEMAN, Justice. The Arkansas State Game and Fish Commission acquired some 34,000 acres of land in Arkansas and Jefferson Counties, beginning in 1948. It is known and designated as the Bayou Meto Wildlife Management Area. At the time of acquisition nearly all of the merchantable timber had been recently removed, but since that time no timber has been cut from these lands. In 1973, the Commission decided to initiate a program of "harvesting" of timber on these lands. Pursuant to the plan evolved, the Commission entered into a contract on October 18, 1973, with Alvin Yarbrough, for the cutting and removal of certain timber from a 640 acre tract constituting a part of an area of 2,080 acres designated as Compartment 2B, one of

numerous such compartments in the overall plan of the Commission. On July 17, 1974, suit was filed by appellees (citizens, taxpayers and hunters) as a class action, to enjoin the Commission, its members and director and the timber contractor from cutting and removing timber under the contract. Appellees alleged that, if the contract was performed, the area involved would be destroyed as a wildlife and waterfowl habitat, and contended that the proposed action by the Commission was ultra vires, arbitrary, capricious, unreasonable and unlawful. A decree was entered on April 1, 1975, enjoining appellants from carrying out the particular timber cutting operation. This appeal comes from that decree, which was based upon the chancery court's holding that the contract was ultra vires and that the Commission had acted arbitrarily, capriciously, unreasonably and unlawfully in entering into it, and that the making of this particular contract was an abuse of discretion. We disagree and reverse.

The parties are not in agreement about the scope of judicial review of actions of the Arkansas State Game and Fish Commission, which is not only an administrative agency with constitutional status but the repository of certain powers of government enumerated in Amendment 35 to the Arkansas Constitution by which it was created. As we view the matter, we need not resolve all the differences between the parties as to the powers of the Commission or the scope of judicial review. If the act was ultra vires, there is no question about the power of equity courts to restrain it. *Arkansas State Game & Fish Comm'n* v. *Eubank,* 256 Ark. 930, 512 S.W. 2d 540; *Shellnut* v. *Arkansas State Game & Fish Comm'n,* 222 Ark. 25, 258 S.W. 2d 570. If the Commission's action is not ultra vires and was not arbitrary or capricious, unreasonable or wantonly injurious, in bad faith, or an abuse of its discretion, then the injunction must be dissolved. *Arkansas State Game & Fish Comm'n* v. *Eubank,* supra; *Farris* v. *Arkansas State Game & Fish Comm'n,* 228 Ark. 776, 310 S.W. 2d 231; *Shellnut* v. *Arkansas State Game & Fish Comm'n,* supra. The matter of unreasonableness is not directed at the question of the wisdom of the action, which we take to be outside the scope of judicial review. The Game and Fish Commission's actions are certainly not to be judged solely on the basis of their wisdom or the lack of it any more than the actions of a city council or another administrative agency. See *Patterson* v. *U.S.,* 178 F. Supp. 771 (D.C. Ark.

1959); *Haynie* v. *City of Little Rock,* 243 Ark. 86, 418 S.W. 2d 633; Am. Jur. 2d 558, Administrative Bodies and Procedure, § 207. To do so would be to impermissibly substitute the judgment of the courts for that of the agency. *Hall* v. *Bledsoe,* 126 Ark. 125, 189 S.W. 1041. See also, *City of Batesville* v. *Grace,* 259 Ark. 493, 534 S.W. 2d 224.

It was alleged and shown that this contract was the first entered into in the implementation of a plan to cut some of the merchantable timber on practically all of the Bayou Meto Wildlife Area. The contract provided for the sale of mixed hardwoods marked by Commission agents and employees with blue and yellow paint. It authorized the erection of mills, camps, roads and other improvements necessary in the logging and manufacturing of the timber sold in locations approved in advance by representatives of the Commission and required removal of the contractor's structures, tools and equipment prior to the expiration of the contract. There were restrictions on the manner of utilization of the trees cut, the height of stumps and a provision for triple damages for unnecessary damage to unmarked trees, witness trees, monument and timber reproduction, to be determined by the Commission's local officer in charge, who could also require cutting of unmarked trees unavoidably damaged and the payment of current market value therefor.

The chancellor not only found that the Commission's actions were ultra vires and capricious and arbitrary but that they were violative of the limitations on its powers set forth in *Farris* and contrary to the interest of the public. These general conclusions are apparently based upon the specific fact finding of the chancellor, which was as follows:

> Without detailing the evidence, it is clearly apparent that the intensity of the timber cut proposed would effectively destroy the particular 640-acre tract as a refuge for ducks. At the present time, ducks come into this area to feed on acorns, and other food. To destroy the trees to the extent set forth in the proposed cut would drastically reduce the number of ducks using the area. The evidence reflects that ducks often roost at night in open water; but during the day they fly to

wooded areas, such as this 640-acre tract. They feed there, and return to their roosting area at night. It is also to be noted that this tract would be used by ducks as a refuge even more extensively if the Commission could devise a means for flooding the tract for more of the Winter period when ducks are in this area. But the evidence also clearly reflects that the present situation as to water is far better from the standpoint of ducks than would be the case if the proposed timber cut is made.

It goes almost without saying that if the proposed cut is made, it will be many years before the tract is restored to its present state with respect to "cover." That is the principal reason why the danger is so important for this Court to realize. Unlike the situation in *Eubank,* supra, the ill effects will last far longer than a few days. In fact, the damage done might well be permanent, insofar as the duck population in the Bayou Meto Refuge is concerned.

Although we have emphasized the importance of providing a refuge for ducks in Bayou Meto, this wildlife management area is inhabited by other wildlife, and several witnesses testified on this point. The evidence reflects that the proposed cut would damage the refuge from the standpoint of this other wildlife.

On trial de novo, we find that the preponderance of the evidence shows that the contract was not ultra vires and that the Commission's action was not arbitrary or capricious, or an abuse of its discretion.

In considering the question of the powers of the Commission, we must first view Constitutional Amendment 35, which, of course, is an act of the ultimate sovereign, the people of Arkansas, and is subject only to constitutional, not legislative or judicial, limitations. See *Smith* v. *McNair,* 231 Ark. 49, 328 S.W. 2d 262; *Arkanaas State Game & Fish Comm'n* v. *Edgmon,* 218 Ark. 207, 235 S.W. 2d 554; *Farris* v. *Arkansas State Game & Fish Comm'n,* 228 Ark. 776, 310 S.W. 2d 231; *Shellnut* v. *Arkansas State Game & Fish Comm'n,* supra. Pertinent provisions are:

> The control, management, restoration, conservation and regulation of birds, fish, game and wildlife resources of the State, including hatcheries, sanctuaries, refuges, reservations and all property now owned, or used for said purposes and the acquisition and establishment of same, the administration of the laws now and/or hereafter pertaining thereto, shall be vested in a Commission to be known as the Arkansas State Game and Fish Commission, to consist of eight members. ***
>
> Commissioners shall have knowledge of and interest in wildlife conservation. ***
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> *****
>
> The fees, monies, or funds arising from all sources by the operation and transaction of the said Commission and from the application and administration of the laws and regulations pertaining to birds, game, fish and wildlife resources of the State and the sale or property used for said purposes shall be expended by the Commission for the control, management, restoration, conservation and regulation of the birds, fish, and wildlife resources of the State, ***
>
> *****
>
> Said Commission shall have the power to acquire by purchase, gifts, eminent domain, or otherwise, all property necessary, useful or convenient for the use of the Commission in the exercise of any of its duties, ***

Judicial interpretation of these powers has been rather limited, but this court has, on occasion, been called upon to review various actions and has commented upon the extent of, and limits on, the constitutional grant. We have held that the Commission has a very broad discretion in determining how wildlife shall be conserved. *W. R. Wrape Stave Co.* v. *Arkansas State Game & Fish Comm'n,* 215 Ark. 229, 219 S.W. 2d 948; *Hampton* v. *Arkansas State Game & Fish Comm'n,* 218 Ark. 757, 238 S.W. 2d 950. In *Wrape,* we said that the Amendment is complete within itself and that it was intended by the Amendment to either provide or leave to the Commission,

methods for attaining the ends enumerated. See also, *State* v. *Casey,* 225 Ark. 149, 279 S.W. 2d 819. We have said that the powers of the Commission are broad. *Arkansas State Game & Fish Comm'n* v. *Hornaday,* 219 Ark. 184, 242 S.W. 2d 342; *State* v. *Casey,* supra.

Even though the issues were not related to the particular subject before us, the language of this court in treating rules and regulations adopted by the Commission are equally applicable to any other discretionary power vested in the Commission by the amendment. In *Casey,* we said:

> *** Under these provisions of the amendment we hold that the Commission has been given full and complete administrative power and authority to promulgate rules and regulations necessary for the conservation and preservation of all wildlife including not only the power to establish a bag limit, set seasons in which to hunt and fish and the penalty for violations but also the power to levy a license fee on all hunting dogs, just so long as such license fees are not unreasonable or arbitrary and are for regulatory purposes — as appears here — and not for revenue. ***

In *Farris,* we said:

> *** A majority of this court has determined that the Game and Fish Commission as opposed to the Legislature, is vested with the power to make such rules and regulations as is deemed necessary to protect and conserve the wildlife resources of the state. In the exercise of its police power the Commission has determined that it should prohibit the sale of game fish from private impoundments of water. The Commission has a wide discretion within which it may determine what the public interest demands, and what measures are necessary to secure and promote such requirements. The only limitation upon this power to formulate these rules and regulations, which tend to promote the protection and conservation of the wild life resources of the state, and which tend to promote the health, peace, morals, education, good order and welfare of the public is that the rules and regulations must reasonably tend to

> correct some evil, and promote some interest of the commonwealth, not violative of any direct or positive mandate of the constitution. *** The Commission, as trustee for the people of this state, has the responsibility and is charged with the duty to take whatever steps it deems necessary to promote the interest of the Game and Fish Conservation Program of this state; subject only to constitutional provisions against discrimination, and to any valid exercise of authority under the provisions of the Federal Constitution. ***

It is also important that we have in view the purposes of the Commission in acquiring and maintaining the area involved. The records of the Commission during the acquisition period revealed that the original approach was made by the initiation of an investigation of possible acquisition of a wildlife management area in the vicinity of Stuttgart, followed by authorization of the activation of a plan for establishing a wildlife management area on Bayou Meto embracing about 7,000 acres of the land now owned. The minutes of the Commission recorded the approval of the Bayou Meto Land Acquisition as a Federal Aid Wildlife Restoration project by the United States Fish & Wildlife Service. They also recited that waterfowl, deer, squirrel, furbearing animals and turkey population were to be there protected and managed to provide maximum restoration and utilization and that other use to be made of the land was timber management. There was testimony that Regional Federal Aid documents disclosed that the land was acquired as a wildlife management area, not as a public duck shooting area, in spite of the fact that a former secretary of the Commission had described it as a public shooting ground for ducks when he testified in *Hampton* v. *Arkansas State Game & Fish Comm'n,* supra.

Testimony of James Talley, Forester for the Game and Fish Commission, indicated that the contract on the 640 acres was only the first step in a cutting cycle designed for both timber and game management on the entire tract. At a rate of 640 to 1,200 acres per year, according to a letter from Talley introduced in evidence, several years would elapse before all the timberlands were reached.

W. D. Gaines, Biologist for the Arkansas State Game & Fish Commission, compiled a habitat analysis for the Commission on Compartment 2B, which was outlined in the Commission's wildlife forestry management plan for the Bayou Meto Wildlife Management Area. He had written a rough draft of the analysis in the summer and fall of 1973, but did not have it in the form exhibited in evidence prior to the execution of the timber contract. Gaines had a college degree in biology and additional hours of credit in forestry. He had previously been employed by U.S. Gypsum Company, a private timber company, for whom he formulated wildlife management plans for some 100,000 acres in Arkansas, Louisiana, Tennessee and Mississippi along the Mississippi River. He had been employed by the Commission for approximately five years, of which he had spent at least three and one-half years in carrying out direct management on 80,000 acres of Commission land as District Wildlife Biologist.

In making his analysis, Gaines made field inspections of the area, both before and after the marking of trees to be cut on the 640-acre tract. He found little of the compartment in an artificial green tree reservoir, and only a small portion of the 640 acres flooded or used by migratory waterfowl. This area could not be counted on as a duck reservoir but it could be developed into a green tree reservoir if it were encompassed by a levee and deep wells and pumps were installed. In considering multi-species management, he found Compartment 2B capable of supporting 50 to 60 per cent of the wildlife it had a potential for supporting. In his analysis he attributed this to general stagnation and unproductivity of the overstory mast producing timber species which should afford, in a cyclic manner, hardwood mast in sufficient quantities to act as a supplemental food supply during late fall and winter and to the absence of sufficient ground growing food and cover. He explained the desired procedure as follows:

> The best overall feasible management technique that could and should be employed in this forest is a general thinning of the growing stock to provide a release to over-burdened trees providing additional sunlight to the crowns, to provide small openings or holes in the forest creating the growth of grass, weeds, and reproduction of the forest species that will aid both

in a renewable vigorous and sustained long range equilibrium of the forest as a whole and provide in the brush areas needed food and cover for most forest game animals.

Gaines found a population of one white-tailed deer for each 40 to 50 acres in the tract. He described this as extremely low for a bottomland hardwood area. This he attributed to the lack of available browse and cover because of the overstory canopy and general deterioration of the forest. Hindering factors which caused a low fall turkey population were lack of nesting cover, bugging grounds, escape cover from predators, spring and summer plants producing berries, fruit and seeds, and winter grasses and buds necessary to supplement overstory mast production. He found the compartment unsuitable for migratory or wintering waterfowl without development for flooding. He stated that a hardwood forest managed for waterfowl should provide a vigorous, healthy stand of older classes of trees, well spaced to promote the maximum amount of mast production, and interspersed with small openings containing grass, weeds, and other plants to provide food for ducks when the overstory trees did not produce. The best overall management for squirrels, according to his analysis, was to create a forest condition that has a large percentage of healthy, well-spaced trees 30 to 100 years old. From a long range point of view, scientific forest game management plans through removal or thinning of standing trees to prevent stagnation and deterioration of a mature forest would be advantageous for squirrels in spite of a short term adverse effect on the population. Gaines' analysis as to rabbits was that population increased quickly in newly thinned areas that provided cover as well as food from plants that grow in newly created openings. Gaines reported that forest removal as a wildlife management technique is widely accepted by professional wildlife managers throughout the nation as the only practical means for large scale wildlife management, in spite of severe attack from a portion of the public not directly involved in wildlife management, whose viewpoint he described as naive. Gaines said that fencing a temporary forest and keeping out fires would doom it to extinction. He stated his opinion that there was a necessity for diversification in publicly owned wildlife areas to fulfill the needs of the present and future population

of Arkansas on a multi-species basis, i.e., deer, squirrels, turkeys, ducks. According to Gaines, different forest management practices would be utilized in other compartments, because of differing situations.

The testimony of Gaines had very strong support from that of Dr. Leslie L. Glasgow, a consultant employed by appellants after this suit was filed and described by appellees as possessed not only of an impressive academic record but of some experience in managing wildlife habitats, at least on an advisory basis. Dr. Glasgow, a teacher of forestry and wildlife at Louisiana State University holds a bachelor's degree in forestry, a master's degree in wildlife conservation, a doctor's degree in wildlife management and enough hours for a master's degree in zoology. He had been Director of the Louisiana Wildlife and Fisheries Commission, an Assistant Secretary of the United States Department of the Interior, administering the National Parks Bureau, the United States Fish & Wildlife Service, the Bureau of Marine Resources and the Bureau of Commercial Fisheries, Waterfowl Biologist for both Louisiana and Indiana, and a wildlife consultant since 1952, mostly in the development of wildlife management plans for private individuals, state and federal governments, generally in wet lands. Dr. Glasgow is also a duck hunter and has written on related subjects for publication. He had visited the area three times between 1956 and the time he testified. He spent three and one-half hours on the ground inspecting Compartment 2B after viewing it from the air, just a month before he testified. He observed the markings on the trees made for carrying out the contract involved. He found little lesser vegetation on the forest floor.

Dr. Glasgow said that an unmanaged wilderness would not produce a sustained habitat for an optimum wildlife population that is adapted to the area, but would develop into a few old trees that dominate the site, so that the number of suitable areas for wildlife, with the exception of squirrels, decreases, as will the wildlife. He said that it was difficult to manage wildlife, but that wildlife responds to management of the habitat, and that the most practical and commonly used method is to manipulate the timber stand by use of a selective removal of trees or groups of trees, as in the Commission's plan, to provide diversity in the stand, to permit development

of other food producers such as annual weeds and other ground vegetation, to stimulate reproduction of desirable species of trees, rather than undesirable hardwoods which are shade tolerant, and to stimulate food production on remaining trees by their increased exposure to sunlight. He found that Compartment 2 B, in its existing condition, was not a good habitat for either waterfowl or other wildlife, because the vigorous trees that were dominant had been previously removed, leaving only cull species which were undesirable from a wildlife standpoint. From his examination of the Commission's plan, he found it to be a step in the right direction toward development of an adequately diversified wildlife habitat and felt that the luxury of managing an area for a single purpose rather than for multiple species of game could no longer be afforded. Dr. Glasgow testified that the selective removal plan would improve the waterfowl habitat without question and would not destroy waterfowl coming into Arkansas and staying in the Bayou Meto Management Area.

James Talley, the Game & Fish Commission Forester, had been previously employed by the Arkansas Forestry Commission as Fire Control Assistant and Associate Forester. In the latter position he had formulated all the programs of the Arkansas Forestry Commission. He was instrumental in marking the compartmental selection for forest management of the Bayou Meto Wildlife Management Area. He said that both single tree and group selection methods had been used in Compartment 2 B, the former to remove broken, overmature, diseased and undesirable trees and the latter to let sunlight hit the forest floor for the benefit of the young tree generation in order to produce more desirable trees as well as mushrooms, berries, seeds, browse, insects and grubs for wildlife food. The area was marked under his supervision and direction.

Carl Hunter, a farm manager possessed of a degree in agriculture, with a major in biology had served as a wildlife biologist for appellants for 13 or 14 years ending in 1957. He observed that a large mature open forest which produces heavy mast crops most years produces large concentrations of waterfowl. He had gone over the area in question and estimated that 50 per cent of the timber would be cut. This he said would deteriorate the wildlife habitat, would only benefit

deer, would be detrimental to some degree to other types of wildlife and would afford hardships to duck hunters through ruts left by machinery and by reason of treetops and underbrush resulting from the cutting. Potential hardships on hunters were emphasized by other witnesses.

Wayne Hampton, who served on the Game and Fish Commission from August 1960, until April 1962, visited the area and found that, on a half-acre sample there were 17 trees, 10 of which, all acorn bearing, were marked for cutting. He thought the Commission plan would destroy the Bayou Meto Area as a duck habitat. A county surveyor testified that the proposed timber cut was heavy and erratic. A sawmill operator testified that cutting operations would result in damaging 20 per cent of the remaining trees.

A number of witnesses, whose only qualification was that they were duck hunters, were permitted, in spite of appellants' objections, to give opinion evidence, because, according to the chancellor, all duck hunters consider themselves experts. We can accord little weight to this testimony. There were those who had cut timber, or had seen timber removed, from lands and found that a habitat for ducks had been destroyed to the detriment of duck hunting. Some had found that deer hunting had not been affected and that in certain areas squirrel, coon, and turkey could be hunted. Some of these joined in the opinion that, if the program were carried on, the area would be destroyed as a duck habitat. Most of the testimony on behalf of appellees was directed toward the effect of the plan on duck hunting in the wildlife area and in the general vicinity. Many were concerned with the number of mast producing and den trees marked for cutting. In determining the questions presented here, we must remember that the Commission's duties and its right to determine how they are to be performed, i.e., how wildlife is to be conserved, are not to be measured by mere doubt-creating suggestions. *W. R. Wrape Stave Co.* v. *Arkansas State Game & Fish Comm'n,* supra.

The strongest evidence favoring appellees was a publication entitled "Disappearing Wetlands in Eastern Arkansas" written by Trusten Holder, who had retired in 1969 after 29 years' service with the Game & Fish Commission and who is

considered an authority on the subject on which he wrote. Gaines disagreed with some of Holder's statements. Holder was not available for cross-examination. His publication contains the following statement:

> Contrary to popular opinion an area does not have to be managed. In fact, most of the real benefits to wildlife and to the general public can be received just by buying a wooded tract and keeping it from being cleared.

Dr. Glasgow specifically expressed his disagreement with this statement in spite of his great respect for the author. This witness stated that selective cutting and followup of wildlife stand improvement was an accepted and approved practice in many areas of the United States.

When we view the whole record, it seems clear to us that the action of the Game & Fish Commission was not ultra vires or unlawful. It was simply an exercise of discretion of that body in the "control, management, restoration, conservation . . . of . . . game and wildlife resources of the State, . . . sanctuaries, refuges, reservations . . . " It is also clear to us that the Commission has not acted arbitrarily and capriciously. To act arbitrarily means to act in a manner decisive but unreasoned, or arising from an unrestrained exercise of the will, caprice of personal preference, based on random or convenient selection or choice rather than on reason or nature and to act capriciously means to act without being guided by steady judgment or purpose. *City of Little Rock* v. *Parker,* 241 Ark. 381, 407 S.W. 2d 921; *City of North Little Rock* v. *Harble,* 239 Ark. 1007, 395 S.W. 2d 751. However unwise or inexpedient the Commission's decision may be or however wrong it may turn out to be, there is no evidence that it was unreasoned or without steady judgment or purpose. There may well be a difference of opinion about the propriety of the particular procedure adopted to accomplish the basic purposes of Amendment 35, but it certainly cannot be said that there is not respectable authority supportive of the approach being taken. In considering the matter we must remember that the Commission is composed of members having knowledge of and interest in wildlife conservation.

Nor can we say that the Commission abused its discre-

tion. Here again, we must defer to the knowledge and interest of the Commission and would have to say that there was no reasonable basis for their decision before we could say that there was an abuse. This we cannot do. It is urged that the Bayour Meto Wildlife Management Area was acquired and dedicated primarily, if not solely, for a duck refuge. There is clear evidence that, even at the beginning of the property acquisition, other purposes were contemplated, in spite of the testimony of the then executive secretary of the Commission, in *Hampton* v. *Arkansas State Game & Fish Comm'n,* supra, that the primary purpose for the acquisition was for duck hunting and shooting. Even if that were the case, there is nothing whatever to limit the discretion of the Commission to change the primary use of all or any part of the sanctuary or refuge or to devote the property to other uses, so long as they are within the scope of the purposes enumerated in Amendment 35. Decisions in this regard are policy matters vested entirely in the Commission, so long as it acts within limitations which have been imposed on the exercise of its powers. Evidence of abuse of this discretion should be so clear as to be virtually beyond argument before the courts should declare it so. The constitutional amendment left to the Commission the adoption of methods to reach the desired ends. In this respect we must also say that the Commission is substituted for the General Assembly in determining what is in the public interest in the matter of wildlife conservation. *Farris* v. *Arkansas State Game & Fish Comm'n,* supra. At least when the matter is debatable, it would be beyond our powers to substitute our judgment for theirs. See *City of Little Rock* v. *McKenzie,* 239 Ark. 9, 386 S.W. 2d 697.

The decree is reversed, the injunction dissolved and the case dismissed.

The Chief Justice and Justices HOLT and ROY dissent.

FRANK HOLT, Justice, dissenting. I must respectfully dissent. It is true that the Commission has broad discretion in matters concerning the conservation of wildlife. *Hampton* v. *Ark. State Game & Fish Comm.,* 218 Ark. 757, 238 S.W. 2d 950 (1951). However, it is well established that the power of the Commission is subject to judicial review and restraint by the

courts where, according to the evidence, it exceeds that power. *Shellnut* v. *Ark. State Game & Fish Comm.*, 222 Ark. 25, 258 S.W. 2d 570 (1953); *Ark. State Game & Fish Comm.* v. *Eubank and Johnson*, 256 Ark. 930, 512 S.W. 2d 540 (1974); and *Farris* v. *Ark. State Game & Fish Comm.*, 228 Ark. 776, 310 S.W. 2d 231 (1958).

In the case at bar it appears that the majority relies primarily upon the testimony of appellants' experts in determining that the chancellor's finding is against the preponderance of the evidence. The appellees also presented expert witnesses. Mr. Hunter, who had worked as a wildlife biologist for appellant for approximately 14 years, testified that since 1957 he has managed the Wing Mead Farms consisting of approximately 7,000 acres with about 2,000 of these acres in hardwood timber and duck reservoirs. There has been no cutting permitted in this area in at least 35 years and possibly 50 years. His management of the Wing Mead Farms has been so successful that Dr. Glasgow, one of appellants' principal witnesses, brought one of his wildlife classes from Louisiana State University on a field trip to observe the Wing Mead Farms. According to Mr. Hunter, an uncut forest produces large concentrations of water fowl. He had observed the area in question and testified that approximately 50% of the timber would be cut according to appellants' proposal. He further testified that, as a result of the proposed cut, "I think it would deteriorate the wildlife habitat." Appellants' selective cutting would be beneficial only to deer hunting and would be detrimental to other types of wildlife including duck hunting.

The appellees adduced as evidence a publication, "Disappearing Wetlands in Eastern Arkansas," written by Mr. Trusten Holder. Mr. Holder retired in 1969 after 29 years' service with the appellant Commission. He is an acknowledged expert and an authority on the subject of his article. In his publication he wrote:

> Contrary to popular opinion an area does not have to be managed. In fact, most of the real benefits to wildlife and to the general public can be received just by buying a wooded tract and keeping it from being cleared.

Wayne Hampton, a witness for the appellees, was of the view that the appellants' proposed cut would "ruin" the Bayou Meto area as a duck habitat. It is significant that he had once served as a commissioner on the appellant Commission. He is a longtime resident of the general area. According to him, it appeared that approximately one-half of the trees would be destroyed. Another witness, who is director of the American Duck Hunters Association, testified that he had seen the results of a similar cut on other areas managed by appellant Commission. He described the cut: "I would call it a total destruction of any duck woods that I have ever seen in my life. I was never so amazed as to what we were led to believe that had happened in this area."

The majority summarily rejects and accords little weight to the testimony of duck hunters, most of whom were local landowners or residents. Based upon many years of experience, they were knowledgeable about the results of appellants' proposed timber cutting. From their observation of the cutting and removing of timber, such as that proposed by appellants, it would be detrimental to and destroy the area as a duck habitat.

After review of all the evidence, I am unable to say that the chancellor's finding is clearly against the preponderance of the evidence and I would affirm.

HARRIS, C.J., and ROY, J., join in this dissent.

# Jack FREEZE, Mayor, et al *v.* Buck JONES and Raybon L. HARVEL

75-386 539 S.W. 2d 425

Opinion delivered July 12, 1976

[Rehearing denied September 13, 1976.]

*Dailey, West, Core & Coffman,* for appellants.

*Franklin Wilder,* for appellees.

JOHN A. FOGLEMAN, Justice. On December 23, 1974, the Board of Directors of the City of Fort Smith adopted Ordinance 3224 vacating and abandoning a block of Birnie Avenue between Midland Boulevard and North 32nd Street. The city's action was initiated by the petition of Safeway Stores, Inc., the owner of all the abutting property on both sides of Birnie Avenue between Midland and North 32nd Street. It was filed October 23, 1974, and was followed by a public hearing on December 3, 1974, at which presentations about the closing were made by the city's Director of Planning and by the attorney for the petitioners. No one spoke in opposition to the proposed action, although notice was published twice in November.

The portion of the street affected was dedicated as Prairie Avenue by the filing of a plat of Kelley's Addition to Fort Smith in 1906. Birnie ends at Midland on the west and Albert Pike on the east. Pryor Avenue is one block, and

Kelley Highway, two blocks, south of Birnie. Wirsing is one block, and Johnson, two blocks, north. The street right-of-way was 50 feet wide but the paved portion was only 20 feet wide. There was a dip in the street between Midland and North 32nd where a branch or drainage ditch crossed it. After heavy rains, Birnie was rendered impassable for a time. Continued washing made maintenance difficult on this part of the street.

Midland Boulevard is one of the main traffic arteries in Fort Smith. It consists of three lanes of traffic in each direction, divided by a median. It carries 16,000 vehicles per day. It runs diagonally in a northeasterly-southwesterly direction. Albert Pike is a heavily travelled street connecting with Midland, north of Birnie. North 32nd Street between Kelley Highway and Spradling are also arterial streets. There are no residential uses of the property abutting the portion of Birnie vacated.

Immediately after the petition was filed, Safeway Stores conveyed the property on both sides of Birnie to Wal-Mart Properties, Inc., who then planned to build a shopping center on it. The latter corporation promptly conveyed the south one-half of the right-of-way to the City of Fort Smith, and it will be used for utilities. No one questions the fact that the closing of the street was critical to the shopping center plans, as it enables the abutting property owner to build a shopping center on one side and a parking lot on the other without a street intervening.

In the ordinance, the Board of Directors of the city specifically found that the right-of-way was not required for corporate purposes, that no public inconvenience would result from the closing, that the owners (who were the petitioners) had consented to the abandonment, and that the public interest and welfare would not be adversely affected.

On December 22, 1974, appellee Buck Jones, petitioned the Chancery Court of Sebastian County to enjoin the closing of the street, alleging that the ordinance violated Ark. Stat. Ann. § 19-3825 (Repl. 1968) and that *Brooksher* v. *Jones,* 238 Ark. 1005, 386 S.W. 2d 253 barred the closing of this portion of the street, as res judicata. Appellee Harvel was added as a plaintiff by an amended petition. Another amendment filed

on the day before the trial alleged that the action of the city in adopting the ordinance was arbitrary, capricious, unreasonable, not for any public purpose, and in violation of public safety. The decree from which this appeal was taken declared the ordinance null and void and enjoined the city from carrying it into effect. On trial de novo, we reverse.

We first quickly dispose of appellees' argument that this case is governed by our decision in *Brooksher* v. *Jones,* supra, in which an ordinance closing the same portion of Birnie Avenue was held void. The chancery court correctly rejected appellees' plea of res judicata, even if the parties are considered as identical. In *Brooksher,* we expressly disavowed any intention to hold that the city could not vacate the street under Ark. Stat. Ann. § 19-2304 (Repl. 1968) under any circumstances. We restricted the holding to the undisputed facts then before the court. The critical distinction is that as we have twice previously pointed out, there was no finding by the city governing board, or other evidence, that this portion of Birnie Avenue was not required for corporate purposes, as there was here. *Kemp* v. *Simmons,* 244 Ark. 1052, 428 S.W. 2d 59; *City of Little Rock* v. *Linn,* 245 Ark. 260, 432 S.W. 2d 455.[1] Evidence in the present case shows that traffic on Birnie Avenue has declined since the trial in *Brooksher.* The only evidence on the subject then was that closing of this portion of the street would work a hardship on many people. The preponderance of the evidence is to the contrary here. So *Brooksher* is not controlling here, either as res judicata or binding precedent.

We just as quickly dispose of appellees' contention that the power of the city to close the street under Ark. Stat. Ann. § 19-2304 was limited by § 19-3825. The very words of the opinion in *Brooksher,* supra, relied upon by appelles so strongly as res judicata, clearly indicate the contrary. The same indication is also clearly implicit in our decisions in *Stephens* v. *City of Springdale,* 233 Ark. 865, 350 S.W. 2d 182; *Roberts* v. *Pace,* 230 Ark. 280, 322 S.W. 2d 75; *Risser* v. *City of Little Rock,* 225 Ark. 318, 281 S.W. 2d 949, cert. den. 350 U.S. 965; and

[1]In *Brooksher,* the only finding as to the basis for the action of the City Commission was that it was for the purpose of allowing Safeway Stores, Inc. to erect buildings on the vacated portion of the street.

*Cernauskas* v. *Fletcher,* 211 Ark. 678, 201 S.W. 2d 999. See also *City of Little Rock* v. *Linn,* supra.

The city challenged the standing of appellees to bring the action. Appellee Harvel had resided for 30 years at 2620 North 37th Street in Prairie View Addition, which is at the corner of North 37th Street and Birnie Avenue. This is five blocks from the strip closed by the ordinance. Appellee Jones' property is at 4817 South V Street, far removed from Birnie Avenue. Jones also has some interest in a tract at 3620 North 6th Street, which is also quite distant from the strip of street being vacated.

It is well settled that appelles, as citizens and taxpayers did not have standing to challenge the city's action. *City of Little Rock* v. *Linn,* supra. Relief is available to those who suffer special and peculiar injury or damage, but this special injury or damage must be such as is not common to the public in general and not just a matter of general public inconvenience.

No attempt was ever made to show that appellee Jones had suffered special damages which would give him standing to challenge the street closing. Harvel attempted to show special damage by reason of diminished fire protection and inconvenience of travel. He based his contention about fire protection upon the location of fire plugs and additional turns required at square corners. He had been a District Fire Chief in Fort Smith before his retirement. He said that the number one response company for his area would come south on Albert Pike and west on Birnie to his property and not use the closed portion at all. The number two response company is west and south of his property and according to his information would proceed to Kelley Highway, on Kelley to Midland, thence left on Midland, on Midland to Birnie and then left on Birnie. He said that square turns at Kelley and North 32nd and at Pryor and North 32nd would be more difficult for fire equipment than the angle turn to the right at Midland and Birnie. Harvel said that if Birnie were closed, he would have to drive to Kelley Avenue to enter Midland when he travelled downtown. He could also travel north on North 32nd Street to enter Midland. At each of these alternate intersections there is a traffic light, but there is none at the west end of Birnie. Harvel said he would have to make an extra

turn in travelling either alternate route and he objected to having to wait at traffic lights before entering Midland. He also testified that it would be more difficult for ambulances and the police to locate and reach his residence.

Harvel had retired in 1971 and admitted that he did not know the present plans of the fire department for responses to his neighborhood. The Fort Smith Fire Chief said that he had never used Birnie Avenue as a response route and had never heard of its being used as a response route in his 33 years in the department, that there was no need for fire response vehicles to use Birnie between Midland and North 32nd Street, that the equipment approaching Harvel's property would leave Midland at Kelley Highway and proceed on North 32nd Street to Birnie, and that the square corners could be turned without much difficulty. He had been consulted about the effect of the closing by the Planning Director. Some persons who used streets in the area testified that it was easier to enter Midland at intersections controlled by traffic lights than at Birnie where there was no light, and that many people who travelled Birnie actually entered Midland by first going south to Kelley or north two blocks to Johnson, which intersection with Midland was also light-controlled. There was testimony by the city's Director of Planning that it is more desirable that traffic be funnelled to an arterial street via a collector street or another arterial street, rather than by way of a local street, such as Birnie. The Director of Planning and Transportation for the Western Arkansas Planning and Development District testified that it was extremely difficult to enter Midland from Birnie because of the heavy Midland traffic and the difficulty of executing a right hand turn from Birnie because of the angle of intersection.

Appellees are in no better position than were the protestants in *Linn* and *Risser*. Appellees attempt to distinguish *City of Little Rock* v. *Linn,* supra, on the basis that the vacation of the street in that case was under an exception to Ark. Stat. Ann. § 19-3825. This is an incorrect reading of *Linn*. In that case, we held the closing valid under both §§ 19-2304 and 19-3825, the petition for closing having been under both sections.

Assuming that a citizen and taxpayer has standing to at-

tack an ultra vires act of the city, appellees have failed to show that the ordinance was ultra vires. It is true that the city governing board cannot sell, give away or exchange the streets of a city without the consent of abutting owners or without statutory authority and that any attempt to do so is ultra vires. *Beebe* v. *City of Little Rock,* 68 Ark. 39, 56 S.W. 791. But we do not consider that there has been any sale, exchange or gift of the city streets in this case. The abutting owners consented and the city had statutory authority to vacate the street when it was no longer needed for corporate purposes under Ark. Stat. Ann. § 19-2304. In making this determination, the city's governing board had a very wide latitude of discretion. *City of Little Rock* v. *Linn,* supra. We cannot say that this discretion was so abused under the circumstances as to make the ordinance involved ultra vires. While we held in *Risser* that a contract for the permanent abandonment of city streets would be ultra vires, there is no evidence of any contract in this case. A conveyance to the only abutting owner is not prohibited. *Barbee* v. *Carpenter,* 223 Ark. 660, 267 S.W. 2d 768. Nor is a vacation of a street for the benefit of the abutting owner if the street is not needed for corporate purposes. *Kansas City Southern Ry. Co.* v. *City of Ft. Smith,* 228 Ark. 625, 309 S.W. 2d 315; *City of Little Rock* v. *Linn,* supra.

Appellees, however, attempt to extend the rule of *Risser* by their contention that, as beneficiaries of the public trust under which the streets were held by the city, they are entitled to attack the action as a gift of trust property without consideration and in violation of Art. 5 § 21 of the Arkansas Constitution. Mr. Harvel testified that he did not see why the city could not take bids on the portion of the street closed and sell it. It is vigorously argued on his behalf that this should be done and, because it was not done, appellees have standing to challenge the city action. It is also argued that the property should have been devoted to other corporate uses.

This argument is based upon a misconception of the character of the title of the city to the street right-of-way and of its corporate powers. Appellees argue that under Ark. Stat. Ann. § 19-2304, the city could use the lands for other public or municipal objects or purposes, or sell it and use the proceeds for such purposes. Appellees rely heavily upon such

cases as *Goodman* v. *Powell,* 210 Ark. 963, 198 S.W. 2d 199, which only goes to the question of equity jurisdiction in a case involving a public square. It does not support their argument as to standing in this case, however, involving streets dedicated by the filing of a plat and accepted by the city. The property which can be so used or sold is only lands which have been acquired by or donated to the city. The ownership of the fee in the Birnie Avenue right-of-way remained in the abutting owners together with all rights not inconsistent with the public use to which the property was dedicated. *Lincoln Hotel Co.* v. *McGehee,* 181 Ark. 1117, 29 S.W. 2d 668. *Taylor* v. *Armstrong,* 24 Ark. 102; *Town of Hoxie* v. *Gibson,* 150 Ark. 432, 234 S.W. 490. When a city vacates a street in which it has only an easement, it has no further rights in the property. *Kansas City Southern Ry. Co.* v. *City of Ft. Smith,* supra. It cannot be sold by the city but passes to the abutting owners. *Beebe* v. *City of Little Rock,* supra; *Arkansas River Packet Co.* v. *Sorrels,* 50 Ark. 466, 8 S.W. 683; *Town of Hoxie* v. *Gibson,* supra. Neither can the city devote the street to another public use even though the legislature may have attempted to authorize such action, because to do so would impose an additional servitude upon the land in violation of the rights of the abutting owner, who would have the right to enjoin such use. *Lincoln* v. *McGehee Hotel Co.,* supra; *Arkansas River Packet Co.* v. *Sorrels,* supra; *City of Osceola* v. *Haynie,* 147 Ark. 290, 227 S.W. 407. But a non-abutting owner, such as both appellees, could not enjoin the action, unless he could show special and peculiar injury not suffered in common with the general public. *Arkansas River Packet Co.* v. *Sorrels,* supra. See also, *State* v. *City of Marianna,* 183 Ark. 927, 39 S.W. 2d 301. Cf. *Campbell* v. *Ford,* 244 Ark. 1141, 428 S.W. 2d 262; *Adams* v. *Merchants & Planters Bank & Trust Co.,* 226 Ark. 88, 288 S.W. 2d 35.

Since there is no theory upon which appellees had standing to challenge the ordinance in question, the decree is reversed and the cause dismissed.

Lanny Paul VENABLE *v.* STATE of Arkansas

CR 75-207 538 S.W. 2d 286

Opinion delivered July 12, 1976

*Don Langston* and *Hubert Graves,* for appellant.

*Jim Guy Tucker,* Atty. Gen., by: *B. J. McCoy,* Asst. Atty. Gen., for appellee.

JOHN A. FOGLEMAN, Justice. Appellant was charged and found guilty of the murder of Donnie Edward Douglas on December 21, 1974, while engaged in the perpetration of the crime of rape of Sherry Douglas in violation of Ark. Stat. Ann. § 41-4702 (A) (Supp. 1973). He was sentenced to life imprisonment without parole. He seeks reversal of the judgment of conviction on 15 grounds. We find no basis for reversal of this judgment on any of them or on any objection made during the course of the trial. We shall review the points for reversal argued by appellant in the order raised by him and state the facts disclosed by the evidence only to the extent necessary for proper treatment of them.

I

THE COURT ERRED IN REFUSING TO SET BAIL.

Appellant moved that the court set bail pending trial. He admits in argument here that it would have been difficult for him to have made bail in any amount and that his motion was actually an attack upon the constitutionality of our capital felony murder statute's provision for the death penal-

ty. He argues that the death penalty is cruel and unusual punishment contrary to Art. 2 § 9 of the Arkansas Constitution and Amendment Eight to the United States Constitution. We have held the death penalty provision of the act constitutional on similar attacks. *Collins* v. *State,* 259 Ark. 8, 531 S.W. 2d 13; *Neal* v. *State,* 259 Ark. 27, 531 S.W. 2d 17. See also, *Graham* v. *State,* 253 Ark. 462, 486 S.W. 2d 678. Appellant somehow reads the diverse opinions of individual justices of the United States Supreme Court to collectively mandate abolition of the death penalty, at least as embodied in the Arkansas statutes. We do not so read these opinions. See *Collins* v. *State,* supra. It seems to us that this is foreclosed by the decisions of the United States Supreme Court in *Gregg* v. *Georgia,* 428 U.S. 153, 96 S. Ct. 2971, 49 L. Ed. 2d 859 (1976); *Proffitt* v. *Florida,* 428 U.S. 242, 96 S. Ct. 2960, 49 L. Ed. 2d 913 (1976); *Jurek* v. *Texas,* 428 U.S. 262, 96 S. Ct. 2950, 49 L. Ed. 2d 944 (1976). See Criminal Law Reporter, Vol. 19, No. 13. Be that as it may, any challenge by appellant to the death penalty is moot, because he was sentenced to life imprisonment without parole. *Harris* v. *State,* 259 Ark. 187, 532 S.W. 2d 423.

II

THE TRIAL COURT ERRED IN OVERRULING DEFENDANT'S MOTION THAT JURORS WHO WOULD NOT CONSIDER THE DEATH PENALTY NOT BE EXCUSED FOR CAUSE IN THAT PART OF THE TRIAL AT WHICH DEFENDANT'S GUILT OR INNOCENCE WOULD BE DECIDED.

III

THE COURT ERRED IN OVERRULING DEFENDANT'S MOTION FOR A ONE WEEK CONTINUANCE IN ORDER TO PRESENT EVIDENCE THAT A JURY COMPOSED ONLY OF PERSONS WHO WOULD CONSIDER THE DEATH PENALTY IS MORE LIKELY TO CONVICT THAN IS A JURY COMPOSED OF A CROSS SECTION.

IV

THE COURT ERRED IN OVERRULING DEFENDANT'S MOTION FOR PAYMENT OF TRAVEL EXPENSES AND WITNESS FEES TO EXPERT WITNESSES WHO WOULD TESTIFY THAT A JURY COMPOSED ONLY OF PERSONS WHO WOULD BE WILLING TO CONSIDER THE DEATH PENALTY IS MORE LIKELY TO CONVICT THAN IS A JURY COMPOSED OF A CROSS SECTION.

This case was set for trial in March, 1975, but continued until April 28, 1975, in order to permit appellant's attorney to prepare for trial. On April 24, 1975, appellant moved in limine that prospective jurors who are opposed to, and who would under no circumstances vote for, the death penalty not be excused for cause in that portion of the trial at which the defendant's guilt or innocence was to be determined on the ground that a jury composed of only persons who would consider the death penalty would be more likely to convict him than would a jury composed of a cross-section which included persons who would refuse to consider the death penalty and that trial before a jury composed of persons who would be willing to impose the death penalty would deny him a fair trial and otherwise violate rights guaranteed him by the due process clauses of the Fifth and Fourteenth Amendments to the United States Constitution and the due process clause of Art. 2 § 8 of the Arkansas Constitution. By oral amendment, appellant also invoked the constitutional guaranties of right to trial by an impartial jury in the Sixth Amendment to the United States Constitution and Art. 2, § 10 of the state constitution. Motion was denied. In passing, it appears to us that failure to excuse jurors who would be unwilling to consider the death penalty under any circumstances could, in effect, nullify our death penalty statute, because it requires that the same jury which determines guilt also determine the sentence to be imposed in the sentencing stage of a bifurcated trial. See Ark. Stat. Ann. § 41-4710 (Supp. 1973). Be that as it may, we find no error in the circuit judge's action on this motion. Basically, the constitutional law on the subject of excusal of jurors for cause because of their unwillingness to consider the death penalty under any circumstances is stated in *Withers-*

*poon* v. *Illinois,* 391 U.S. 510, 88 S. Ct. 1770, 20 L. Ed. 2d 776 (1968) and *Bumper* v. *North Carolina,* 391 U.S. 543, 88 S. Ct. 1788, 20 L. Ed. 2d 797 (1968), decided the same day. The very argument advanced by appellant was rejected in *Witherspoon,* in the light of information then available to the court. In *Bumper,* the court also rejected the argument that a jury so selected deprived a defendant of his Sixth Amendment right to trial by an impartial jury. We find no violation of constitutional rights in denial of this motion.

In effect, appellant recognizes the impact of the holding in *Witherspoon* on his contention, but says that he was prepared to make the showing which was lacking in *Witherspoon.* On April 24, 1975, at 12:43 p.m., appellant filed his motion for a continuance from April 28 to May 5 to enable him to obtain the attendance of Dr. Daniel Taub, a psychologist of Springfield, Missouri, who he alleged was employed at the Medical Center for Federal Prisoners there. On the same date, appellant filed a motion asking that the court order the Treasurer of Sebastian County to pay the $500 witness fee of Dr. Taub, along with his travel expenses, alleging that this doctor had indicated in a telephone conversation with appellant's attorney that, in the doctor's professional opinion, a jury composed entirely of persons who would be willing to impose the death penalty would be more likely to convict a defendant than would a jury which included some who would not consider the death penalty. It was further alleged that appellant's attorney had attempted, without success, to obtain the testimony of expert witnesses locally and had been informed that no local experts had any experience in the area.

Appellant also moved on April 25, 1975 that the case be continued to May 5, 1975, in order that he might obtain the attendance of Dr. Faye Goldberg, a psychologist, employed by the University of Chicago in Chicago, Illinois, who had indicated in a telephone conversation with appellant's attorney that she held the same professional opinion as that attributed to Dr. Taub and that her opinion would be supported by testimony in accordance with an article written by the witness, a copy of which was attached to the motion. The article was entitled, "Toward Expansion of Witherspoon, Capital Scruples, Jury Bias, and Use of Psychological Data to Raise Presumptions in the Law" and reprinted from the Har-

vard Civil Liberties Law Review, Vol. V, No. 1, January, 1970, pp. 53-69.

All the motions regarding these points for reversal were heard by the circuit court on April 28.

The granting or denial of a motion for continuance to obtain the attendance of an absent witness lies within the sound judicial discretion of the trial judge, and his action will not be reversed on appeal in the absence of such a clear abuse of that discretion as to amount to a denial of justice. *Figeroa* v. *State,* 244 Ark. 457, 425 S.W. 2d 516; *Thacker* v. *State,* 253 Ark. 864, 489 S.W. 2d 500; *Freeman* v. *State,* 258 Ark. 496, 527 S.W. 2d 623. The denial of a motion which is not in substantial compliance with statutory requirements is not an abuse of discretion.

One of the critical factors in the consideration of such a motion is the diligence of the party seeking the continuance in obtaining the testimony or the attendance of the witness. Ark. Stat. Ann. §§ 27-1403 (Repl. 1964), 43-1706 (Repl. 1964); *Thacker* v. *State,* supra. In denying the motion, the circuit judge pointed out that appellant's attorneys, the Public Defenders, were appointed on January 2, 1975, that the case was continued for one month to permit them to prepare for the trial, that he had specifically inquired of the Public Defender's office five or six days before the trial date about any possible motions for continuance and was not informed of any, and that the inquiry was made partially because the judge had been advised that the prosecuting witness was coming from California for the trial and some 20 or 25 witnesses, many of whom did not reside in Arkansas, had been subpoenaed for the April 28 date. Even though appellant's attorney advised the court that he had exhausted all possibilities of locating witnesses in Arkansas who were qualified to testify on the subject and did not learn of the identity or availability of the witnesses sought until after the court's inquiry, we cannot say that the court's implicit finding that there was a lack of due diligence in obtaining the attendance of either witness to support appellant's motion in limine was erroneous.

In order to obtain a continuance because of the absence of a witness, it is necessary that the movant support his motion by affidavit stating what facts affiant believes the witness will prove and not merely the effect of such facts in evidence. In the case of an expert witness, this would at least require that the basis of his opinion be stated. The requirement was not even substantially complied with in the case of Dr. Taub. Assuming however, for the purpose of his motion that attaching the article written in 1970 by Dr. Goldberg was a sufficient statement of facts to which the witness would testify, it is not verified by anyone's affidavit, as required by statute. Nor does anyone, by affidavit, express the belief that the facts stated are true. Furthermore, the materiality of the factual background for the testimony of the expert witness does not appear on the face of the motion, because her opinion seems to be based on 1966 data. The failure to file the required affidavit is another significant factor in appellate review of the trial court's action in denying a motion for continuance. *Thacker* v. *State,* supra; *Brown* v. *State,* 252 Ark. 846, 481 S.W. 2d 366.

If all the other requirements for a continuance had been met, the testimony of Dr. Goldberg could not well be the basis for appellant's position. Appellant argues that the United States Supreme Court, in *Witherspoon,* invited the same kind of evidence Dr. Goldberg could have furnished. Appellant points out that in rejecting the precise argument he advances, the United States Supreme Court said that the data adduced by the petitioner there was too tentative and fragmentary to establish the premise and that the court could not conclude on the basis of the record before it, or as a matter of judicial notice, that exclusion of jurors opposed to capital punishment results in an unrepresentative jury on the issue of guilt or innocence and substantially increases the risk of conviction. It seems evident to us from footnotes in both the *Witherspoon* and *Bumper* opinions that the very article which appellant relies upon as indicative of Dr. Goldberg's probable testimony was among the fragmentary scientific data rejected by the *Witherspoon* court as insufficient.

Appellant has failed to show that there was an abuse of the trial court's discretion in denying his motion for continuance to permit him to make a showing of at least

questionable relevance on the matter of jury selection. We perceive no significant difference, insofar as the trial court's discretion is concerned, between this case and *Blanton* v. *State,* 249 Ark. 181, 458 S.W. 2d 373, cert. den. 401 U.S. 1003 (1970), where we held that there was no abuse of discretion in the denial of a motion for continuance to permit a defendant to investigate the nature and makeup of a jury panel to determine its economic class composition.

V

THE TRIAL COURT ERRED IN ALLOWING THE PROSECUTION TO ASK A PROSPECTIVE JUROR IF HE WOULD IMPOSE THE DEATH SENTENCE.

We find no error. Appellant argues that the asking of the following question of a prospective juror by the prosecuting attorney was error: "I believe your answer was that you would consider the death penalty, but then when it came right down to it if the circumstances justified it, would you impose it?" Appellant objected on the basis that the proper test was whether the juror would consider the death penalty. Appellant argues that the question was improper because it asked the juror to state whether he would vote for the death penalty in a specified hypothetical situation. We could well agree with appellant if the question had included a statement of a certain hypothetical situation or set of facts and tended to commit the juror to vote for the death penalty if that factual showing were made. This was not the case here. As a matter of fact, the prosecuting attorney, in pursuing the line of questioning, stated that no one knew what the evidence would be without hearing it, and that it was difficult for one to say what he might do. The juror's eventual affirmative answer was that he would go along with the death penalty if the circumstances justified it. We think the argument here is a semantical one which merits no consideration.

VI

THE TRIAL COURT ERRED IN REFUSING TO STRIKE FOR CAUSE A PROSPECTIVE JUROR WHO STATED THAT, GIVEN A CHOICE

OF VOTING CONVICTION OF CAPITAL FELONY MURDER OR ACQUITTAL, HE COULD NOT VOTE FOR ACQUITTAL, IF THE EVIDENCE PROVED MURDER BUT DID NOT PROVE CAPITAL FELONY.

We do not read the record on this point as appellant does. The prospective juror had never served as a juror before. It is clear to us that he did not fully understand questions by appellant's attorneys about the requirement that the state prove both murder and its commission in the perpetration of rape and felt that proof of murder alone would be sufficient for a conviction and for application of the capital felony murder statute. On the basis of these answers, appellant challenged the juror for cause. The prosecuting attorney then took up voir dire examination. Here again, the juror was not able to distinguish between murder and capital felony murder in his answers. He did state, however, that he would follow the court's instructions. In response to further questioning by appellant's attorneys, the juror answered that he could not vote to acquit the defendant if the state failed to prove perpetration of a rape beyond a reasonable doubt but proved beyond a reasonable doubt that he committed murder. Appellant again challenged the juror for cause. The trial judge then explained that there were different degrees of murder, that only capital felony murder could carry a death penalty, and that the court might or might not give instructions on first degree murder along with a capital felony murder instruction. The judge then asked if the case were submitted only on the capital felony murder charge and the state failed to prove the rape beyond a reasonable doubt, whether the juror would still vote to find the defendant guilty of capital felony murder. The juror responded, "Not necessarily, no." The court then asked whether the juror could listen to the evidence and return his verdict on that evidence and the instructions given, even if the juror did not agree with the instructions, and received an affirmative answer. Thereafter, the court denied the challenge.

VII

THE COURT ERRED IN REFUSING TO STRIKE FOR CAUSE A PROSPECTIVE JUROR

WHO STATED HE HAD AN OPINION WHICH IT WOULD TAKE PROOF TO REMOVE.

Here again, we evaluate the record differently. The juror did equivocally say that he had an opinion based upon newspaper and television accounts of the crime. When asked if he had an opinion, he answered, "Well, yes and no. It just — I'd have to hear the evidence, you know, of the case. I don't have a set opinion on it, really, either way." Upon pursuit of the point by appellant's attorney, the juror stated that he would "follow what the witnesses and the court decide" and that it would not require any proof other than what he heard in court to remove "what [I] now understand about the case," but that it would take some proof in court. Upon challenge for cause, the circuit court interrogated the prospective juror thus:

> THE COURT: Did I understand you to say — If I misquote you, please tell me — that you would follow the law and the evidence and the instructions?
>
> A. Yes.
>
> ******
>
> THE COURT: Would you take into consideration anything else?
>
> A. No, sir.
>
> THE COURT: Would you take into consideration your opinion, regardless of how lightly held or strongly held it is at this time?
>
> A. (Nods head no).

We find no abuse of the trial court's discretion in denying the challenge for cause.

VIII

THE COURT ERRED IN OVERRULING DEFENDANT'S OBJECTION AND ALLOWING A

## WITNESS TO TESTIFY TO TELEPHONE CONVERSATIONS WHICH OCCURRED OUTSIDE THE PRESENCE OF THE DEFENDANT.

The witness was Modine Sosebee, a friend and neighbor of Donnie Douglas and Sherry Douglas, the victim of the murder and the alleged victim of the rape respectively. The friendship was close. The two couples went to the same church, as did Mr. and Mrs. Edward Douglas, Donnie's father and mother, and the parties visited occasionally on the telephone. The Douglases owned a hog and had planned to butcher it at the Sosebee residence, one-half mile across the field from the Donnie Douglas house, on Saturday, December 21, with the help of the Sosebees. Mrs. Sosebee testified that she received a telephone call about 6:00 a.m. on that day, from Sherry, who said that they would be unable to butcher the hog because Donnie had gone to Alabama with Roger Pierce (Donnie's stepbrother) to pick up Angie's (Roger's sister's) car. Mrs. Sosebee said that on the next day, Sunday, Bertha Douglas, Donnie's stepmother, called on the telephone. An objection to this witness' relating the statements of Bertha (Mrs. Edward) Douglas was sustained. The objection was on the grounds of hearsay and the right to confrontation. The objection on the right to confrontation was overruled, since it was disclosed by the state's attorney that Bertha Douglas would be a witness. The state's attorney also stated that the telephone conversation was not offered to show the truth of the statements but to show that the conversation took place. The court then overruled the objection. The witness then said that Mrs. Douglas asked if the kids (Donnie and Sherry) were there, and said there had been a death in the family and that members of the family had been trying to reach Donnie and Sherry the day before without success. Mrs. Sosebee said that she then reported the substance of her conversation with Sherry on Saturday morning, and that Mrs. Douglas replied that Donnie and Roger did not go to Alabama and then said, "Something has happened. We're going to go look for those kids. Roger got back yesterday morning and Donnie wasn't with him." The court then admonished the jury that this conversation was not offered for the purpose of showing its truth but merely to show that it had taken place.

Appellant only argues the hearsay objection here. In considering this objection, it is necessary that we consider some of the background that had already been developed. Sherry Douglas had testified about the plans to butcher the hog and that Donnie's parents knew of the plans. She had also testified that Donnie and Roger had planned to go to Alabama to pick up an automobile, but that Pierce had actually left without Donnie on Friday. She said that appellant had killed her husband and raped her during the night, and directed her to call Mrs. Sosebee and tell her that Donnie had changed his mind about killing the hog on Saturday but she had told appellant that she should say that Donnie had gone to Alabama with Roger and would kill the hog when he got back. The reason she made this suggestion was because she knew Donnie had seen Mrs. Sosebee on Friday evening and thought he might have told her that Roger had gone to Alabama without him and that Mrs. Sosebee might know that something was wrong and knew that Mrs. Douglas would know and that someone would come over to see what was wrong.

Mrs. Bertha Douglas later testified that on Saturday she had received a telephone call concerning the whereabouts of Donnie and Sherry Douglas and had called Mrs. Sosebee, who told her of the telephone call from Sherry. Mrs. Douglas said that, since she knew that Roger had gone to Alabama alone and had returned with the car on Sunday morning, her husband then went to Donnie's home, but he soon returned, and, as soon as she could get someone to babysit with a granddaughter, both of them went to the residence of Donnie and Sherry. It was then about 5:00 p.m. She said Donnie's car was gone but that a Chevrolet car was sitting there. After attending to hogs, chickens, ducks and dogs on the place, Mr. Douglas went to the front door, and later both went to the back door, where they found a hole chopped in the door that had not been there when Mr. Douglas came over in the morning. She would not permit her husband to break in. According to her, they then went to church and delivered some Christmas gifts, but she continued to worry about Donnie and Sherry and called a deputy sheriff, who with another officer went to the Donnie Douglas house along with the elder Douglases. There they found Donnie's car parked at the house, his body on the floor, and appellant asleep on a bed to

which Sherry, who was nude, was tied.

Since Mrs. Douglas did testify, the right of confrontation was preserved. No objection was made to the testimony of Mrs. Douglas when she related the telephone conversation with Mrs. Sosebee. In view of this failure to object, the admonition given by the trial court, the relevancy of the telephone conversation to the actions of the elder Douglases leading to the discovery of their son's body and the insignificant bearing the statements of Mrs. Douglas had on the issues in the case, the error, if any, in admitting this evidence was harmless.

IX

THE COURT ERRED IN OVERRULING DEFENDANT'S OBJECTION AND ALLOWING THE PROSECUTOR TO ASK LEADING QUESTIONS ON DIRECT EXAMINATION.

These objections were directed at the examination of Richard Lanier, a service station operator who had seen appellant and Sherry Douglas at his station on Saturday, December 21, on two occasions. We have reviewed the record as abstracted and are unable to say that the trial judge abused his discretion.

X

THE TRIAL COURT ERRED IN OVERRULING DEFENDANT'S MOTION FOR MISTRIAL AFTER THE STEPMOTHER OF THE DECEASED BROKE DOWN ON THE WITNESS STAND AND ASKED WHY ANYONE WOULD WANT TO KILL THE DECEASED.

XV

THE COURT ERRED IN REFUSING TO DECLARE A MISTRIAL WHEN THE WIFE OF THE DECEASED, AND ALLEGED VICTIM OF RAPE, RAN FROM THE COURTROOM CRYING DURING THE PROSECUTOR'S SUMMATION.

These points relate to emotional reactions of a witness on the one hand and a victim on the other. At the conclusion of her direct examination, Mrs. Douglas identified appellant as the person brought out of her stepson's house when she and her husband went there with the officers by pointing him out. Immediately the prosecuting attorney asked that the record show that she had identified appellant and Mrs. Douglas, crying, exclaimed:

> Oh, my God! Why, Lord, why Donnie, why Donnie, why? Why would anybody want to kill him (crying).

Appellant's prompt motion for a mistrial was denied but his subsequent alternative motion for an admonition to the jury was granted by the following statement:

> Any remarks that the witness made voluntarily that were not in response to questions are not considered evidence and will be disregarded by the jury.

The record is not so clear as to the actions of Sherry Douglas. Appellant's attorney stated, in moving for a mistrial before making his closing argument, that Sherry Douglas, who had been sitting near the jury box, had run from the courtroom crying during the prosecuting attorney's opening argument and that he could hear her sobbing, crying and talking outside the courtroom after her exit and was sure that the jury had. The prosecuting attorney was sworn and testified that he was within three or four feet of the jury when the incident was supposed to have occurred and that he did not hear Sherry Douglas crying or saying anything, although he was aware that someone had left the courtroom. Appellant testified that he saw Sherry Douglas get up and leave the courtroom crying and heard her crying until someone closed the door behind her. Thereafter, he said, he heard her sobbing. This motion was overruled. The trial judge was not asked to admonish the jury.

Emotional outbursts by the relatives of murder victims and by victims of crimes are not unusual and are difficult to control. In these instances there were no accusatory remarks or remarks directed at the accused. The trial judge must have been aware of all that took place in his presence and was in a

better position to evaluate the impact of these occurrences than anyone else. He had a wide latitude of discretion in the control of the trial. Utilization of the extreme and drastic remedy of declaration of a mistrial should be a last resort. We find no abuse of discretion in the denial of motions for a mistrial.

## XI

### THE COURT ERRED IN REFUSING TO DIRECT A VERDICT OF ACQUITTAL AS TO CAPITAL FELONY MURDER.

Appellant here contends that the evidence is insufficient to present a jury question as to his guilt of capital felony murder saying that, even when viewed in the light most favorable to the state, it did not show that the killing was committed by a person (appellant) engaged in the perpetration of rape. He tacitly concedes that the evidence on behalf of the state, if believed, is sufficient to show that he killed Donnie Douglas and that he raped Sherry Douglas, even though he steadfastly denies having done either but he argues that the evidence does not show that the killing was done in order to accomplish the rape.

Of course, the necessary evidence may be circumstantial. The circumstances shown were sufficient basis for a reasonable mind to conclude, without resort to speculation or conjecture, that the killing was done while appellant was engaged in the perpetration of the crime of rape. A review of the evidence in the light most favorable to the state shows could come and drink a beer. They took Venable to his mother and stepfather about a city block away from the Douglas residence. He was a frequent visitor to the Douglas home after he had come to trade cars with Donnie and had met Sherry some two or three weeks prior to the slaying of Donnie. Lanny Venable, the Sosebees and the elder Douglases knew of the plan to butcher the Douglas hog at the Sosebee residence on Saturday, December 21. All of them knew about the plans of Donnie Douglas and Roger Pierce to go after an automobile in Alabama. On Friday night Lanny Venable went with Donnie and Sherry Douglas to the Grand Avenue Lounge where Donnie played in a band. While there,

Venable sat at the table with Sherry. He drank 10 or 12 cans of beer and she drank Sprite. The lounge closed at about 12:30 a.m. on Saturday and the three went to one or more places in search of drugs, without success. Sherry Douglas said that her husband was trying to get them for Venable. She testified that, on the way home, Venable asked if he might not come to the Douglas house and drink a beer. She said she told him she was tired and wanted to go to bed and that Donnie had said that he was tired, too, but that Venable could come and drink a beer. They took Venable to his mother's house so he could let her know where he was going. The Douglases left Venable there and went to their own house. Sherry said that she went to bed immediately. Venable testified that he got his rifle while at home, then got in his car and proceeded to the Douglas house. His excuse for getting the rifle was that there had been a problem about wolves or wild dogs. After Venable arrived, Donnie Douglas was playing tapes on his stereo tape player. The door between the bedroom and the living room was open. Sherry Douglas said that she could hear the two talking about a pizza Venable had brought but heard no argument between them. She heard Donnie talking about butchering the hog and then heard him walk across the room toward the stereo and change tapes. According to her, as soon as she heard the tape plugged up, she heard a shot and a thump, turned over and found Venable standing by her bed pointing a gun at her. She had glanced at the clock and noted that it was 2:10 a.m. She said that Venable told her that if she didn't do just as he said, he would kill her, too, and that prison had made him like he was. He added that if she were not pregnant, he would kill her right then, too. She said that when she tried to get off the bed and go to her husband, he shoved her back on the bed, hung a blanket over the door, made her lie down and started talking to her. She testified that when she asked him why he killed her husband, Venable said he had to in order to get him out of the way, that he had to talk to her, he was sorry, it was something he had to do and shortly thereafter he made her remove her clothing, engage in oral sex with him and then raped her. She said that Venable's rifle was right beside the bed and that she was afraid to resist him. After the intercourse, she said he tied her hands and feet to the bed with a cord he cut from the television set in the house and went to sleep for about 10 minutes. She said that later in the morning

she called Modine Sosebee at Venable's direction while he was holding a gun on her. She explained that she worded the conversation about killing the hog as she did because she thought Mrs. Sosebee would know something was wrong and would investigate. She said that Venable raped her again during the morning and then took her to his mother's house while no one was at home, made her cook breakfast for him, raped her again and then took her into Oklahoma, returning to the Douglas home on Sunday at about 1:00 p.m. when he poked the hole in the door, but locked it from the outside with a padlock. She stated that he again forced her to have intercourse with him but suggested that they leave and come back after dark, so it would not be so risky for him to leave. According to her, he said he would tie her to the bed, so that it would take several hours for her to get loose and enable him to escape before she called the police. She said they did return, he raped her again, tied her up and went soundly to sleep, not having slept but 10 minutes since he killed her husband. She said that while she was tied to the bed, she had seen car lights outside, then saw a car back out. It was after the car had left that Venable fell asleep. Shortly thereafter Donnie's parents and the officers came and rescued her.

Venable testified that Sherry killed Donnie when he plugged in the tape, using Venable's rifle. He admits the frequent acts of intercourse, except for the oral sex, but said that there was no force or compulsion involved. He explained that he tied Sherry to the bed as part of a prearranged plan for him to get away and for her to say that someone had broken into the house, shot her husband and raped her.

All the circumstances certainly afforded a reasonable basis for finding that Venable killed Donnie Douglas to enable him to perpetrate the crime of rape on Douglas's wife. It would be difficult to assign any other motive for the killing, if Venable was the killer.

## XII

THE COURT ERRED IN REFUSING TO SUBMIT NO HIGHER AN OFFENSE THAN SECOND DEGREE MURDER TO THE JURY.

Appellant moved for a directed verdict as to first degree murder and moved that no issue be submitted on any greater offense than second degree murder. There was no prejudicial error as there was sufficient evidence to support the conviction of capital felony murder.

## XIII

THE COURT ERRED IN ALLOWING THE STATE TOXICOLOGIST WHO STATED THAT HE WAS NOT A PHARMACOLOGIST OR AN EXPERT TO TESTIFY TO INFORMATION HE HAD AS TO HOW LONG CERTAIN DRUGS WILL REMAIN IN THE BLOODSTREAM.

The State Toxicologist was subpoenaed and presented as a witness by appellant. The witness testified that he had analyzed samples of blood taken from the body of Donnie Douglas. He found methamphetamines, Qualude, also known as Methoqualone, phenobarbitol and a blood alcohol content of 0.07 percent by "weight volume" of alcohol. He did not do a quantitative analysis to determine the amount of drugs present. On cross-examination, he said that since he was not a pharmacologist he could not say now long the drugs could have been in the bloodstream when the test was made, except in relation to information he had gained in order that he might carry on his job as an analyst. When asked what that information was, appellant's attorney's objection was overruled on the basis that the question was proper cross-examination. The witness then stated that, in cases in which he had performed analyses, there were those in which, to the best of his knowledge, the phenobarbitol had been taken as long as 20 days before the tests were made.

The relevance of the witness' testimony is not readily apparent. Someone shot and killed Donnie Douglas as he changed a tape on his stereo tape player. No one suggests that he had done anything at the time to provoke or invite an assault or that his death was caused by anything other than the gunshot wound. If the testimony related to mitigating circumstances, it is sufficient to say that the jury imposed the lesser punishment for capital felony murder. Assuming, however, that the evidence was admissible as a part of the res

gestae, in view of the fact that the questions were propounded on cross-examination, and, in view of the discretion invested in the trial judge to control cross-examination and to determine the qualification of a witness to give opinion evidence, we find no abuse of discretion.

XIV

THE TRIAL COURT ERRED IN REFUSING TO INSTRUCT THE JURY THAT THE STATE MUST PROVE THE ELEMENTS OF A MURDER IN ORDER FOR THE DEFENDANT TO BE CONVICTED OF A CAPITAL FELONY.

Appellant argues that the court should have instructed the jury that they must find the elements of first degree murder, or at least all the elements of second degree murder before they could find appellant guilty of capital felony murder. Of course, in our view of the evidence, it sustains a conviction of capital felony murder, but appellant's complaint here goes to the matter of instructions to the jury. Appellant relies upon commentary on the equivalent section of the new Arkansas Criminal Code, Ark. Stat. Ann. § 41-1501, effective January 1, 1976. Since this provision was not in effect at the time of the offense charged or the time of trial, we forego any abstract discussion of its construction. It is sufficient for the purposes of this case to say that we view the capital felony murder statute in existence at the time of this offense in the same light that we have heretofore viewed the felony murder statute. In that light, proof of a homicide in the commission of rape relieves the state of the burden of proving premeditation, deliberation or the specific intent to take human life. See *Bosnick* v. *State,* 248 Ark. 846, 454 S.W. 2d 311; *Murray* v. *State,* 249 Ark. 887, 462 S.W. 2d 438; *Walker* v. *State,* 239 Ark. 172, 388 S.W. 2d 13.

We have, as in other cases involving the death penalty, reviewed the record for other objections made during the course of the trial and find none worthy of consideration.

The judgment is affirmed.

Bernard BULLON *v.* Ernest MONROE

76-92 539 S.W. 2d 434

Opinion delivered July 12, 1976
[Rehearing denied September 13, 1976.]

*Pickens, Boyce, McLarty & Watson,* for appellant.

*Bowie, Carlyle & Erwin,* for appellee.

CONLEY BYRD, Justice. Appellant Bernard Bullon brought this action against appellee Ernest Monroe under the Small Claims Statute, Ark. Stat. Ann. § 75-918 (Repl. 1957), to recover $101.00. Monroe admitted that he had agreed to pay for the damages that he had done to appellant's 1972 Toyota Corona station wagon, but denied that the damages amounted to $101.00. The trial court found the damages to be $50.00 and entered judgment for that amount. On appeal appellant contends:

"I. The court erred in awarding to the plaintiff only $50.00 in damages.

II. The court erred in refusing to assess double damages and attorney's fees."

POINT I. The contention that there is no substantial evidence to support a judgment for less than $101.00 is without merit. Admittedly appellant's automobile had been damaged prior to the parking lot incident in question and there is a considerable difference of opinion among the witnesses as to whether the damages shown on the repair estimate were caused by the parking lot incident. As we view the evidence the trial court could have fixed the damages at any figure from the $4.58 tender of Monroe to the $101.00 figure testified to by appellant and his witnesses. At least we cannot say that there is no substantial evidence to support the $50.00 finding.

POINT II. Appellant here argues that Monroe had no meritorious defense to this small automobile damage claim and that despite the fact he recovered less than the $101.00 which he claimed, the trial court should have entered a judgment for double the amount of the damages plus a reasonable attorney's fee. We cannot agree with appellant.

The basic legislative purpose of the small claims statute "was evidently to provide an effective remedy for the enforcement of claims so small that in the past they have often not been worth the expense of litigation and could therefore be ignored by the wrongdoer with impunity," *Ford* v. *Markham,* 235 Ark. 1025, 363 S.W. 2d 926 (1963).Furthermore, being penal in nature it must be strictly construed, *Rouse* v. *Weston,* 243 Ark. 396, 420 S.W. 2d 83 (1967). When viewed in the light of the purpose of the statute and its penal nature we must conclude that a wrongdoer has a meritorious defense that will defeat the penalty provisions of the statute when the fact finder determines that the actual loss or damage is less than the amount demanded. To construe the statute otherwise would permit one who suffered only $100 in damages to extort another $100 from the wrongdoers on the premise that if the wrongdoer does not pay the $200 demand it would cost him at least $250 when he went to court.

Affirmed.

In Re Louis Art DODRILL

76-54 538 S.W. 2d 549

Opinion delivered July 12, 1976

*McArthur, Johnson, Lofton, Wilson & Jacobs,* for petitioner.

*W. Dent Gitchel,* for Supreme Court of Arkansas Committee on Professional Ethics.

FRANK HOLT, Justice. In February, 1975, the circuit court rendered a judgment suspending petitioner's license to practice law for twelve months and ordering that his license "be reinstated thereafter only upon the petitioner's satisfactory passing the regular examination for admission to the Bar administered by the State Board of Bar Examiners." Petitioner argues that the provision of the court's judgment which requires him to satisfactorily pass the regular bar examination is a nullity because the circuit judge was without the power or authority to impose such a condition on the reinstatement of his suspended license. Therefore, petitioner asserts that since the one year period of suspension is completed his license should be forthwith reissued to him.

Proceedings involving the disbarment of an attorney are civil in nature. *Hurst* v. *Bar Rules Committee of the State of Arkan-*

*sas,* 202 Ark. 1101, 155 S.W. 2d 697 (1941). Amendment 28 to the Arkansas Constitution (1874) provides:

> The Supreme Court shall make rules regulating the practice of law and the professional conduct of attorneys at law.

Rule 5 of our Supreme Court Rules on Professional Conduct (1973), promulgated pursuant to Amendment 28, provides in pertinent part:

> If the Judge or Chancellor finds, upon the hearing before him, that the attorney has been guilty of professional misconduct, he shall reprove, reprimand, suspend, or disbar such attorney, as the testimony may warrant . . . .
>
> Either the Committee or the attorney defendant may appeal to the Supreme Court from the action taken by the Judge or Chancellor. . . .

Further, as to jurisdiction, it was succinctly said in *Feldman* v. *State Board of Law Examiners,* 438 F. 2d 699 (8th Cir. 1971):

> The principle is firmly established that the judicial branch of the government, acting through the courts, has exclusive jurisdiction to admit, control and disbar attorneys.

Here, in a disbarment proceeding, the trial court clearly had jurisdiction with the power and authority to impose the lesser penalty; i.e., to conditionally suspend petitioner's license "as the testimony may warrant. . . . " which we equate with the imposition of reasonable conditions upon termination of the suspension. If the condition was unacceptable when imposed, petitioner's remedy was by appeal to test the reasonableness of the condition. Admittedly, petitioner failed to exercise his right of appeal within the proper time. Consequently, he is not entitled to a review of his petition which asserts that the court was without the power and authority to require him to pass the bar examination as a condition to the reinstatement of his license.

Petition denied.

# ARKANSAS STATE HIGHWAY COMMISSION *v.* George Forbes ALCOTT

76-79 539 S.W. 2d 432

Opinion delivered July 12, 1976

[Rehearing denied September 13, 1976.]

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

*Lightle, Tedder, Hannah & Beebe,* for appellee.

FRANK HOLT, Justice. In this eminent domain case, pursuant to Ark. Stat. Ann. § 76-532 (Repl. 1957), appellant condemned a strip of land approximately 50' wide and 126' long out of a city lot 70' wide. The strip was taken for the asserted purpose of restoring public access to an adjacent parcel of land which was landlocked as a result of the recent construction of a highway. On appellee's motion the cause was transferred to chancery court for a determination as to whether the taking of the lot was for public use. The chancellor enjoined the appellant from any further construction on or use of the tract involved. From that ruling comes this appeal.

Appellant contends that the court erred in holding that the lands taken by appellant were not taken for a public use. It argues that the taking was necessary because restoration of

public access to the adjacent property would substantially reduce right-of-way costs and, therefore, would be in the best interest of the state. Appellant argues further that in effect the taking of appellee's property constituted an exchange of property. Appellant relies upon *Arkansas Highway Commission* v. *Morgan Estate,* 243 Ark. 450, 420 S.W. 2d 525 (1967). We find no merit in appellant's arguments.

Private property can be taken under the power of eminent domain only for a public use. *City of Little Rock* v. *Raines,* 241 Ark. 1071, 411 S.W. 2d 486 (1967); *Cloth* v. *Chicago R.I. & P. Ry. Co.*, 97 Ark. 86, 132 S.W. 1005 (1910); and *Ozark Coal Co.* v. *Pa. Anthracite Rd. Co.,* 97 Ark. 495, 134 S.W. 634 (1911). Whether or not a proposed use for which private property is taken is for a public or private use is a judicial question which the owner has a right to have determined by the courts. *City of Little Rock* v. *Raines, supra.*

Here appellant's own witness testified, as abstracted:

> The public is using this. They are paying for it. . . . The purpose of the highway acquiring this was for access to Mr. Corbin's use. The right of way department made this decision to acquire a private right of way for Mr. Corbin to get service access to the property. . . . But it was a condemnation. That is solely for the purpose of providing Mr. Corbin a private driveway, to reduce damages to the adjoining property. . . . I don't think the Highway Department is going to maintain this property. We made the right of way available for Mr. Corbin's use. We haven't traded any property with him. We haven't conveyed it to anybody. We do not intend to maintain it and Mr. Corbin would have no right to convey it as a right of way into his property. . . . Mr. Corbin has no control over that road. . . . There was no trade of this piece of property. . . . I consider that I traded in the sense that I restored access that I had taken. . . . that was our intent, to restore access to Mr. Corbin's property to reduce damages. . . . There was not any piece of property exchanged for this piece of property.

The evidence adduced by appellant clearly shows that this taking was not for a public use. To the contrary, it was for the

purpose of providing a private driveway and this the state cannot do.

Since we agree that the taking was not for public use, we deem it unnecessary to consider appellant's other contention that the court erred in finding that appellant did not comply with Ark. Stat. Ann. § 76-2203 (Repl. 1957).

Affirmed.

## TRI-B ADVERTISING, INC. *v.* ARKANSAS STATE HIGHWAY COMMISSION et al

76-58 539 S.W. 2d 430

Opinion delivered July 12, 1976

[Rehearing denied September 13, 1976.]

*Howell, Price, Howell & Barron,* for appellant.

*Thomas B. Keys* and *Chris Parker,* for appellees.

ELSIJANE T. ROY, Justice. Appellant Tri-B Advertising, Inc. filed a complaint for damages against the Arkansas State Highway Commission (Commission) and Folk Construction Co., Inc. (Folk), appellees herein. The complaint alleged that the Commission ordered its agent Folk, as part of an eminent domain action, to remove an outdoor advertising sign owned by appellant and that its property valued at $2500 was taken for public use without compensation in contravention of the Arkansas Constitution. Each appellee filed a demurrer to the complaint, and both were sustained by the trial court.

On appeal Tri-B Advertising, Inc. first contends that the trial court erred in granting appellees' demurrers because appellant's complaint stated a common law cause of action against them.

Under its first assignment of error appellant urges that in failing to follow necessary statutory procedure prior to

removal of its sign the Commission became vulnerable to a common law cause of action in a State court. It is contended by appellant that it received neither notification of the condemnation action taken against it nor compensation in the form of a deposit to cover the estimated value of the condemned property. Appellant argues that this failure to provide compensation is violative of § 22, Article 2 of the Constitution of Arkansas which requires that before private property shall be acquired for public use just compensation shall be tendered.

Appellees, without disclaiming in any manner appellant's assertions of the taking of the property without notice or compensation, contend that § 20, Article 5 of the Arkansas Constitution forestalls making an agency of the State a defendant in any State court.

It is well settled that in determining the sufficiency of a complaint on demurrer, every reasonable intendment should be indulged in favor of the complaint, and if facts stated in the complaint, together with all reasonable inferences to be deduced therefrom, constitute a cause of action, the demurrer should be overruled. *Mortenson* v. *Ballard,* 209 Ark. 1, 188 S.W. 2d 749 (1945). *Green Seed Co. of Ark.* v. *Williams,* 246 Ark. 463, 438 S.W. 2d 717 (1969); *Comer Lbr. & Supply Co.* v. *Woodward,* 235 Ark. 632, 361 S.W. 2d 259 (1962).

The State of Arkansas, its officers and its agencies cannot be made a defendant in any of its courts. Article 5, § 20, Arkansas Constitution. The Arkansas State Highway Commission is an agency of the State, and suit cannot be maintained against the Commission. *Ark. State Highway Commission* v. *Nelson Brothers,* 191 Ark. 629, 87 S.W. 2d 394 (1935). This immunity extends to suits for torts. *Wenderoth* v. *Baker,* 238 Ark. 464, 382 S.W. 2d 578 (1964); *Ark. State Highway Commission* v. *Lasley,* 239 Ark. 538, 390 S.W. 2d 443 (1965).

In *Bryant* v. *Arkansas State Highway Commission,* 233 Ark. 41, 342 S.W. 2d 415 (1961), we stated:

> The suability of the Highway Commission was considered in a series of decisions closely following the *Nelson Brothers* case. In *Ark. State Highway Comm.* v. *Par-*

> *tain,* 192 Ark. 127, 90 S.W. 2d 968, it was held that where the Commission was threatening to take private property without making any provision for compensation, the landowner was entitled to enjoin the Commission from taking the property until an amount sufficient to cover the damages had first been deposited in court. Such an injunction, restraining the commissioners from acting illegally, was not regarded as a prohibited suit against the State. 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. *Ark. State Highway Comm.,* 194 Ark. 616, 108 S.W. 2d 1077; *Ark. State Highway Comm.* v. *Bush,* 195 Ark. 920, 114 S.W. 2d 1061.

The complaint states the device had been removed prior to the filing of this suit. The "taking" of any property interest in the sign as a fixture had likewise been completed. See *Ark. State Highway Commission* v. *Holden,* 217 Ark. 466, 231 S.W. 2d 113 (1950); *Ark. State Highway Commission* v. *Flake,* 254 Ark. 624, 495 S.W. 2d 855 (1973).

The *Bryant* decision, *supra,* has been reaffirmed in *Ark. State Highway Commission* v. *Flake,* supra, and *Shipley* v. *Crawford County,* 253 Ark. 1021, 490 S.W. 2d 439 (1973), and appellant is limited to a remedy in the State Claims Commission. Ark. Stat. Ann. § 13-1402 (Repl. 1968).

Appellant's second contention is that the court erred in granting appellee Folk's demurrer because the complaint states a cause of action for the commission of an intentional tort. In *Ark. State Highway Commission* v. *Steed and Steed,* 241 Ark. 950, 411 S.W. 2d 17 (1967), we held:

> . . . [T]here is no liability on the part of a contractor if he follows the designs and plans and specifications of the condemnor and complies with his contract with it if he did not do so in an improper or unskillful manner or was not guilty of negligence which caused the damage to which complaint is made. (Citations omitted.)

However, the converse of this principle is also true. If the contractor does not act in compliance with these requisites he may become liable even though acting under directions of the Commission.

In 40 C.J.S. Highways § 212 the general rule of law is stated as follows:

> However, the contractor, and not the highway authority, is liable for damages resulting from his own tortious acts in the performance of the contract, as where he is negligent, or commits an unauthorized trespass on the property off the right of way. Even though the highway authority may be immune from liability for damage, such immunity is not shared by the contractor. * * *

In *Bucton Construction Company* v. *Carlson,* 225 Ark. 208, 280 S.W. 2d 408 (1955), we upheld a judgment against a contractor who negligently performed such a contract.

When we view the complaint construing every reasonable intendment in favor of the pleader, as we are required to do when its sufficiency is tested by a demurrer,[1] we find a factual issue is presented as to whether the damage done to appellant's property was caused by some negligent or tortious act on the part of the contractor. Therefore the demurrer should have been overruled.

The judgment of the trial court is affirmed as to the Commission and remanded for action not inconsistent with this opinion as to Folk.

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[1]*Comer Lbr. & Supply Co.* v. *Woodward, supra.*

Horace Junior ROGERS *v.* STATE of Arkansas

CR 76-36 538 S.W. 2d 300

Opinion delivered July 12, 1976

*Hubert Graves,* for appellant.

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

ELSIJANE T. ROY, Justice. On April 22, 1975, appellant Horace Rogers was charged under Ark. Stat. Ann. § 41-1001

(Repl. 1964) with the crime of burglary. He was additionally charged with being a habitual criminal according to the provisions of Ark. Stat. Ann. § 43-2328 (Supp. 1975).

Appellant was tried and found guilty of burglary. Thereafter evidence of prior convictions was introduced by the State in support of its charge under the Habitual Criminal Statute. The past convictions included charges of burglary and grand larceny to which appellant had entered a plea of nolo contendere; a sentence under the provisions of Title 18 U.S.C. §§ 5031-42 for the crime of uttering committed during appellant's minority and a two year sentence received by appellant in Oklahoma stemming from a guilty plea to a charge of second degree burglary. The charge of grand larceny to which appellant entered a plea of nolo contendere resulted in a five year probationary sentence.

Appellant first cites error in the lower court's ruling which admitted as evidence of a previous conviction his probationary sentence for grand larceny. Appellant contends that inasmuch as he was not committed to prison as a result of the charge of grand larceny, but rather received a probationary sentence, this could not be construed as a conviction and cannot serve as the basis for applying the Habitual Criminal Statute.

In support of this argument appellant cites *State Medical Board* v. *Rodgers,* 190 Ark. 266, 79 S.W. 2d 83 (1935), *Tucker* v. *State,* 248 Ark. 979, 455 S.W. 2d 888 (1970), and *Sutherland* v. *Arkansas Department of Insurance,* 250 Ark. 903, 467 S.W. 2d 724 (1971), as reflecting the view that a commitment to prison is a necessary predicate to a finding of a conviction. The Habitual Criminal Statute is not controlled by the same interpretative logic that has governed the decisions earlier cited.

*Rodgers, supra,* concerned construction of a statute providing for revocation of a license to practice medicine upon "conviction of a crime involving moral turpitude." *Tucker, supra,* concerned construction of a statute providing "that a person who has been convicted of a felony, and has not been pardoned, is disqualified to act as a grand or petit juror." *Southerland, supra,* concerned construction of a statute providing that an insurance agent's license could be revoked

upon " '[c]onviction, *by final judgment,* of a felony involving moral turpitude.' " (Italics supplied.) Each of these cases dealt with only one particular crime and none involved the Habitual Criminal Statute which in the emergency clause stated that:

> . . . [T]he passage of this Act will provide for greater punishment of habitual criminals and reduce the number of persons *committing* more than one felony and reduce the number of crimes *committed* in this State. * * * (Italics supplied.)

The statute provides that:

> Any person convicted of an offense, which is *punishable* by imprisonment in the penitentiary, who shall subsequently be convicted of another such offense, shall be punished as follows: (Italics supplied.)

The crime with which appellant was charged and found guilty was *punishable* by a term of imprisonment. The legislature intended the word "conviction" as used in Ark. Stat. Ann. § 43-2328 (Supp. 1975) to mean the establishment of guilt prior to and independently of judgment and sentence. This usage of the word "conviction" has been specifically recognized by the Court. In *Fanning* v. *State,* 47 Ark. 442, 2 S.W. 70 (1886), the Court stated:

> A conviction is defined to be "that legal proceeding of record which ascertains the guilt of the party, and upon which the sentence or judgment is founded."

The statutory purpose was to discourage individuals from repeatedly committing acts constituting felonies under our law, i.e., acts which are "punishable by imprisonment in the penitentiary." It was the repeated commission of such offenses which concerned the legislature, not the actual punishment by imprisonment or lack of it which the offender received for any such previous offense.

It would not be reasonable to assume that the legislature intended a person who was found to have committed a felony for which he was actually imprisoned should receive a

harsher penalty than a person who was found to have committed the same felony but was placed on statutory probation. For the foregoing reasons we find no merit in this contention.

Appellant also questions the admission of testimony that he had been charged in the United States District Court with the crime of uttering and sentenced under the Federal Juvenile Delinquency Act[1] to a term not to exceed his minority.

An adjudication in federal court as a juvenile delinquent is not deemed a criminal conviction. *Fagerstrom* v. *U.S.,* 311 F. 2d 717 (8th Cir. 1963). The stated legislative intent of the Act is that any adjudication of juvenile delinquency thereunder shall result in the determination of a status and not conviction for a crime. *Cotton* v. *U.S.,* 355 F. 2d 480 (10th Cir. 1966). See *United States* v. *Caniff,* 521 F. 2d 565 (2d Cir. 1975), cert. denied 423 U.S. 1059, 96 S. Ct. 796, 46 L. Ed. 2d 650 (1976), to the same effect.

For the foregoing reasons the court erred in allowing the sentence under the Federal Juvenile Delinquency Act to be admitted in evidence.

The erroneous admission of this conviction requires that appellant's plea for a sentence reduction be recognized. Ark. Stat. Ann. § 43-2328 provides in part applicable to this appeal that:

> If the fourth or subsequent offense is such that, upon a first conviction, the offender could be punished by imprisonment for a term less than his natural life, then the person shall be sentenced to imprisonment for the fourth or subsequent offense for a determinate term not less than the maximum sentence provided by law for a first conviction of the offense for which the defendant is being tried, and not more than one and one half (1 1/2) times the maximum sentence provided by law for a first conviction; provided, that any person convicted of a fourth or subsequent offense shall be sentenced to imprison-

[1]Title 18 U.S.C., §§ 5031-42.

ment for not less than five (5) years.

Since we have determined that of the two prior convictions contested by appellant as inadmissible one must be so declared, three previous admissible convictions remain. When cumulated with appellant's instant conviction the language of § 43-2328(3) becomes applicable. This section makes mandatory the imposition of the maximum term of imprisonment, 21 years, against one falling within its ambit. It additionally provides that a multiplier may be used to lengthen this term, and it is clear that the jury, in sentencing appellant to a 31 1/2-year term of imprisonment, thus increased the period of incarceration by use of this device. However, because we cannot ascertain beyond speculative persuasion what role the inadmissible conviction played in enhancing appellant's sentence and because the potential for prejudice is thereby engendered, we reduce this sentence to the minimum permissible term, or 21 years. See *Roach* v. *State,* 255 Ark. 773, 503 S.W. 2d 467 (1973), and *Richards* v. *State,* 254 Ark. 760, 498 S.W. 2d 1 (1973).

Accordingly, should the attorney general decide, within 17 days, to accept this reduction the judgment will be affirmed as modified. Otherwise the judgment will be reversed and the cause remanded for a new trial.

FOGLEMAN, J., dissents.

JOHN A. FOGLEMAN, Justice, dissenting. I must dissent because I think the court has misconstrued the Habitual Criminal Act as to the probationary sentence. This act is highly penal and must be strictly construed against the state and in favor of the accused. *Higgins* v. *State,* 235 Ark. 153, 357 S.W. 2d 499. Otherwise, I would agree that the statute might possibly be construed as the majority has construed it. But if the strict construction rule is applied, the very language of the statute mandates a construction more favorable to appellant. Actually the Habitual Criminal Act imposes collateral consequences just as did the statutes involved in *State Medical Board* v. *Rodgers,* 190 Ark. 266, 79 S.W. 2d 83; *Tucker* v. *State,* 248 Ark. 979, 455 S.W. 2d 888; and *Sutherland* v. *Arkansas Department of Insurance,* 250 Ark. 903, 467 S.W. 2d 724. If there is any difference, a statute calling for greatly extended terms

of imprisonment may well call for an interpretation more, rather than less, favorable to appellant. But this is mandated by the very language of the act itself. The language seized upon by the majority, "punishable by imprisonment in the penitentiary," is not a limitation on the word "conviction." The purpose is to eliminate misdemeanors. The meaning of the word conviction is made clear by Ark. Stat. Ann. § 43-2330 (Repl. 1964) which speaks to that which must be proved as a prior conviction, i.e., the "conviction and judgment of imprisonment in the penitentiary." There could be no other reason for including the words "judgment of imprisonment in the penitentiary."

ARKANSAS POWER AND LIGHT CO.
*v.* Jetta Catherine JOHNSON, Administratrix
of the Estate of Richard Lee
JOHNSON, Deceased

75-322 538 S.W. 2d 541

Opinion delivered July 12, 1976

*House, Holmes & Jewell,* for appellant.

*McMath, Leatherman & Woods, P.A.,* by: *Phillip H. McMath,* for appellee.

WALTER R. NIBLOCK, Special Justice. Jetta Catherine Johnson, Appellee, brought this action as Administratrix of the estate of Richard Lee Johnson, deceased, on her behalf as widow and on behalf of her two minor children, against Arkansas Power and Light Company, Appellant.

Richard Lee Johnson was employed as a painter by Don McCormick Paint Company for approximately two weeks prior to his death. During that time, he had worked at the Community Church, 20th and Louisiana in Little Rock, Arkansas. When the accident occurred, Johnson had begun to apply the second coat of paint, repeating the work he had done in applying the first coat.

The church, on the west side, has three levels, namely a one-story annex that has a flat roof, and two additional slanted roof levels above the flat roof. On either side of the building are two telephone poles, the north pole standing erect, and the south pole leaning to the east. Various wires were strung from the poles including an Arkansas Power and Light Company neutral wire, hanging approximately 14 feet above the flat roof level. Also, strung from these poles, about 20 feet above the flat roof, was an Arkansas Power and Light Company primary conductor, which carried 7620 volts.

On the day of his death, Mr. Johnson began work at 8:00 a.m. He was working on the flat roof, using an aluminum ladder extended to about 22 feet and an electric spray painting machine. Working with him was Robert Cochran, also a painter. The two painted along the west side of the building, going from north to south. While Mr. Cochran went down to the ground to get more paint, Mr. Johnson picked up the ladder, holding it vertically and proceeded to move the ladder south to go around the corner. When Cochran last saw Johnson, he was moving the ladder

around the corner.

Mr. Cochran testified that while he was on the ground, he heard Mr. Johnson make a groaning noise. He found Mr. Johnson lying on the roof on his back. The aluminum ladder was dangling toward the ground. Mr. Johnson was breathing irregularly, but died shortly thereafter.

An autopsy revealed a small lesion on the deceased's right little toe which was found to be an electrical exit wound and that death was by electrocution. However, the deceased also was afflicted with cirrhosis of the liver, and at the time of death he had a blood alcohol level of .06%.

Mr. Earl Looper testified, over the objection of the appellant, that approximately six weeks after the death of Mr. Johnson, he received an electrical injury, which required hospitalization, at the same spot as did the deceased. Mr. Looper was repairing the church roof and was also using an aluminum ladder. The parties stipulated that the physical conditions existing at the time of both accidents were not only substantially similar but identical.

Mr. Robert Frank, an electrical engineer, testified for the appellee that, in his opinion, the conditions concerning the existence of the powerlines in question were unsafe and in violation of the National Electric Safety Code. However, Mr. Charles Dietz, witness for the appellant, testified that the measurements were in compliance with the National Electric Safety Code.

The case was tried before the jury on two separate occasions, on each occasion the jury returned similar verdicts in favor of the plaintiff. In the first trial, the jury erroneously awarded the estate of the deceased $96,200.82, even though the estate was entitled to recover only funeral expenses and some $10,000.00 for conscious pain and suffering. Therefore, the plaintiff joined in the defendant's motion for a new trial which was granted. The second trial again resulted in a verdict in favor of the plaintiff for $151,616.42. It is from this judgment that appellant appeals.

Appellant raises two points for reversal. It is first argued

that the trial court erred in admitting the testimony of Earl Looper concerning his subsequent electrocution on the same premises on which deceased suffered his fatal shock. We find this point to be without merit.

The general rule with regard to the admissibility of evidence of similar occurrences is that such evidence is admissible only upon a showing that the events arose out of the same or substantially similar circumstances and the burden rests on the party offering such evidence to prove that the necessary similarity of conditions exists. *Fulwider* v. *Woods,* 249 Ark. 776, 461 S.W. 2d 581 (1971); 32 *CJS Evidence,* § 584. There is no question that the appellee adequately sustained this burden at the trial since the defendant stipulated "that the conditions of the building and of the facilities both of Arkansas Power and Light Company and any other physical matters connected with the location are the same today as they were in April, 1972, and in June, 1972."

The issue, therefore, becomes one basically of relevance. It is appellant's contention that evidence of a prior similar accident is admissible only for the purpose of showing notice of a dangerous condition to the alleged tortfeasor. Not only is this point irrelevant because we are concerned here with a subsequent accident, but it is a misinterpretation of our prior decisions. *St. Louis Southwestern Railway Company* v. *Jackson, Adm'r,* 242 Ark. 858, 416 S.W. 2d 273 (1967), is cited for this proposition; however, in that opinion we stated:

> "The annotation in 70 ALR 2d 170 points out that 38 states and several of the federal courts have held evidence of a prior similar accident admissible to establish a dangerous or defective condition at the place in question, where the dangerous condition of the place in question is at issue. In addition, 36 such states and several of the federal courts have held such evidence admissible to show defendant's notice of the existence of the defect." 416 S.W. 2d at 276.

Nowhere in that opinion was it stated that evidence of a prior similar accident is admissible *only* to show knowledge of the dangerous condition on the part of the defendant.

In allowing the introduction of the evidence in question, the trial court stated:

> "The statement I made about proffered evidence applies, of course, to his motion as it does to others, but I have given considerable time and concern and attention to this matter since it was a question in the first trial. I have come to the conclusion that under appropriate conditions and proper foundation evidence of the subsequent accident may be introduced in this case to prove, not necessarily the existence of a particular physical condition or situation because that you say you have stipulated or will stipulate, but to show that the plaintiff's injury was caused by the alleged defective dangerous condition or situation, to show that the situation as of the time of the accident sued for was dangerous and to refute any argument, which I assume will be made, or evidence to the effect that it was impossible for this to happen. I'm talking about the first instance where Johnson was injured, to refute any evidence or claim that it is impossible for that accident to have happened." ***

As authority for its position, the trial court relied on McCormick, *Evidence,* § 200 (2nd Ed. 1972), *Rowe Auto and Trailer Sales, Inc.* v. *King,* 257 Ark. 484, 517 S.W. 2d 946 and *Fulwider* v. *Woods,* 249 Ark. 776, 461 S.W. 2d 581 (1971). McCormick recognizes that proof of other similar accidents and injuries in negligence cases may be offered for the purpose of proving the existence of a particular physical condition, situation or defect; showing that the alleged defective or dangerous situation caused the plaintiff's injury. He points out that the need is plainer where the issue of cause is in genuine dispute because the inference of causation is an elusive one as to which circumstantial evidence is appropriate. We agree with appellee that these purposes were adequate to call for the exercise of the trial court's discretion as to admissibility of the Looper testimony.

In *Fulwider* v. *Woods,* supra, we stated:

> "The question involved is basically one of relevance. Its resolution involves the same or similar fac-

> tors involved in determining admissibility of proof of prior or subsequent conditions or conduct to prove an existence of a condition or conduct at the time in issue. This determination is usually held to be within the discretion of the trial court. See *Giroux* v. *Gayne,* 108 NH, 394, 236 A. 2d 695 (1967); *Cogswell* v. *C. C. Anderson Stores Co.,* 68 Idaho 205, 192 P 2d 383 (1948); *Jenson* v. *Southern Pacific Company,* 129 Cal. App. 2d 67, 276 P. 2d 703 (1954); *Manning* v. *New York Telephone Company,* 388 F. 2d 910 (2nd Cir., 1968); *Little Rock Gas and Fuel Co.* v. *Coppedge,* 116 Ark. 334, 172 S.W. 885. Of course, there is no reversible error in such cases in the absence of an abuse of discretion." 461 S.W. 2d at 587.

Although the *Fulwider* case dealt with the admissibility of evidence showing subsequent conduct in an action concerning fraudulent misrepresentations, that case is not so distinguishable that its principle is inapplicable to the case at bar. The cases cited in *Fulwider* to support the principle that the relevance and admissibility of evidence concerning prior or subsequent accidents are within the discretion of the trial court, include many personal injury actions. In *Manning* v. *New York Telephone Company,* the court stated:

> "Appellant complains of the admission of testimony relating to the condition of the pole step hole on dates as much as three years after the accident as evidence of the condition of the pole step hole at the time of the accident. Whether evidence of a subsequent condition should be admitted depends upon the time elapsed and the likelihood of a change in condition during that interval. Absent an abuse of discretion, a trial judge's decision to admit such evidence will not be disturbed on appeal." (citations omitted) 388 F. 2d at 912.

Admission of evidence of subsequent incidents, like that of prior incidents poses the question of relevancy, even though the admission of the former must be approached with greater caution than the latter. Questions of relevancy address themselves to the sound judicial discretion of the trial judge. The exercise of that discretion should not be reversed on appeal except for manifest abuse.

Several cases of other jurisdictions which involve electrocution have also held evidence of subsequent accidents admissible. In *Moran* v. *Corliss Steam Engine Co.,* 21 RI 386, 43 A. 874 (1899), testimony concerning electrical shocks received by employees subsequent to the shock received by the plaintiff was held admissible as being relevant to prove the particular conditions and lack of insulation at the time of the accident. In *Robinson* v. *Western States Gas and Electric Co.,* 184 Cal. 401, 194 P. 39 (1920), evidence of a shock suffered by another individual approximately three months after the plaintiff's electrocution was introduced to show that if the conditions produced a shock upon one person, in all probability it would have produced the same shock upon the deceased palintiff. In *Vicksburg Railroad and Light Co.* v. *Miles,* 88 Miss. 204, 40 So. 748 (1906), evidence of subsequent electrical shocks was admitted to prove that the railroad had not properly grounded its rails. These cases and others are discussed in the Annotation at 81 ALR 685.

Without further belaboring the authorities on the question, we have concluded that we cannot say that the trial judge abused his discretion in admitting the testimony of Looper. In arriving at this conclusion, we do not consider the similarity of conditions existing at the time of the two incidents as the sole basis for the judge's exercising his discretion to admit the evidence. The critical factor was aptly pointed out by the trial judge in his remarks in ruling on admissibility, i.e., that the proximate cause of Johnson's death was a very important issue in the case. The cause of death had been for some period of time something of a mystery. Consequently, the evidence of causation was based upon circumstances and the opinions of medical experts. Under these peculiar circumstances we find no abuse of discretion in admitting this evidence.

The second point relied upon for reversal by the appellant is that the trial court erred in overruling appellant's motion for directed verdicts and for judgment *non obstante veredicto.* Appellant argues that as a matter of law it was not negligent or, in the alternative, that the decedent's own acts and omissions constitute sufficient negligence to bar recovery under Ark. Stat. Ann. § 27-1730.1 (Repl. 1962). Both parties introduced testimony concerning whether or not the

appellant complied with the standards of the National Electric Safety Code. Appellant points out our prior statement that construction in compliance with the Code constitutes a prima facia showing of the lack of negligence on the part of the utility company. *Southwestern Gas and Electric Co.* v. *Deshazo,* 199 Ark. 1078, 138 S.W. 2d 397 (1940). Electric companies are responsible to the public for the steady production and supply of power and it is inconceivable that they should be held liable for injuries which cannot reasonably be foreseen, especially when adequate safety measures have been taken. *Arkansas Power and Light Co.* v. *Lum,* 222 Ark. 678, 262 S.W. 2d 920 (1954). Therefore, appellant argues that since the company complied with the safety measures enunciated in the National Electric Safety Code, it is not negligent as a matter of law. However, in *Arkansas Power and Light Co.* v. *McGowan,* 227 Ark. 55, 296 S.W. 2d 430 (1956), we found that compliance with the rules of the National Electric Safety Code can be a factual question of negligence to be determined by the jury.

Even though the specific standards of the National Safety Code were complied with, an expert witness called by appellant testified that these were minimum standards which were not practical for this particular installation. More importantly, he pointed out that the code itself recognized that service requirements frequently called for higher factors of safety and said that, in view of the particular situation here, the mere fact that there was more than the minimum diagonal clearance between the building and the primary conductor was meaningless. The evidence established that the south pole tilted to the east causing the horizontal measurement at the south end ot be 1.64 feet from the insulated primary wire to the roof line. If the pole were vertical, the distance would have been 4.22 feet The table accompanying the National Electric Safety Code requires a minimum horizontal clearance of three feet. More importantly, the evidence established that there was a vertical clearance between the roof and the uninsulated primary line of 19.662 feet and a horizontal clearance of 2.495 feet at the north end. The base of the supporting poles at the north and south ends of the building were virtually equidistant from the building. The south pole supported a 1200 pound transformer attached to the east side of the pole. The guy wire on this pole extend-

ed to the south rather than to the west, so that its fall was not directly opposed to the weight of the transformer. At the time of the trial, the south pole leaned toward the building, so that the point of attachment of the primary conductor was 3.7 feet east of a vertical plane from the bottom of the pole. As a result, the clearance of the uninsulated primary wire at the south end where Johnson was found lying on his back was 20.42 feet vertically or 1.64 feet (or approximately 19-3/4 inches) horizontally. Appellant's Director of Distribution Plant Department said that the pole would probably not have been leaning when installed, and that if it had been in an erect position, the horizontal clearance would have been the same at both locations. He admitted that if a ladder 15 inches wide were turned perpendicular to the wire, and flush with the edge of the roof, only five inches clearance would be left. Of course, the clearance would have been much greater but for the slant of the pole. It was much greater at the north end. As one moved the ladder extended vertically the clearance of the uninsulated wire diminished at a rate that was significant but not necessarily obvious to one carrying a ladder such as that Johnson had and endeavoring to hold it in a vertical position while moving it. It is hardly necessary to say that the use of such ladders on the church roof should have been foreseen.

We have consistently held that persons or companies supplying electrical energy to the public must exercise ordinary care in the construction of service lines, to make inspections at reasonable times to see that the equipment is kept in reasonably safe condition, and to diligently discover and repair defects. *Brakensiek* v. *Nickles,* 216 Ark. 889, 227 S.W. 2d 948 (1950); *Arkansas Power and Light Co.* v. *Bollen,* 199 Ark. 566, 134 S.W. 2d 585 (1939); *Arkansas General Utilities Co.* v. *Shipman,* 188 Ark. 580, 67 S.W. 2d 178 (1934). In view of the fact that the leaning pole allowed a clearance of only 1.64 feet between the non-insulated power line and the roof, it was reasonable for the jury to conclude that the appellant had failed in its duty to inspect and repair defects, or failed to maintain safety standards which might have required insulation or the wire or moving it.

In the case of *Futrell* v. *Arkansas-Missouri Power Corp.,* 8 Cir., 104 F. 2d 752, 754, the court said:

"(1) It is elementary that in considering a motion to direct a verdict the testimony and all inferences that reasonably may be drawn therefrom must be accepted in the light most favorable to the plaintiff." *Adams* v. *Barron G. Collier, Inc.,* 8 Cir., 73 F. 2d 975.

"(2) It likewise is elementary that an issue of negligence generally is a question for the jury and only where all reasonable minds must reach the same conclusion from the facts does it become one of law for the Court and justify the direction of a verdict." *Glynn* v. *Krippner,* 8 Cir. 60 F. 2d 406; *May Department Stores Co.* v. *Bell,* 8 Cir., 61 F. 2d 830.

"(3) An electric company, because of the very nature of its business, is required to use a high degree of care in the erection, maintenance, operation and inspection of its plant and equipment used in the generation and transmission of electricity for the protection of those likely to come in contact therewith." *Dierks Lumber and Coal Co.* v. *Brown,* 8 Cir. 19 F. 2d 732; *Arkansas Light & Power Co.* v. *Cullen,* 167 Ark. 379, 268 S.W. 12; *Arkansas General Utilities Co.* v. *Shipman,* 188 Ark. 580, 67 S.W. 2d 178.

In the case of *Arkansas Power nnd Light Co.* v. *Hoover,* 182 Ark. 1065, 34 S.W. 2d 464, 469, this Court said:

"Moreover, this instruction was erroneous and should not have been given. We have repeatedly held that it was the duty of the company to keep its appliances in safe condition, and that either the wires must be kept insulated, or must be so located as to be, comparatively speaking, harmless. If the company does not choose to properly insulate a deadly wire of its maintenance, it must place the same underground, at a high altitude, or at some inaccessible place.

"We said in a recent case: 'The authorities appear to be unanimous in holding that there is no such duty, (to insulate all wires) but the cases do hold, as we understand them, that this duty must be performed, or other sufficient safety methods employed to prevent

contact with wires conveying the current at such places as danger of contact may reasonably be anticipated.' *Arkansas Power and Light Co.* v. *Cates,* 180 Ark. 1003, 24 S.W. 2d 846, 848." *McGowan,* 296 S.W. 2d at 426.

Since the reviewing court is bound to examine the evidence in the light most favorable to the appellee, *Jones* v. *American Pioneer Life Insurance Co.,* 255 Ark. 474, 500 S.W. 2d 748 (1973), and bound to sustain the jury verdict if there is any substantial evidence to support it, *Black* v. *Johnson,* 252 Ark. 889, 481 S.W. 2d 701 (1972) and *Arkansas General Utilities Co.* v. *Shipman,* supra, we must affirm the jury's finding of appellant's negligence. This conclusion is further supported by our recent statement in *Woodruff Electric Cooperative Corp.* v. *Daniel,* 251 Ark. 468, 472 S.W. 2d 919 (1971):

> "We have long recognized the rule that the very nature of the business of an electric company requires it to use a high degree of care in the erection, maintenance, operation, and inspection of its equipment which is used in the transmission of its electric power, so as to prevent injury to one likely to come in contact with the power line." *Arkansas Power and Light Co.* v. *McGowan,* 227 Ark. 55, 296 S.W. 2d 420 (1956).

In *Arkansas Power and Light Co.* v. *Cates,* 180 Ark. 1003, 24 S.W. 2d 846 (1930) we recognized that:

> "The duty of an electric company in reference to keeping its appliances in safe condition is a continuing one. Not only must it exercise a high degree of care in the original selection and installation of its electric apparatus, but thereafter it must use commensurate care to keep the same in a proper state of repair. The obligation of repairing defects does not mean merely that the company is required to remedy such defective conditions as are brought to its actual knowledge. The company is required to use active diligence to discover defects in its system. In other words, an electric company is bound to exercise due care in the inspection of its poles, wires, transformers and other appliances."

Appellant argues in the alternative that since the

decedent's contributory negligence exceeds its own negligence, the appellee is barred from recovery by our comparative negligence statute. This theory is based upon two points. The first is that the decedent was charged with knowledge of the dangerous qualities of electricity and as the deceased had previously worked on the same building, his lack of attention must have been the cause of his death. The second point raised by appellant is based on the blood alcohol content of the decedent's body which appellant argues is proof that the deceased had been drinking on the morning of the accident. There is also evidence that Johnson's appearance was normal when he was at work on the morning of his death and testimony by his wife tending to prove that he had consumed no alcohol after he had drunk some beer before retiring on the preceding night.

The question of the contributory negligence of the deceased was clearly one for the jury's determination in this case. In *Arkansas-Missouri Power Co.* v. *Davis,* 222 Ark. 686, 262 S.W. 2d 916, 919 (1953), a case similar on its facts, we stated:

> "We think the testimony of Harvill and Zander was sufficient to take the case to the jury on the question of whether the defendant power company was negligent in permitting the electric line to remain within about 4 feet of the signboard after the construction of the board. The testimony of these two witnesses is one of the distinguishing features between this case and the case of *Arkansas Power and Light Co.* v. *Lum,* 222 Ark. 678, 262 S.W. 2d 920. It might be asked, how can it be said that the power company should have anticipated the very thing that did happen, but that the injured party be relieved from any duty to foresee what might happen even though he realized the dangerous qualities of electricity. The answer is that the questions of negligence and contributory negligence were peculiarly within the province of the jury to decide, there being sufficient evidence to justify the submission of both issues."

In *Arkansas Power and Light Co.* v. *McGowan,* supra, which involved an electrocution caused by a ladder coming into contact with the electrical wire, we also held the question of contributory negligence to be before the jury. We cannot say that

Johnson's negligence was as great or greater than that of appellant as a matter of law. The jury was instructed as to assumption of risk and comparative negligence. An appropriate instruction on the question of intoxication and its bearing on the question of negligence was also given. Therefore, this issue was properly submitted to the jury in the case at bar. There is sufficient evidence to support the jury's determination. This verdict must be upheld.

Affirmed.

ROY, J., not participating.

Winston M. HOLLOWAY, Ray Lee WELCH and Gary Don CAMPBELL *v.* STATE of Arkansas

CR 76-25 539 S.W. 2d 435

Opinion delivered July 19, 1976

[As Amended on Denial of Rehearing September 20, 1976.]

*Harold L. Hall,* Public Defender, for appellants.

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

CARLETON HARRIS, Chief Justice. Appellants, Winston Holloway, Ray Lee Welch and Gary Don Campbell, were charged by information with robbery of the Leather Bottle Restaurant in Little Rock on June 1, 1975, and with the use of a firearm in committing the offense. The three men were further charged with the rape of two female employees of the restaurant. Following a jury trial, all three men were convicted, with punishment for each set at 21 years imprisonment for the robbery, and life imprisonment for rape. From the judgment so entered, Holloway, Welch, and Campbell appeal, arguing several points for reversal.

For convenience, we first discuss the last point which is simply that the court erred in not giving instructions for directed verdicts of acquittal. While appellants concede that any possible error was cured by the giving of the state's instruction defining an accessory, we proceed to a discussion of the contention as a matter of providing background for other points asserted.

Other than the identity of the perpetrators, the facts about the robbery-rapes are not disputed. After the closing of the Leather Bottle on June 1, around 1:30 - 1:45 A.M., five employees had remained in the restaurant, and were preparing to leave. The employees were Donald Henry, Michael Garrett, David Carroll, and two women. All five were in the restaurant office in the lower part of the building.

As one of the women (hereafter called "first woman") began to leave, she heard someone running down the stairs toward the office. When she looked, she saw a man — whom she subsequently identified as appellant Holloway — coming down the stairs, brandishing a .45 caliber automatic pistol. She also saw two other men at the top of the stairs. Holloway forced her back into the office at gunpoint, where he herded her and the four other employees against the wall, threatening to kill them if they moved or opened their eyes. At this point one of the employees, Donald Henry, saw appellant Welch, also in the office, rifling the other woman's (hereafter called "second woman") purse.

While one of the other men remained in the office with the employees, Holloway grabbed the second woman by the arm and took her outside, to the stairs, where he forced her to disrobe, and then raped her. She was thereafter raped a second time by another man, but was unable to identify the assailant. Holloway subsequently returned to the office and asked which employee could open the safe. David Carroll, manager of the restaurant, said that he could, and Holloway directed him to do so. While this was occurring, another of the three men came into the office and forced the first woman out to the stairs, where he took all the money from her purse, and then raped her at gunpoint.

Subsequently, after getting all the available cash from the safe, the three men again made all the employees face the office wall, eyes closed, while they "shot out" the telephones with gunshots. The employees were then grouped into the restaurant's walk-in freezer, which was then locked. After about an hour — around 3:30 A.M. — one of the employees, Michael Garrett, escaped from the freezer by a small service opening, and released the others. The police were called, and the women taken to a doctor.

Because the robbers kept them facing the wall, and instructed them to keep their eyes closed, none of the employees were able to identify all three men. The first woman and Donald Henry identified Holloway and Welch. Michael Garrett could identify only Holloway. The second woman and David Carroll identified Holloway and Campbell.

In addition to the testimony of the five employees, the state also presented evidence of a statement given by appellant Campbell to two police officers, Paul Plummer and Jerry Best. The officers testified that on July 4, 1975, they received information that appellant Campbell was being held in the city detention center, under the alias Robert Hill. They removed Campbell from detention, showed him a warrant charging him with robbery, and began taking him to an interrogation room. At this point both officers testified Campbell spontaneously said, "I haven't raped anyone. I will tell you about the robbery." The officers said that they cautioned Campbell to stay silent, because he had not been warned of his rights, but that he immediately volunteered the

same statement again.

Thereafter Campbell was warned of his constitutional rights, and both officers stated that he signed a "rights waiver," which was admitted into evidence. Plummer and Best testified that Campbell then told them that he, Welch and Holloway had robbed the establishment. The officers said that Campbell admitted complicity in the robbery, but denied raping anyone, stating that he had held a rifle and had stood at the top of the stairs. In the oral statement Campbell said that the men had stolen about $2,000.00, and that his share of the money was approximately $700.00. It is apparent that, aside from the concession, the court did not err in refusing to instruct directed verdicts of acquittal.

Appellants contend that the trial court "erred in refusing to grant a mistrial when the defendants were brought in court before the jury in their jail uniforms in violation of their rights under the Sixth and Fourteenth Amendments to the Constitution." Before the trial began, counsel for appellants moved for a mistrial, alleging that appellants were "paraded through the courtroom in their jail uniforms where all of the prospective jurors were seated." The record does not reflect whether any of the prospective jurors ever saw appellants prior to the trial. Nor does the record reflect the exact attire of the men except that they were dressed in matching blue trousers and blue shirts.

Appellants' argument has no merit, for several reasons. First, appellants rejected, twice, the trial court's offer to allow them to change clothes. *The trial court gave the appellants this opportunity before the trial began and before the actual selection of the jury.* Therefore, appellants may be deemed to have waived the point. Finally, in the recent case of *Estelle* v. *Williams,* 425 U.S. 501, 96 S. Ct. 1691, 48 L. Ed. 2d 126 (1976), the U.S. Supreme Court held that a defendant's constitutional rights were violated only when he was *compelled* to wear identifiable prison clothing at his trial. The court stressed that such attire must be "distinctive" and "identifiable."

It is asserted that the court erred in refusing to grant appellants' motion for a severance and in not appointing

separate counsel. Prior to the trial, all three appellants moved for severance, and for appointment of separate counsel. As grounds for severance, each asserted that witnesses might be called by one of the defendants to testify against the other defendants, that a joint trial would deprive each appellant of his right to call the co-defendants as witnesses, and that a joint trial would prevent counsel from commenting on the failure of any co-defendant to testify, if such occurred. The motion for separate counsel alleged only that the appellants had stated to counsel that "there is a possibility of conflict of interest in each of their cases." The motions were denied.

Appellants' counsel renewed the motion for separate counsel at the trial, stating that "one or two of the defendants may testify and, if they do, then I will not be able to cross-examine them because I have received confidential information from them." The trial court denied the motion.

First, let us review the contention that a severance should have been granted. Let it be pointed out that appellants demonstrate no prejudice from the joint trial. As previously noted, three grounds were alleged in the motion for severance. None of these grounds materialized during the trial. Moreover, the trial court properly limited the use of Campbell's statement against the co-defendants by deleting all references by name to the other two defendants, and substituting the words, "two other people" and "two other fellows." This procedure fully complied with this court's requirements. *Gammel and Spann* v. *State,* 259 Ark. 96, 531 S.W. 2d 474 (1976); *Stewart and McGhee* v. *State,* 257 Ark. 753, 519 S.W. 2d 733, *cert. denied,* 423 U.S. 859. In fact, it was counsel for appellants who stated before the jury that the confession implicated the two co-defendants.

As this court has held numerous times, "[t]he granting of a severance is within the sound discretion of the trial court." *Keese and Pilgreen* v. *State,* 223 Ark. 261, 265 S.W. 2d 542; *Vault* v. *Adkisson,* 254 Ark. 75, 491 S.W. 2d 609. We find no abuse of discretion in the instant case.

Next, let us review the point that separate counsel should have been appointed. The applicable law was discussed in *Trotter and Harris* v. *State,* 237 Ark. 820, 377 S.W. 2d 14,

*cert. denied,* 379 U.S. 890. In a lengthy discussion the court reviewed the relevant precedents, and held that no conflict of interest had arisen because counsel represented the two co-defendants. The court stated:

> "Both men were charged with the same offense, which grew out of the same occurrence. The only evidence, which in any manner could be said to indicate a conflict of interest, was the statement of Harris made to the sheriff that, though he drove the car, he did not actually rape the prosecuting witness. This might indicate that he was only an accessory, but the distinction between principals and accessories was abolished in this state in 1936. See Ark. Stat. Ann. § 41-118 (1947). Accordingly, even under this statement, if Harris were guilty, he was guilty as a principal."

The court also noted that the trial court had correctly limited the use of the statement, and that both Harris and Trotter received the same sentence, indicating that neither had been prejudiced as against the other by the statement.

Thus, the instant case presents facts identical in important respects to *Trotter.* Appellants "were charged with the same offense, which grew out of the same occurrence." Although Campbell's statement did deny any involvement in the rapes, as did the statement in *Trotter,* this denial had no effect on his guilt as a principal. The trial court likewise limited the use of the statement against the co-defendants, and all appellants did, in fact, receive the same sentence. Under the *Trotter* standard, therefore, no conflict of interest has been shown.

This conclusion is in accordance with the overwhelming majority of courts that have ruled upon the issue — *i.e.,* the record must show some material basis for an alleged conflict of interest, before reversible error occurs in single representation of co-defendants.[1] In a particularly definitive case, *United*

[1]In *American-Canadian Oil and Drilling Corp.* v. *Aldridge and Stroud,* 237 Ark. 407, 373 S.W. 2d 148, this court expressly held that a mere possibility of conflicting interest does not disqualify an attorney *per se.* The court stated:

> "A mere possibility that different interests represented by an attorney might develop a conflict is not sufficient to disqualify him."

The court held that the interests must be actually adverse.

*States* v. *Williams,* 429 F. 2d 158, *cert. denied,* 400 U.S. 947, the Eighth Circuit stated:

> "It has been firmly established that joint representation of codefendants is not *per se* violative of the Sixth Amendment. [Citations omitted.] Expressed another way, no reversible error is committed by the district court in assigning a single attorney to represent two or more codefendants in a pending criminal action, absent evidence of an actual conflict of interest or evidence pointing to a substantial possibility of a conflict of interest between the codefendants. [Citations omitted.] Where courts have found such evidence on the appellate record, they have not hesitated to direct a reversal for a new trial. [Citations omitted.]
>
> ". . .[T]here is nothing pointing to an actual or substantial possibility of a conflict of interest between appellant and his codefendant, Brinkley. We need go no further. A reversal here would be tantamount to a holding that joint representation is illegal *per se* , a result not mandated by the Sixth Amendment, *Glassen* [v. *United States,* 315 U. S. 60], or its progeny."

Similarly, in *United States* v. *Gallagher,* 437 F. 2d 1191, the Seventh Circuit, confronted with the same argument, found no conflict of interest, and stated:

> "The existence of a conflict of interest, to warrant [reversal], must be founded on something more than mere speculation or surmise. We perceive nothing in this record which demonstrates the existence of any real conflict of interest between the defendants."

Research discloses at least thirty-two jurisdictions that adhere to this standard, requiring some factual demonstration of a conflict of interest.

By contrast, a small minority of jurisdictions (five) appear to have adopted a much more liberal standard first applied by the District of Columbia Court of Appeals in *United States* v. *Lollar,* 376 F. 2d 243. Under the *Lollar* rule, the trial court bears the burden of investigating any potential

conflict of interest, and of determining the need for separate counsel, whenever any "informed speculation" of conflict exists. Although this rule was first announced almost a decade ago, very few jurisdictions have found it persuasive. For example, in *United States ex rel. Robinson* v. *Housewright,* 525 F. 2d 988 (Nov. 26, 1975), the Seventh Circuit expressly rejected the *Lollar* standard for appointment of separate counsel. That court stated that "the primary responsibility for the ascertainment and avoidance of conflict situations must lie with the members of the bar," and that "it is incumbent upon the defendants to demonstrate, with a reasonable degree of specificity, that a conflict of interests actually existed at trial." Likewise, in *State* v. *Jeffrey,* 515 P. 2d 364, the Montana Supreme Court refused to adopt the *Lollar* rule, adhering instead to the majority requirement "that there be a showing of a conflict of interest to the prejudice of the accused, and that this conflict must be more than a mere conjecture as to what might have been shown."

Although this court referred to the "informed speculation" rule when reversing a conviction in *Shelton* v. *State,* 254 Ark. 815, 496 S.W. 2d 419, it cannot be presumed that *Shelton* overruled *Trotter and Harris* v. *State, supra.* In fact, the *Shelton* opinion does not discuss, or even mention *Trotter.* In *Shelton,* there were no co-defendants. A witness, Joe Hilderbrand, had been a defendant but the case against him had been dismissed. It was contemplated that the state might call Hilderbrand as a witness and counsel for Shelton stated that he had represented Hilderbrand, had received confidential information from him, and would not feel free in cross-examining Hilderbrand if he were called to testify. A principal difference in that case and the one at bar is that Shelton never did take the stand and testify.

A recent case, *United States* v. *Jeffers,* 520 F. 2d 1256 (7th Cir.), *cert. denied,* 96 S. Ct. 805 (Jan. 13, 1976), discusses the proper procedure to be followed when an alleged conflict of interest may arise because counsel possesses confidential information. The opinion was written by Justice (then Judge) John Paul Stevens. In *Jeffers,* counsel for multiple defendants asserted that he was unable to fully cross-examine a prosecution witness whom his law firm had previously represented. Counsel alleged that because of this prior representation, he

was in possession of confidential information that created a conflict of interest, limiting his effectiveness in representing the *Jeffers* defendants. He requested that the trial court permit him to withdraw from the case because of the presumed conflict. The trial court held, however, that no actual showing of a conflict had been made, and that therefore counsel would not be permitted to withdraw.

On appeal of the ensuing convictions, the Seventh Circuit in *Jeffers* approved the trial court's ruling. Judge Stevens first noted that counsel "made no effort to disclose the privileged information to the court *in camera* to enable the court to evaluate its relevance." Reviewing the scope of the attorney-client relationship, the court further stated that "[t]he risk that an item of confidential information might be misused does not create a conflict of interest which disqualifies an attorney from conducting any cross-examination at all." The court concluded:

> "Thus, if defense counsel was concerned that he might be using confidential information improperly, he could have outlined the nature of the information to the judge and, if necessary, made an *in camera* disclosure to him. On the basis of such a disclosure it might have become apparent that the privilege was either inapplicable or had been waived by the witness. Or, it might have been clear that the information was not usable for other evidentiary reasons."

In the instant case, no disclosure of the nature of the information acquired was outlined to the judge. After all, without any reflection on present counsel, a very honorable man and competent lawyer, requiring the granting of a motion to appoint separate counsel purely on the basis of a motion stating that confidential information had been received from the defendants, might well eventuate in an imposition on the court and could result in the mandatory appointment of additional counsel in every case where multiple defendants were involved; the contingencies set forth in *Jeffers* might well dispose of the issue.

Summarizing, a review of the record establishes that no prejudice resulted, in fact, to appellants. As the state correct-

ly points out, all three appellants voluntarily took the stand, *against* the advice of counsel, and denied any involvement in the crime. Most important, however, *none* of the appellants attempted to incriminate any of the others. Campbell completely denied making the statement to the officers, and denied even knowing Holloway at all. Holloway and Welch both stated that they knew nothing about the case. Thus, the actual testimony adduced at trial by appellants presented no conflict of interest whatsoever. Accordingly, the record presents no basis from which this court can find that separate counsel should have been appointed. This conclusion agrees with the holdings of other courts in similar fact situations. *People* v. *Spencer,* 206 N.W. 2d 733 (Mich. App.); *Davis* v. *State,* 201 S.E. 2d 345 (Ga. App.).

Appellants assert that the trial court erred by admitting into evidence the "rights waiver" allegedly signed by Campbell, and the oral statement allegedly made by him to police. Campbell denied signing the form and making the statement, contending that he was under the influence of alcohol and narcotics at the time.

In reviewing a trial court's ruling on the admissibility of a statement, this court makes an independent determination based on the totality of the evidence, but reverses the trial court only when its ruling is clearly against the preponderance of the evidence. *Degler* v. *State,* 257 Ark. 388, 517 S.W. 2d 515. The ruling of the trial court in the instant case clearly is not against the preponderance of the evidence. Both officers who were present during Campbell's interrogation testified that he was not visibly under the influence of drugs or alcohol, that he could walk and talk normally, and appeared sober. Both officers said that they could smell alcohol on Campbell, and gave him a "breathalyzer" test, but that Campbell's mental faculties were not apparently impaired. The conflicting testimony posed an issue of credibility for the trial court, and from the appellate record it cannot be said that error was committed in admitting the rights form and oral statement.

Appellants argue that the trial court erred by refusing to allow their counsel to ask one of the officers who had interrogated Campbell about the statutory presumption on

blood alcohol content. The officer testified that a "breathalyzer" test given to Campbell "showed that he registered point 16 percent blood alcohol." Appellants' counsel then asked, "And what is the percentage reading for a drunk?" The trial court at that point sustained the state's objection to the question.

The *prima facie* presumption of intoxication set forth in Ark. Stat. Ann. § 75-1031.1 (Repl. 1957) applies solely to individuals who are charged with the offense of driving a vehicle while intoxicated. As the state points out, the statute is relevant solely to the issue of an individual's ability to drive safely — his reactions, coordination, and capacity to operate an automobile. Appellants cite no authority that a statute with such a limited purpose should be applied to the vastly different issue of a defendant's mental ability to comprehend his constitutional rights and to give a statement. To the contrary, see *Wilson* v. *Coston,* 239 Ark. 515, 390 S.W. 2d 445; *Hoffman* v. *State,* 70 N.W. 2d 314 (Neb.); *People* v. *Leis,* 213 N.Y.S. 2d 138; *State* v. *Aarhus,* 128 N.W. 2d 881 (S.D.) The argument, we think, is untenable.

Finally, it is asserted that "The court erred in permitting officers to testify that they took a picture of defendant, Campbell, and a warrant for his arrest when they went to the jail to talk to a man by the name of Robert Hill." During the examination of Jerry Best, one of the officers who had questioned Campbell, Best testified that he and Plummer had taken "a picture of Campbell and a warrant that we had for him" when they went to retrieve him from the detention center.[2] Appellants' counsel objected and requested a mistrial, which the trial court denied. Appellants contend that the refusal of a mistrial was error, because the officer's testimony allegedly created "an impression to the jury that it was a mug shot of the defendant and could lead them to believe that he had a long record."

[2]Officer Plummer had received information that a man who had given his name as Robert Hill was being held in the detention center, but that "Hill" was actually Gary Don Campbell. Campbell had been previously convicted of an offense and the officers took his picture to the detention center as a matter of being positive that "Hill" and Campbell were one and the same.

It must be noted that the officer used the word, "picture," and made no reference to a "mug shot." The word used by the officer seems in no way prejudicial to appellants; further, no request was made for an admonition to the jury. The applicable standard is stated in *Gammel and Spann* v. *State,* 259 Ark. 96, 531 S.W. 2d 474:

> "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. [Citation omitted.] It should not be granted when any possible prejudice could be removed by an admonition to the jury. [Citation omitted.] It certainly was not called for in this case. Appellants did not seek an admonition to the jury to disregard the questions or any of their implications."

Still further, Plummer had already earlier testified to the same facts without objection, and any possible error would be rendered harmless.

All objections made during the trial by appellants have been examined and found to contain no merit. Finding no reversible error on the whole case, the judgment is affirmed.

It is so ordered.

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

CONLEY BYRD, Justice, dissenting. I would reverse this case because the trial court forced the public defender to represent all three defendants after he, in accordance with American Bar Association Standards For Criminal Justice, The Defense Function § 3.5(a)(1971), informed the court that, because of a confidential communication from his clients, there was a conflict of interest among them. The record with respect to the conflict issue shows the following:

> "MR. HALL: At this time I would like to renew that motion on the ground that one or two of the defendants may testify and, if they do, then I will not be able to cross-examine them because I have received confidential information from them.

THE COURT: I don't know why you wouldn't. Overruled. Save your exceptions.

. . .

MR. HALL: I am in a position now where I am more or less muzzled as to any cross-examination.

THE COURT: You have no right to cross-examine your own witness.

MR. HALL: Or to examine them.

THE COURT: You have a right to examine them, but you have no right to cross-examine them. The prosecuting attorney does that.

MR. HALL: If one takes the stand, somebody needs to protect the other two's interest while that one is testifying, and I can't do that since I have talked to each one individually.

* * *

THE COURT: You are overruled. Each defendant said he wants to testify, and there will be no cross-examination of these witnesses, just a direct examination by you."

The record shows that all defendants testified in their own behalf. The following took place when the defendant, Welch, testified:

"DEFENDANT HOLLOWAY: Your Honor, are we allowed to make an objection?

THE COURT: No, sir. Your counsel will take care of any objections.

MR. HALL: Your Honor, that is what I am trying to say. I can't cross-examine them.

THE COURT: You proceed like I tell you to, Mr. Hall.

You have no right to cross-examine your own witnesses anyway."

The oath administered to lawyers when they receive their license to practice law before this court requires each lawyer to affirmatively answer that "I will maintain the confidence and preserve inviolate the secrets of my client. . . ." Disciplinary Rules DR 4-101(B) of the Code of Professional Responsibility, adopted by this court provides:

"(B) Except when permitted under DR 4-101(C), a lawyer shall not knowingly:

(1) Reveal a confidence or secret of his client.

(2) Use a confidence or secret of his client to the disadvantage of the client.

(3) Use a confidence or secret of his client for the advantage of himself or of a third person, unless the client consents after full disclosure."

In the American Bar Association Project on Minimum Standards for Criminal Justice, Providing Defense Services, we find the following with reference to the professional independence of appointed defense counsel.

"1.4 Professional independence.

The plan should be designed to guarantee the relationship between lawyer and client. The plan and the lawyers serving under it should be free from political influence and should be subject to judicial supervision only in the same manner and to the same extent as are lawyers in private practice. One means for assuring this independence, regardless of the type of system adopted, is to place the ultimate authority and responsibility for the operation of the plan in a board of trustees. Where an assigned counsel system is selected, it should be governed by such a board. The board should have the power to establish general policy for the operation of the plan, consistent with these standards and in keeping with the standards of professional conduct. The board should be precluded from interfering in the conduct of

particular cases.

*Commentary*

a. Integrity of the professional relation

> A system which does not guarantee the integrity of the professional relation is fundamentally deficient in that it fails to provide counsel who have the same freedom of action as the lawyer whom the person with sufficient means can retain. Inequalitites of this nature are seriously detrimental to the fulfillment of the goals of providing counsel. They are quickly perceived by those who are being provided representation and may encourage cynicism toward the justness of the legal system and, ultimately, of society itself. Much of the dispute concerning the merits of various systems has centered on their capacity to guarantee professional independence. The study made by the Special Committee of the Association of the Bar of the City of New York and the National Legal Aid Association concluded that the necessary independence could be guaranteed under any type of system, from public defender to assigned counsel, if and only if the system is properly insulated from pressures, whether they flow from an excess of benevolence or from less noble motivations. See EQUAL JUSTICE FOR THE ACCUSED 61, 67, 71, 74-75. The importance of assuring the undivided loyalty of defense counsel to his client has been emphasized in previously adopted standards."

To sustain its illogical position that "the record must show some material basis for an alleged conflict of interest, before reversible error occurs in single representation of co-defendants," the majority mistakenly rely upon *Trotter and Harris* v. *State*, 237 Ark. 820, 377 S.W. 2d 14 (1964); *United States* v. *Williams*, 429 F. 2d 158 (8th Cir. 1970); *United States* v. *Gallagher*, 437 F. 2d 1191 (7th Cir. 1971); *United States ex rel Robinson* v. *Housewright*, 525 F. 2d 988 (7th Cir. 1971); *State* v. *Jeffrey*, 163 Mont. 92, 515 P. 2d 364 (1973); and *United States* v. *Jeffers*, 520 F. 2d 1256 (7th Cir. 1975).

In *Trotter and Harris* v. *State, supra,* the issue was not rais-

ed in the trial court. The opinion points out that during an in camera hearing in the trial court to determine if Trotter and Harris should take the witness stand that both parties expressed their approval of appointed counsel and of his efforts during the trial. In the absence of any showing of a conflict in the record, this court properly held that there was no merit to the conflict of interest contention. In the case before us the objection was raised in the trial court and at every opportunity in keeping with the Code of Professional Conduct.

In *United States* v. *Williams, supra,* upon which the majority relies, the defendants were making a post-conviction attack upon their guilty pleas. The record there shows that both defendants had escaped from the Iowa prison at the same time and that they were arrested together. When they were brought before Judge Duncan for arraignment the appointed counsel raised the possibility of a conflict of interest. In doing so appointed counsel stated: "At this time, Your Honor, I know of no conflict but I am saying that the conflict may arise in the future." When Judge Duncan asked, "Is there anything, any statement that come from [the defendants] that indicates a conflict of interest?" The attorney responded, "Not at the present time." Thus the Eighth Circuit was correct in asserting that the post-conviction conflict of interest assertion was without merit. However, such holding is not authority for saying that a conflict arising from a confidential communication to appointed counsel should be denied when the matter is brought to the attention of the court before trial. In fact the very emphasis of the court to the proposition that the motion was not made upon a confidential communication would indicate that the court would require representation by different counsel should that situation arise.

In *United States* v. *Gallagher, supra,* the court had appointed separate counsel for each defendant. Subsequently, the defendants employed single counsel to represent both. When the evidence showed that one of the defendants was the dominant member of the conspiracy, the lawyer suggested to the court that he didn't know, "whether I should let Tom Gallagher go at this time and concentrate on the lack of evidence against Neil Gallagher or whether I should concentrate on the [evidence] against Neil and pound that in front of the jury." The court there pointed out that the existence of a

conflict of interest was left to only speculation and surmise. There was no contention in that case that the conflict arose from a confidential communication. In fact, it would appear that the motion was more in the nature of a defense ploy.

The majority's reliance upon *United States ex rel Robinson* v. *Housewright, supra,* is totally misplaced. There Robinson had entered a bargained plea of guilty to murder and received a reduced sentence. He sought to raise the conflict of interest of his appointed counsel in a post-conviction hearing. However, the appointed counsel testified that he knew of no conflict of interest. In pointing out that Robinson was entitled to no relief the court stated:

> ". . . The record discloses that the court appointed attorney had not ascertained the presence of a disabling conflict. Nor does anything suggest that he would not have brought to the attention of the court the existence of such a conflict. . . " [citing § 3.5(a) ABA Standards For Criminal Justice, supra.]

The majority's reliance upon *State* v. *Jeffry, supra,* is not supported by the facts there involved nor the reasoning of the Montana Court. Both defendants there were tried together and as pointed out by the court:

> "Both hired and retained the same counsel to represent them in all preliminary matters and at trial. Counsel was not appointed, or imposed upon either of them — he was retained by the defendants. Prior to this appeal neither of the defendants had claimed he was denied effective counsel, but now, after conviction, they each contend that since they were represented by the same counsel they each were denied their right to effective counsel."

The Montana Court first stated that in determining the conflict of interest issue, it followed the reasoning set forth in *Kruchten* v. *Eyesman,* 406 F. 2d 311 (9th Cir. 1969), which provides:

> "In considering the legal aspect of the conflict of interest claim, we start with the premise that if a conflict

> of interest actually exists the court will not weigh or determine the degree of prejudice which may result before granting relief. *Glasser* v. *United States,* 315 U.S. 60, 62 S. Ct. 457, 86 L. Ed. 680 (1942). However, until an actual conflict is shown to exist or can be reasonably foreseen an attorney may, in good faith, represent both defendants."

The reason for denying relief when the conflict issue is raised for the first time on appeal was stated by the Montana Court as follows:

> ". . . The whole problem directs itself ultimately on appeal to the adequacy or inadequacy of defense counsel and in the eyes of this Court such adequacy or inadequacy of counsel should not be tested by the greater sophistication of appellate counsel who did not try the case, nor should the test be made on the basis of applying different defense tactics, perhaps of doubtful efficiency, after leisurely studying the transcript of the trial. . . ."

Of course in the case before us we have the statement of the Public Defender that a conflict would arise in the event the defendants took the witness stand in their own behalf. He made that statement because of confidential communications he had received from his clients.

Finally the majority make much of the fact that the now Justice John Paul Stevens wrote the opinion in *United States* v. *Jeffers,* 520 F. 2d 1256 (1976). That case does not even involve a conflict of interest arising from the representation of co-defendants. There retained counsel, Cohen of the law firm of Cohen & Thiros, represented a number of defendants termed "The Family" who were indicted for a "highly-structured and on-going narcotics distribution net work in Gary, Indiana." On the sixth day of trial the government brought forth as a witness one James Berry. At that time Cohen informed the court that Berry had previously been represented by one of his law partners in a prior state court homicide case. Cohen admitted that his law firm did not then represent Berry, that he did not personally know Berry, and that he personally had had no confidential communication from

Berry. Before concluding that no conflict of interest was shown that would effectively prevent the cross-examination of witness Berry, Judge Stevens emphasized:

> ". . . We also emphasize at the outset that this is not a case involving an existing personal relationship between Cohen and the witness Berry. Consequently, the numerous cases involving an on-going relationship between an adverse witness and a lawyer are inappropriate."

In a foot note following the above statement it is stated:

> "The courts have frequently held that the existence of such a relationship, with the inherent hesitancy of counsel to completely cross-examine a current client, creates a very real conflict of interest and requires a mistrial if the conflict is disclosed, or a new trial, if the conflict is discovered only later, see *Castillo* v. *Estelle,* 504 F. 2d 1243 (5th Cir. 1974), . . . "

Our own case of *Shelton* v. *State,* 254 Ark. 815, 496 S.W. 2d 419 (1973), falls in the category of the cases mentioned by Justice Stevens in the foot note, *supra.*

The majority's assertion that the Public Defender should tell all of his confidential communications to the trial judge to protect some of his clients could prove very embarrassing to the public defender's other clients if the jury should become hung on the amount of punishment and leave the punishment to be fixed by the trial court. Under the majority opinion appointed counsel can never maintain inviolate the confidence of his clients.

For the reasons stated I respectfully dissent.

GEORGE ROSE SMITH and FOGLEMAN, JJ., join in this dissent.

David RYAN *v.* STATE of Arkansas

CR 76-48 538 S.W. 2d 702

Opinion delivered July 19, 1976

*Shaver, Shaver & Smith,* by: *Tom B. Smith,* for appellant.

*Jim Guy Tucker,* Atty. Gen., by: *B.J. McCoy,* Asst. Atty. Gen., for appellee.

CARLETON HARRIS, Chief Justice. Appellant, David Ryan, was convicted by a jury of possession of a controlled substance (marijuana) with intent to deliver in violation of Ark. Stat. Ann. § 82-2601 et seq. (Supp. 1975), and sentenced to four years confinement in the Department of Correction, with a fine of $7,500.00. From the judgment so entered, Ryan appeals, arguing several points for reversal.

Proof on the part of the state reflects that a Cross County deputy sheriff, Jerry Dallas, was driving past a trailer park in Wynne, about 5:00 P.M. on March 12, 1975, when he saw appellant and several other persons standing in a group in the park. Dallas was familiar with appellant and some of the others in the group, and stated that he had knowledge that some of the people observed had dealt in drugs. The deputy noticed that appellant had a brown paper sack in his hands. When Dallas stopped his car to investigate, appellant "took off running" with the sack. About three or four minutes later, though, while the deputy was questioning the other members of the group, a resident of the trailer park, Melvin Swink, came up and told Dallas that he had surprised a young man, whom he later identified as appellant, placing something in his (Swink's) boat. Swink had asked the man what he was doing and the man replied, "I'm hiding something," but then said, "I'll get it," and pulled a brown paper sack from the boat. Swink told Dallas that the man walked around a nearby trailer, toward a large drainage ditch behind the trailer, carrying the sack. When the man reappeared from behind the trailer, a moment later, he was no longer carrying the sack. Another resident of the trailer park, Ray Dean Davis, also had observed appellant.

Deputy Dallas and the two citizens, Swink and Davis, began searching the drainage ditch, which belonged to the city, for the sack. Dallas soon received a report that appellant had been sighted nearby, and he left to look for appellant, requesting Swink and Davis to continue searching in the ditch for the bag. Shortly thereafter, Swink found a brown paper sack in the ditch, near a culvert; the sack contained 15 plastic "baggies" of green vegetable matter. Swink and Davis kept the sack for a few minutes, until Dallas returned, and gave it to him. By that time Dallas, who had not found appellant, had radioed for assistance and had requested a state policeman, Fred Odom, to "stake out" the trailer park in case appellant returned. Dallas then took Swink and Davis, together with the sack, to the sheriff's office for questioning.

Odom apprehended appellant, who had returned to retrieve his automobile, and the officer then took appellant to the sheriff's office; no interrogation of any sort occurred before Odom surrendered custody of appellant to Deputy Dallas. At that point, Dallas orally advised appellant of his rights, reading them from a written statement and explaining them. Dallas said that he asked appellant if he understood the rights, and appellant answered in the affirmative. Officer Odom, who had brought appellant to the office, was present and fully corroborated the testimony of Dallas. Both men stated that no threats or inducements of any type were made to appellant and Ryan at no time requested a lawyer or asked for the questioning to cease.

According to Dallas, appellant said that he had had possession of the marijuana for only a few hours, and had brought it to the trailer park to "stash" it in a friend's trailer. Appellant admitted that the sack was his and that "he was the only one who had anything to do with it." According to the officer, Ryan related that he ran when someone in the group told him that "a police car had hit his brake lights and he just simply got scared standing there with this in his hand and he ran . . . he said that he went around to this boat in the trailer park and was going to hide it, this sack, hide this sack in a boat . . . said this man confronted him and he [appellant] told him he would get the package . . . he got the package back out of the boat and went on through the trailer

park and threw it in the ditch and then he said that he went on home . . . when he was [later] coming into the trailer court to try to get his car he was arrested there."

Officer Odom likewise testified that appellant admitted that the sack was his, and contained 15 bags of marijuana.

Appellant attacks two links in the chain of evidence. First, he argues that the state failed to connect the brown sack found in the ditch with appellant, "and this brown sack could be anyone's sack"; second, that one of the "baggies" containing marijuana was not labeled as having been taken from Ryan when it was sent to the state laboratory for analysis, and was improperly identified on trial; *i.e.*, the integrity of the chain of evidence was not maintained.

A review of the evidence presented by the state shows that these arguments have no merit. Swink testified that he saw appellant walk behind a trailer, which was only seven or eight feet from the drainage ditch, with the sack in his hands, and re-emerge a few moments later without the sack. Swink reported this to Deputy Dallas, and immediately returned to the ditch and began searching for the sack, which he subsequently found. Moreover, the small possibility that anyone else might have placed the sack in the ditch was completely removed by the admission of appellant himself, to Deputy Dallas, "what he did was went (sic) near a culvert and threw it in the ditch." Neither at the pretrial hearing nor the trial did any witness ever challenge the veracity or accuracy of the officer's testimony about this statement.

Further, the admitted mislabeling of one of the "baggies" taken from the sack did not prejudice appellant. Again, the facts are undisputed. After Deputy Dallas received the sack from Swink, he locked it in the evidence room at the sheriff's office, where it remained until the trial. However, another deputy, Hank Williams, was authorized to remove three of the "baggies" from the sack so that they could be sent to the state drug laboratory as samples for identification. Williams drew three "baggies" at random from the sack, and labeled two of them, respectively, "E-1, suspect David Ryan," and "E-2, suspect David Ryan." The mislabeling occurred when Williams marked the third bag, "E-3, suspect

Keith Coffey."

The mistake on the third tag was not discovered until after the jury had retired, when the court reporter noticed the incorrect name. The trial court disclosed this information in open court to counsel, and the prosecuting attorney explained that appellant and Keith Coffey had been arrested a few days apart for drug offenses, and that samples taken from both had been sent to the state laboratory at the same time. Counsel agreed to investigate the matter to find whether the samples had been confused.

The trial court subsequently conducted another hearing on the mislabeling, when Deputy Williams returned to testify. Williams stated that he had simply made a mistake in writing the name on the label, and no possibility existed that he might have confused the samples. Williams reaffirmed his previous testimony that all three bags came from appellant's sack, and stated, "[s]ome way I marked Coffey on Ryan's bag." After Williams testified the trial court denied appellant's motion for a mistrial, commenting that "[i]t is rather evident and obvious and the Court so finds that the defendant, David Ryan, was not in any way prejudiced by the confusion or mix-up due to the erroneous labeling of the drug sample. There has been no showing of any possible prejudice, which could have resulted against the defendant, David Ryan."

This court summarized the law applicable to this point in *Wickliffe and Scott* v. *State,* 258 Ark. 544, 527 S.W. 2d 640:

> "In *West* v. *United States,* 359 F. 2d 50, 55 (8th Cir. 1966), cert. den. 385 U.S. 867 (1966), the court said:
>
> > Appellant seems to be arguing that as long as it is 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.

> Further, the court held that the [trial] court is accorded some discretion in determining the admissibility of evidence.
>
> "In *Fight* v. *State,* 254 Ark. 927, 497 S.W. 2d 262 (1973), we said, '[T]he purpose of the chain of identification is to prevent the introduction of evidence which is not authentic.' To the same effect are *Witham* v. *State,* 258 Ark. 348, 524 S.W. 2d 244 (1975); and *Freeman* v. *State,* 238 Ark. 804, 385 S.W. 2d 156 (1964)."

In the instant case there is no question that the trial court did not abuse its discretion in refusing to declare a mistrial simply because one of the three samples was mislabeled. See *Perez* v. *State,* 249 Ark. 1111, 463 S.W. 2d 394.

Let it be remembered that at no point in the prosecution of this case, neither in the pretrial hearing nor the trial itself, was there any contradiction of the officers' testimony that Ryan had admitted to them that the sack contained marijuana that he had procured, that belonged to him, and that he planned to "stash" somewhere. Nor does appellant, even on appeal, challenge the validity of the two other tested samples of marijuana. Thus, even if error were committed in admitting the mislabeled sample, no prejudice resulted because of appellant's own admissions and the other evidence in the case. See *United States* v. *King,* 485 F. 2d 353 (10th Cir. 1973); *United States* v. *Spinks,* 470 F. 2d 64 (7th Cir. 1972), *cert. denied,* 409 U.S. 1011; *United States* v. *Deaton,* 468 F. 2d 541 (5th Cir. 1972), *cert. denied,* 93 S. Ct. 1386; *Beatty* v. *United States,* 357 F. 2d 19 (10th Cir. 1966); *Caldwell* v. *United States,* 338 F. 2d 385 (8th Cir. 1964), *cert. denied,* 380 U.S. 984.

It is asserted that the trial court erred in admitting the sack, its contents, and appellant's admissions to the officers into evidence. This contention has already been found to be without merit and no further comment is necessary.

It is contended that the information filed was insufficient because it was not filed under oath by the prosecutor, and further, because it did not specify to whom appellant intended to deliver the marijuana. We have held that neither the Constitution nor the statutes require that the information be

under oath. *Bazzell* v. *State,* 222 Ark. 473, 261 S.W. 2d 541. Of course, as to the second phase of the argument, the intent to deliver element is a legal presumption embodied in Ark. Stat. Ann. § 82-2617 (d) (Supp. 1975). For that matter, one who possesses marijuana for sale probably does not know himself to whom it might be sold.

Appellant offered an instruction that "equality before the law is recognized for all persons, and such equality shall not be denied." The trial court refused the instruction. Of course, the instruction was entirely abstract, there being no contention that Ryan was being denied equal protection of the law, *i.e.,* some other defendant received a lesser penalty, or no penalty at all, for the same offense. Not only that, but a review of the instructions given by the trial court reflects that they fully and fairly stated the law applicable to the case.

Finally, it is alleged that the punishment imposed was unconstitutionally cruel and unusual. We have held numerous times that if a sentence comes within the limits imposed by statute, it is not "cruel and unusual." *Randle and Wright* v. *State,* 245 Ark. 653, 434 S.W. 2d 294; *Stout* v. *State,* 249 Ark. 25, 458 S.W. 2d 42. The sentence given falls within the provisions of the statute; in fact, the imprisonment part of the sentence was not much more than the minimum, and the fine imposed was only half that authorized under the law.

Affirmed.

STATE of Arkansas *v.* FAIRFIELD COMMUNITIES LAND COMPANY

76-46 538 S.W. 2d 698

Opinion delivered July 19, 1976

*John Warndof,* for appellant.

*Warner & Smith,* by: *Lillard Cody Hayes,* for appellee.

*Amici Curiae, Youngdahl, Larrison & Agee,* by: *Catherine C.*

*Harris*, for Arkansas State AFL-CIO; *J. Gayle Windsor Jr.*, for Associated Industries of Arkansas, Inc.; *Smith, Williams, Friday, Eldredge & Clark*, by: *Bill S. Clark*, for The Arkansas Hospital Association, Inc.

GEORGE ROSE SMITH, Justice. This action was brought in the name of the State by the Director of Labor, on behalf of a number of the appellee's female employes, to recover overtime wages that assertedly should have been paid under Act 191 of 1915, as amended. Ark. Stat. Ann. §§ 81-601 *et seq.* (Repl. 1960). The appellee contends that the Arkansas statute is no longer valid, having been pre-empted, under the Supremacy Clause, by this provision in the Civil Rights Act of 1964:

> It shall be an unlawful employment practice for an employer . . . to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex." [42 U.S.C.A. § 2000e-2.]

This appeal is from a judgment sustaining the appellee's position and dismissing the complaint.

At the outset it is insisted by the appellant, for the first time, that the circuit court did not have jurisdiction of the subject matter, because the proof does not show that the Civil Rights Act is applicable to the appellee, as an employer. That is, it is now shown that the appellee is engaged in an industry affecting interstate commerce, with 15 or more employees and a specified annual volume of business, as required by federal legislation.

That argument is not sound. Our circuit courts, unlike the federal courts, are tribunals of general jurisdiction with constitutional authority over all cases not within the exclusive jurisdiction of another court. Ark. Const., Art. 7, § 11 (1874); *Whittaker* v. *Watson,* 68 Ark. 555, 60 S.W. 652 (1901). Here the Director of Labor, as plaintiff, selected the forum himself. The circuit court unquestionably has prima facie jurisdiction of an action for the recovery of unpaid wages. The appellee merely pleaded the impact of the Civil Rights Act as a

defense to the action. If the plaintiff thought that the defendant was not entitled to invoke the Act, that issue should have been raised in the trial court. But the issue was not jurisdictional, because even if the defendant had not been entitled to invoke the Act the case would still have proceeded to judgment. For all we know, the plaintiff may have known that the defendant came within the Act and may simply have decided not to encumber the record with needless proof. Thus the appellant has no standing to raise the issue here, subject-matter jurisdiction not being involved.

Now, the merits. Our statute undoubtedly discriminates in favor of women on the sole basis of their sex. The employer must pay time-and-a-half overtime when the work day exceeds eight hours or the work week six days. Ark. Stat. Ann. § 81-601. There is no similar provision for male employees. It is fair to assume that an employer might therefore decide to hire a man rather than a woman, both being qualified. The appellee accordingly argues that our statute conflicts with the federal law, which prohibits any discrimination in hiring or in the terms of employment, on the basis of sex.

In answer to that argument the appellant relies upon the opinions in *Potlatch Forests* v. *Hays,* 318 F. Supp. 1368 (E.D. Ark. 1970), and *Hays* v. *Potlatch Forests,* 465 F. 2d 1081 (8th Cir. 1972), affirming the district court. Those cases upheld the Arkansas statute, upon the ground that the employer could comply with both the federal act and the state act simply by paying overtime to both men and women at the rate specified in the Arkansas statute. An essentially contrary view was taken in *Homemakers, Inc., Los Angeles* v. *Division of Indus. Welf.,* 356 F. Supp. 1111 (N. D. Cal. 1973), affirmed, 509 F. 2d 20 (9th Cir. 1974). Those courts held, as did the trial judge in the case at bar, that for a court to extend the benefits of the state statute by requiring men to be paid at a statutory scale applicable only to women would be an exercise of legislative rather than judicial power.

We are unable to agree with the *Potlatch* opinions, because we think they oversimplify the issue. In *Potlatch* both courts treated the Arkansas statute as a wages-and-hours law having as its sole purpose the payment of female employees at time-and-a-half for overtime. Neither opinion mentions other

aspects of the Arkansas law which we think to be of controlling weight.

The original 1915 statute had several provisions linking wages with the health of the female employees protected by the act. For example, the act created a three-member commission whose duty it was to adopt regulations making it certain that women would not be employed "at a lower rate or wages than will supply said female employees the cost of proper living, and safeguard their health and welfare." Act 191 of 1915, §§ 9 and 11. A 1935 amendment to the statute gave to a commission the power to issue, after a hearing, permits exempting from the statute females in executive or managerial positions. Act 150 of 1935; Ark. Stat. Ann. § 81-606. A 1943 amendment provided that no female could be employed for overtime of a permanent nature in excess of one hour a day without a permit from the Commissioner of Labor. Act 70 of 1943; Ark. Stat. Ann. § 81-601.

It must be emphasized that the constitutionality of Act 191 was upheld on the ground that it was a reasonable method of safeguarding the health of female employees. *State* v. *Crowe,* 130 Ark. 272, 197 S.W. 4, L.R.A. 1918A, 567, Ann. Cas. 1918D, 460 (1917). The majority and dissenting opinions in that case indicate clearly that the statute would not have been sustained had it merely regulated wages and hours, without regard to the health of the female employees.

In the intervening 60 years the pendulum has swung far in the opposite direction. The Supreme Court now holds that an act which discriminates between men and women is invalid as a denial of the equal protection of the law unless there is a reasonable basis for the distinction. *Reed* v. *Reed,* 404 U.S. 71 (1971). Hence Act 191 is now prima facie invalid, because with respect to many office and clerical jobs there is no sound reason for paying time-and-a-half overtime to women while denying it to men. Of course it follows that if the Arkansas act is now invalid, its benefits cannot simply be extended to male employees under the *Potlatch* rationale.

The Director of Labor advances two theories in his effort to have Act 191, as amended, continued in force. First, it was stipulated below that although the Department of Labor still

issues permits under the act, it no longer conducts hearings under §§ 81-606 and -607 to determine whether the particular female employee actually exercises executive or managerial authority. One short answer to this argument is that the discriminatory provision is still in the statute, whether the Department obeys it or not. A second answer is that the stipulation does not touch upon the equally questionable permit requirement in § 81-601, by which a permit must be obtained for any permanent overtime employment of a female in excess of one hour a day.

The Director's second suggestion is that the permit provisions and other discriminatory sections of Act 191, as amended, be held unconstitutional but separable, leaving in effect a simple wages-and-hours law that would benefit male employees under *Potlatch*. What we have already said pretty well answers this argument. Separability means that the legislature would have enacted the valid portion of the act even if it had known the rest to be invalid. But just the opposite is true here. In *Crowe* we sustained Act 191 only because it was considered to be a health measure rather than a mere regulation of wages as such. We could not with even a semblance of judicial integrity completely reverse our position and solemnly declare that the legislature would have adopted Act 191 as a mere wage regulation without regard to the very provisions that saved the statute from unconstitutionality at the time it was passed.

Affirmed.

ROY, J., dissents.

ELSIJANE T. ROY, Justice, dissenting. I disagree with the majority's opinion that the pertinent Arkansas statute is no longer valid. In my opinion, this issue was decided in *Potlatch Forests* v. *Hays,* 318 F. Supp. 1368 (E. D. Ark. 1970), and *Hays* v. *Potlatch Forests,* 465 F. 2d 1081 (8th Cir. 1972), affirming the district court. As noted in the majority opinion, those cases upheld the Arkansas statute upon the ground that the employer could comply with both the Federal act and the State act by paying overtime to both men and women at the rate specified in the Arkansas statutes.

The majority refused to follow the *Potlatch* cases and cited *Homemakers, Inc., Los Angeles* v. *Division of Indus. Welf.*, 356 F. Supp. 1111 (N.D. Cal. 1973), affirmed, 509 F. 2d 20 (9th Cir. 1974), as authority for holding the Arkansas statute invalid even though it differed materially from the California statute. Furthermore, the logic in the *Homemakers* decision is not as sound as the *Potlatch*[1] rationale, since to apply the *Homemakers* doctrine would thwart the purpose of both the State and Federal statutes. Here, the choice is between invalidating the Arkansas statute and lowering wages for female employees or holding the statute valid and equalizing benefits between male and female employees. Extension of wage benefits to men by virtue of the Federal enactment is consistent with the presumption of constitutionality as to both the Arkansas law and the Civil Rights Law of 1964.

The Eighth Circuit in its *Potlatch* opinion stated:

> We agree with the District Court that *Congress expressly disclaimed any general preemptive intent in enacting Title VII,* and that the Arkansas statute can be held invalid only if it is in conflict with the Civil Rights Act. See, 42 U.S.C. §§ 2000e-7 and 2000h-4 [italics supplied].
>
> Insofar as the Arkansas statute results in discrimination against men, we also agree with the trial court that conflict with Title VII can be avoided by requiring Potlatch to pay its male employees the same premium overtime rate which it is compelled to pay its female employees. As the trial court pointed out:
>
> "* * *
>
> "As far as Act 191 of 1915 [Ark. Stat. Ann. § 81-601] is concerned, an employer can comply with it and with the Civil Rights Act by paying daily overtime to both men and women, * * *. The Arkansas statute does not say that women must be paid more than men; it *simply says that they must be paid daily overtime*

[1]Normally if there is a conflict between the circuits on an issue of law Arkansas courts give preference to the Eighth Circuit Court of Appeals interpretation since Arkansas is one of the states in that circuit.

*without making a similar requirement as to men* [italics supplied]."

For compelling reasons the Arkansas overtime act should be preserved. It is a law which serves untold numbers of working people. Neither repeal of the law nor judicial legislation is necessary, but a fair and reasonable accommodation is warranted. Any conceivable disharmony between the State and Federal laws may be fairly accommodated by adopting the extension of benefits rule. There is nothing more fundamental to the welfare of the Arkansas citizenry than adequate wages, and nothing more essential than the law's even application in this vital area. To uphold the existing law would produce the proper balance by preserving its benefits while fulfilling Title VII's promise of fair employment practices.

Furthermore, there is ample precedent to support the judicial extension of benefits. *Frontiero* v. *Richardson,* 411 U.S. 677, 93 S. Ct. 1764, 36 L. Ed. 2d 583 (1973), and *Moritz* v. *Commissioner of Internal Revenue,* 469 F. 2d 466 (10th Cir. 1972).

Objections are also made to the Arkansas act on the grounds that the permit requirements are invalid and consequently the entire statute must fall. We do not agree with the conclusion of the majority that the permit provisions are not separable from the wage provisions of the statute.

It is a well established rule of law that if a statute is valid in part and invalid in part, then the valid part may stand provided it fairly answers the object or purpose of the passage of the law, and the deletion of the invalid portion will not make the statute meaningless.

The absence of the permit provisions certainly would not make the wage-hour part of the Arkansas overtime statute meaningless. The permit provisions do not affect the statute's substance, but are merely additional aids in enforcement of the wage provisions.

In *Brooks* v. *Wilson,* 165 Ark. 477, 265 S.W. 53 (1924), we said:

> . . . [I]f any special provision of an act be unconstitutional and can be stricken out without affecting the validity of the residue of the act, it will be done, and the remainder of the act allowed to stand. *Cribbs* v. *Benedict,* 64 Ark. 555; *State* v. *New York Life Ins. Co.,* 119 Ark. 314; *State* v. *Woodruff,* 120 Ark. 406; and *Davis* v. *State,* 126 Ark. 260.

See also *Levy* v. *Albright,* 204 Ark. 657, 163 S.W. 2d 529 (1942).

Therefore, even if the permit provisions are invalidated the remainder of the statute would suffice to effect the object of having employees receive premium pay for overtime work.

Accordingly, I think the case should be reversed and remanded.

WILLIS SHAW FROZEN EXPRESS *v.*
Tom F. DIGBY, Judge

76-89 538 S.W. 2d 706

Opinion delivered July 19, 1976

*Couch, Blair, Cypert & Waters,* for petitioner.

*Laser, Sharp, Haley, Young & Boswell, P.A.,* for respondent.

GEORGE ROSE SMITH, Justice. The petitioner, Willis Shaw Frozen Express, is an Arkansas corporation engaged in transporting freight by truck, with its principal place of business in Washington county. Upon being sued in Pulaski County it appeared specially and moved that the service of summons be quashed. The motion was denied. The petitioner now seeks a writ of prohibition.

The litigation arises from the petitioner's asserted negligence in carrying a load of produce from Arizona to New York. The shipment did not cross Arkansas, but petitioner has "irregular lines" passing through Pulaski county. The cargo was damaged by being allowed to freeze. The plaintiff below, an insurance company, paid the shipper's loss and brought this action in Pulaski county, as subrogee, for reimbursement.

The issue of venue turns upon the meaning of two successive sections of the Civil Code. The first provides that an action against a domestic corporation may be brought in the county of its principal office — here Washington county. Ark. Stat. Ann. § 27-605 (Repl. 1962). The second provides that an action against a railroad company and certain other carriers (admittedly including the petitioner) for an injury to person or property upon the defendant's road or line "may be brought in any county through or into which the road or line of stages or coaches of the defendant upon which the cause of action arose passes." § 27-606.

Both sections say that the action "may be brought" in a particular county, but we have held that phrase to be mandatory. *Viking Freight Co.* v. *Keck,* 202 Ark. 656, 153 S.W. 2d 163 (1941). The petitioner argues that the two sections are in conflict unless we say that § 27-605 applies to domestic corporations and § 27-606 applies only to foreign corporations. That construction is foreclosed by our language in the *Viking*

case, where we said that § 27-606 makes no distinction between foreign and domestic corporations.

The petitioner is right, however, in insisting that under § 27-606 the suit must be brought in a county through or into which the road or line "upon which the cause of action arose" passes. We do not see how the language of the statute can be given any other interpretation. The respondent relies upon *Chicago, R.I. & P. Ry.* v. *Miller,* 103 Ark. 151, 146 S.W. 485 (1912), where the branch line upon which the cause of action arose did not run through Saline county, where we held the suit to be maintainable. The opinion did not discuss this particular point and, as we read the opinion, did not rule upon it. Furthermore, the defendant's railroad did extend into Saline county, so that the court, considering the main line and the branch line together, may have believed that the terms of § 27-606 were met. We also note that in the *Viking* case, *supra,* although the injury took place in Missouri, it occurred upon the same line that passed through Mississippi county, Arkansas, which we held to be the proper venue.

In the case at bar the shipment from Arizona to New York did not pass through Arkansas at all; so the cause of action could not have arisen upon the lines that pass through Pulaski county. We must sustain the petitioner's insistence that in this instance the venue is fixed by § 27-605.

Writ granted.

ROY, J., not participating.

Rosie K. WELTER *v.* James CURRY et al

75-371 539 S.W. 2d 264

Opinion delivered July 19, 1976

*Wright, Lindsey & Jennings,* for appellant.

*Gordon & Gordon, P.A.,* for appellees.

JOHN A. FOGLEMAN, Justice. Appellees brought this action to recover damages arising from a collision between an automobile driven by appellant Rosie K. Welter and a Honda minibike operated by James Curry, Jr., son of James Curry and Sharon Kay Curry. The incident occurred around

5:00 p.m. on October 6, 1973 on the paved portion of Highway 95 near Ramsey's Grocery, about four miles north of Morrilton. James Jr. was 10 years of age at the time and his five-year-old sister was riding on a seat behind him. Both children suffered injuries and the bike was virtually destroyed. The evidence as to exactly how the collision occurred is in hopeless conflict. The two children had come from the Curry dwelling about one-half mile west of Highway 95, on a dirt road for the purpose of putting air in the tires of the minibike at Ramsey's Grocery. The collision occurred as they started to cross the highway on their return journey. Most of the conflict in the testimony is in the different versions as to the point of approach to the highway by young Curry and the distance he had travelled toward the west from the grocery when he was sighted by the appellant and when the children and minibike were struck by her automobile.

Appellant raises five points for reversal. We find that the judgment must be reversed as to James Curry, Jr. on two of these points.

We find error in instructions given the jury. First there was error in including among the elements of damages the third alternate form of AMI, Civil, 2213 (a). This form is to be used only when there is evidence that there is permanency of injuries. See Note on Use, AMI, Civil, 2202. That evidence must tend to establish permanency with reasonable certainty. It must not leave the jury to speculation or conjecture. *St. Louis, I.M. & S. Ry. Co.* v. *Bird,* 106 Ark. 177, 153 S.W. 104; *McCord* v. *Bailey,* 195 Ark. 862, 114 S.W. 2d 840; *Missouri Pacific Transp. Co.* v. *Kinney,* 199 Ark. 512, 135 S.W. 2d 56; *Midwest Bus Lines, Inc.* v. *Williams,* 243 Ark. 854, 422 S.W. 2d 869.

There is no doubt that James, Jr. suffered serious injury. He was treated by Dr. Thomas Hickey at Morrilton and Dr. John Lohstoeter, an orthopedic surgeon, in Little Rock. He was put in traction for seven days at St. Vincent Infirmary in Little Rock, where he was a patient for exactly three weeks. Prior to discharge he was placed in a body cast. It was removed March 1, 1974, after which he remained in bed at home for about ten days to two weeks. Thereafter, it was necessary that he use crutches until April 23, 1974. At the time of the

trial, his right leg was smaller and shorter than his left, he walked with a limp, and was wearing a special pair of shoes with a five-eighths inch sole and a one-fourth inch heel for the right foot. Dr. Lohstoeter had prescribed an exercise regimen for him to follow for a period of four to six years. At the time of the trial, his mother testified that he had regained virtually all of the strength of his right leg, but that he complained intermittently of pain and trouble with it. The child said that he had not regained the strength of that leg. He lost a year in school. A tutor was employed for him for a time. He will be checked periodically by Dr. Lohstoeter until the end of his growth period. At the time of the trial, Dr. Lohstoeter had not seen him since April 17, 1975.

Dr. Lohstoeter testified for appellees on direct examination substantially as follows:

> James had suffered a transverse split fracture of the right thigh bone at the upper and middle one-third junctions. This involved the bond between the hip and the knee. There was a shortening of the leg because of muscle spasms. Traction was utilized to adjust the bone fragments into an optimum position for healing. In a youth of James' age, bone growth is stimulated by a fracture, so it was necessary to allow some shortening of the leg to compensate for the extra growth. James would have over six years for this growth of one to one and one-fourth inches to take place. The shortness is to be anticipated for one and one-half to two years. On examination on January 28, 1974, James' condition was very stable and very good. X-rays showed good healing and good maintenance of the casted position. When the cast was removed, there was good healing of the fracture elements. Muscle tone was definitely wasted away. On March 15, 1974, James was progressing quite well. He still had some stiffness in the right hip, because of associated scarring and strain elements. On April 23, 1974, when the crutches were discarded, James was put on a full weight bearing program for the next four weeks, to be fully realized during the last week of May or the first week of June. He still had a great deal of wasting away of muscles and had not learned to protect the ligaments at his knee, ankle and hips. The shortness

of the leg causes a pelvic tilt. To correct this, the placement of a heel lift was recommended on June 7, 1974. X-rays of the right foot revealed no damage, but there was a softening of the bones which accompanies immobilization and disuse. On August 12, 1974, the boy was complaining of pain in the right leg when he walked on it a great deal and occasionally when he did not walk. There was laxity in the ligaments. The doctor stressed the necessity for diligent application to the exercise routine. This admonition was repeated on October 24, 1974. On Jaunary 7, 1975, James displayed better walking and stance pattern. While quadriceps atrophy was still present in the right leg, the muscle tone was building and it was evident that the boy was applying himself diligently. His condition was quite good on April 7, 1975, even though he still displayed some front thigh muscle smallness and loss of tone by comparison with the left side, but there had been a fifty per cent correction which was "roughly par for the course." His right knee was quite stable and there was not a great deal of laxity there, even though there were so-called noises when he was bending it back and forth. His gait pattern was good and without stiffness. The bone fracture was totally healed, stable and molded, and there was no rotational deformity to any extent. The shortness was still present, but it will be overcome in five or six years. His right leg had returned to equal, if not dominant position. There is no reason why he should not return to normal activities. His dysfunction now existing will regress and lessen with the passage of time and he will, in the doctor's opinion, return to full function without any disability to the leg. A limited degree of normal activity for his age group was recommended. He should withstand tackling for thighbone and fracture elements, but he is advised not to play football where he may do injury to his knee because he does not have muscle in the front thigh to take the buffing around the knee. He is more restricted in normal restriction, inflection and extention capabilities at the knee than the doctor would anticipate him to be. Improvement over the next two years is expected and when he reaches full growth pattern, there will be no relative shortening so far as the right leg, of which he now has good use, is concerned.

> This can only be determined over a three to six year span. The doctor was hopeful that in five to six years, James will have absolutely normal use of his leg. The rigid exercise program to achieve this is an abnormal load for the youngster to bear. It requires him to exercise ten to fifteen minutes three or four times a day to maintain his continuity to normalcy. The doctor anticipated a very good result.

James is to return to the doctor within one year from the last examination and when he is fourteen years of age, a scanogram will be performed to measure the thighbone and tibia. This will probably be needed again when he is sixteen years of age and also when he is seventeen or eighteen. There was no significant cross-examination of the doctor.

Clearly, there is no substantial evidence of permanent injury. The jury could have considered the nature, extent and duration of the injury under the first alternative of AMI, Civil, 2213 (a).

The evidence in this case is readily distinguishable from that in *Bailey* v. *Bradford,* 244 Ark. 8, 423 S.W. 2d 565; *Belford* v. *Humphrey,* 244 Ark. 211, 424 S.W. 2d 526; *Arkansas Drilling Co.* v. *Gross,* 179 Ark. 631, 17 S.W. 2d 889 and *Missouri Pacific Transportation Co.* v. *Mitchell,* 199 Ark. 1045, 137 S.W. 242, relied upon by appellees. In *Bailey,* there was a brain injury to the child there involved, and, at the time of the trial, she had a fear of riding in an automobile, had trouble with her speech, and still suffered headaches. She could not carry on a conversation without getting tangled up with her words and having to stop.

In *Belford* the injured party had suffered a personality change, was unable to perform certain movements without pain, was, after twenty months, still taking eight muscle relaxant pills per day, and would have difficulty obtaining employment where a physical examination was required. In *Gross,* the defendant rather than the plaintiff requested an instruction making the permanency of the injury a jury question. In *Mitchell,* there was evidence of permanency of injuries and the question there was excessiveness of the verdict rather than sufficiency of the evidence to make a jury question on

permanency of the issues.

In still another case, *Duckworth* v. *Stephens,* 182 Ark. 161, 30 S.W. 2d 840, the nature of the injury, a fracture of the skull at the base, was held to be sufficient evidence of permanency to make a jury question. The testimony of the treating physician was that this injury, with the accompanying long period of unconsciousness of the patient and his bleeding from the ears, was necessarily a serious condition. The testimony of the injured party was that, at the time of the trial, several months later, he still had a discharge of pus from his ear and was still suffering great pain.

It would be a work of supererogation to compare the evidence in this case with that in others of the many cases wherein we held the evidence to be either sufficient or insufficient to pose a jury question on permanency. It is sufficient to say that the evidence in this case neatly fits into the pattern of those cases holding the evidence insufficient to produce a jury question, exemplified by *St. Louis, I.M. & S. Ry. Co.* v. *Bird,* 106 Ark. 177, 153 S.W. 104. There a seven year old boy, after being struck by a train at a railroad crossing, had suffered spasms over a period of eleven months between the injury and the trial, had become very nervous and irritable in contrast to his previous quiet nature, and had lost weight and appetite. His physician testified that the duration of the youth's condition was hard to foretell; that, although he might get well and might not, it was questionable that he ever would; and that the question depended upon the amount of involvement of the child's nervous system and nerve centers of the brain, but that it was possible he might get well under the proper surroundings; that his condition might develop into a paralytic one or a temporary loss of vitality to the extent that he would never get well; that he would have to get well in the next few years or he would never get well; that recovery from neurasthenia from a shock after a period of eleven months, was possible; that he could not say that the probabilities of recovery were greater than of his not recovering in a reasonable time; and that, the case being a doubtful one, the doctor could not be sure whether the injury was permanent or not. This evidence was at least as favorable to the plaintiff as the evidence here. The defendant asked the court to instruct the jury that the evidence did not warrant a verdict for

the child, Wharton Bird, for permanent injury. We held that the court erred in not granting the request. We said:

> *** The testimony, viewed in the strongest light in favor of appellee, does not make it reasonably certain that Wharton Bird was permanently injured. Unless there is testimony tending to show with reasonable certainty that the injury is permanent, the court should not permit the jury to assess any damages for permanent injury. [Citations omitted.]
>
> *****
>
> The experts on behalf of appellee did not testify that, in their opinion, the injury to Wharton Bird was permanent. It was a matter of speculation with them as to whether it was permanent or not. This being true, it must also have been only a matter of conjecture with the jury. But to fulfill the requirements of the law there must be affirmative testimony to the effect that the injury was permanent, before the jury would be authorized to find that such was the fact; and the court should not allow the permanency of the injury to be considered as an element of damage, where the witnesses themselves are uncertain as to whether there would be any permanent injury, and where the nature of the injury, per se, does not show that the injury was permanent.

As we have heretofore pointed out, the injuries in this case make it unlike those upon which appellees rely, in which the nature of the injury is itself sufficient evidence of permanency.

Another error was the inclusion of AMI, Civil, 2213 (g) in the instruction regarding the measure of damages to James Curry, Jr. The specific objection made went to the inclusion of the word "scar." It does not seem that a non-disfiguring scar, which is ordinarily not visible and which does not in any way diminish the future earning power of a minor boy, is a compensable damage, even though it is permanent. See *Arkansas & Louisiana Ry. Co.* v. *Sain,* 90 Ark. 278, 119 S.W. 659, 22 LRA (ns) 910; *Pine Bluff S & S R. Co.* v. *Leatherwood,* 117 Ark. 524, 175 S.W. 1184. See also, *Missouri Pacific R. Co.*

v. *Riley,* 198 Ark. 372, 128 S.W. 2d 1005. Appellees were well aware of this limitation when they alleged in their complaint that young Curry had suffered disfiguring scars that would cause him humiliation and embarrassment.

The evidence in this case fell far short of a showing that the boy had any scar that was compensable. His grandmother testified that, while he was in the hospital, the boy had a raw sore clear around the back of his right leg and another between his knee and his thigh and that it took a long time for these to heal. She testified that at the time of the trial he still had a big scar on the back of his leg and one "on top" between the knee and the thigh. His mother testified that a cast, which had covered James' body from his chest just below his shoulders down to his right foot on one leg and to his left knee on the other, caused scarring on his thigh and on the calf of his right leg. There is no other testimony about the boy's scars.

Assuming that this testimony was sufficient to indicate that the scars were permanent, there is not a word of testimony to indicate that they are disfiguring, discomforting, humiliating, disabling, or that they would normally be visible. Appellant's objection was well taken. If, indeed, the scars were a basis of compensable damage, there should have been evidence available to make a proper showing. Where definite evidence is available, "guess work" evidence would leave a jury to pure speculation. *Thomas* v. *LaCotts,* 222 Ark. 171, 257 S.W. 2d 936. The situation might have been different if the scar had been exhibited to the jury. Appellant's objection was not answered by the trial judge's remark that all appellant's lawyer had to say was, "Show me the scar." The burden of proving entitlement to damages remained upon appellees and no burden ever rested upon appellant in this respect.

We do not find reversible error in the court's refusal to submit to the jury the issue of the negligence of the father, James Curry, by special interrogatory.

Appellant alleged in her answer, counterclaim and third party complaint that the collision and the resulting injuries and damages were proximately caused or contributed to by the negligence of the parents and by the negligence of James

Curry, Jr. which she contended should be imputed to the parents. Appellant specifically alleged that the father was negligent in entrusting a Honda minibike to his young son who was not, and could not be, licensed to operate it on the highways, in permitting the little daughter to ride as a passenger on the vehicle, in failing to properly supervise the children in the use of, and travel on, the bike, in permitting the young boy to ride the bike across the highway with his young sister as a passenger and in failing to instruct the boy in the proper operation of the bike when attempting to cross a paved highway and to apprise him of the dangers of crossing a paved state highway on a minibike with a five-year-old child as a passenger. Appellant sought contribution from the father as a joint tortfeasor. She also alleged that his fault exceeded hers. By an amendment to her pleading, appellant alleged that Curry, Sr., the owner of the minibike, allowed his minor son to operate it at the time and place of the collision, knowing that the child's operation of the vehicle was prohibited by law by virtue of the child's youth, incompetence and inexperience and that he knew that the child would operate it negligently and without having a valid license. For these reasons, she sought full indemnity from the father.

The evidence, viewed in the light most favorable to appellant, certainly raised a question of fact as to the negligence of the parents, who were themselves, seeking recovery from appellant. The case was submitted to the jury for a general verdict. There were verdict forms for the jury to find for or against the parents on their claim against appellant, and to find for or against them as next friends of each of their minor children. There were also general verdict forms for findings for or against appellant on her counterclaim against James Curry for property damage. Among the instructions given the jury, there was one directing the jury to compare the negligence, if it found appellant negligent and also found a party claiming damages negligent, and if the party claiming damages was less negligent, to reduce his damages accordingly. There was no instruction or interrogatory which called upon the jury to state the percentages of negligence attributable to any party or to state whether it found either of the parents or the Curry boy guilty of any negligence. In the jury verdict in favor of the plaintiffs and fixing their damages, there is no indication whether the

jury found all the plaintiffs to be without negligence or whether the verdict was arrived at by comparing negligence, with the greater negligence being attributed to appellant. We find no verdict or judgment on appellant's counterclaim for damages to her automobile. The general verdict form could not be interpreted as relating to appellant's countersuit for indemnity or contribution.

Appellant had asked the court to submit separate interrogatories asking the jury whether the father was negligent, and, if so, to apportion the negligence between her and the father. The circuit judge refused, saying that his instructions to the jury were sufficient to cover the matter. Appellant's attorney also asked that an additional verdict form be submitted for the jury's use, in case it found against appellant on any of the other forms, in finding for her and against James Curry, the father, and fixing an amount of recovery against him, or, conversely, in finding against her and for him on her third party complaint. This request was also denied. Appellant's attorney also submitted specific forms for special interrogatories by which the jury could answer affirmatively or negatively whether they found the elder Curry guilty of negligence which was a proximate cause of damages sustained by the plaintiffs and if they answered in the affirmative, to apportion the negligence between James Curry, the father, and appellant, by percentages.

This court has been most reluctant to hold a trial judge in abuse of discretion in submitting a case to a jury for a general verdict, rather than on interrogatories, and we cannot do so in this case. Appellant had sought both indemnity and contribution from James Curry, Sr. The only responsive pleadings were general denials of appellant's allegations. It is true that no judgment was entered on these features of the case or on any part of appellant's counterclaim or third party complaint.

Still, we cannot say that there was an an abuse of discretion. The burden was on appellant to demonstrate error on appeal. *Holt* v. *Holt,* 253 Ark. 456, 486 S.W. 2d 688. Appellant failed to do this. She argued in her original brief that the determination and quantification of the negligence of James Curry, Jr., James Curry and Rosie K. Welter were required,

without saying why. In her reply brief, she said that the court allowed the jury to ignore the negligence of James Curry, Jr. and Sharon Curry in awarding damages against Mrs. Welter. Yet the jury was instructed to compare negligence and we are unable to say that there was any more reason for the court to require that this be done by special interrogatories in this case than in others involving comparative negligence.

We can only assume that appellant's contention is based upon the objections registered in the trial court, even though appellant may have abandoned the contention that she is entitled to either indemnity or contribution from the parents. If she were, the failure to submit the interrogatories requested would have been a clear abuse of discretion. But we have found no basis for either contribution or indemnity in this case. Appellant was not entitled to contribution, because the parents were not joint tortfeasors with appellant under the Uniform Contribution Among Tortfeasors Act. Ark. Stat. Ann. § 34-1001 et seq (Repl. 1962). It seems to be well settled that there is no right to contribution under the act from one who is not liable in tort to the injured person. Ark. Stat. Ann. § 34-1001, 1002; Annot. 34 ALR 2d 1107 (1954). Before the statute comes into play, there must be a common liability to an injured party, and the injured party must have a possible remedy against both the party seeking contribution and the party from whom it is sought. *Troutman* v. *Modlin,* 353 F. 2d 382 (8 Cir., 1965); *Cox* v. *Maddux,* 255 F. S. Supp. 517 (D.C. Ark., 1966). See also, *C & L Rural Elec. Coop. Corp.* v. *Kincaid,* 221 Ark. 450, 256 S.W. 2d 337; Annot. 26 ALR 3d 1283 (1969). It is clear that these minor plaintiffs had no remedy against their parents. *Rambo* v. *Rambo,* 195 Ark. 832, 114 S.W. 2d 468; Woods, Family Torts in Automobile Cases, 13 Ark. L. Rev. 299 (1959).

Likewise, we have found no basis for indemnity. The right to indemnity, where one of the two parties is not liable to the injured party for the joint wrong, must be based upon a relationship other than that of joint tortfeasors. *Jack Morgan Construction Co.* v. *Larkan,* 254 Ark. 838, 496 S.W. 2d 431. See also *Citizens Coach Co.* v. *Wright,* 228 Ark. 1143, 313 S.W. 2d 94.

Appellant argues vehemently that she was entitled to a

directed verdict, and we are sharply divided on the question. A majority of the court is of the opinion that there was substantial evidence that appellant, the driver of the motor vehicle that struck the minibike on which the children were riding, was guilty of negligence that was a proximate cause of the injuries of the children and that we cannot say that her negligence did not exceed the negligence of the children or that of the parents, as a matter of law. The question is a close one and a part of our difficulty arises from the fact that the Curry boy's testimony was almost exclusively by affirmative and negative answers to leading questions on direct, as well as cross, examination. We are well aware of the reasons for permitting direct examination of children of tender years by leading questions, but we also know that such children are often able to relate incidents in which they are involved with some degree of clarity and sometimes more accurately and vividly than when simply giving affirmative and negative answers. Be that as it may, there is evidence tending to show that Mrs. Welter did not act as a reasonably careful person would under similar circumstances.

Ramsey's Grocery is on the east side of Highway 95 on which Mrs. Welter was driving south. There is a county gravel road south of the grocery which intersects Highway 95, with a slight jog to the south, and continues west toward the Curry residence. It is the road taken to the grocery by the Curry children. As they prepared to enter the intersection for their return home, cars were parked west of the gas pumps and outside the canopy which extended from the front of the Ramsey Grocery to the gasoline pumps. One of them was a "panel truck" parked near the pavement on Highway 95. The Curry youth said he was south of these vehicles approaching the highway crossing from a point north of the county road and, when he was unable to see to the north beyond the panel truck, pulled the front tire of the minibike onto the paved highway, stopped, and saw the Welter car approaching from his right "kind of fast" but was unable to back up and was struck almost immediately. Although he said that he only went about a foot on the pavement, the physical facts show that the minibike was further west than that on the paved highway when struck. Young Curry said that, when he first saw the Welter car, it started crossing over the highway toward him. He did not remember being struck.

In order to cross the highway from the point young Curry entered it, it would be necessary for him to cross at an angle to the south or his left. The investigating state trooper found skid marks made by the automobile commencing in the southbound traffic lane slightly north of a stop sign east of the highway and north of the county road governing traffic approaching the highway from the east. The skid marks veered to the east from the very beginning, and could be traced into the yard of the Kendrick home just south of the intersection and east of Highway 95, where the automobile came to rest, headed southeast by east at almost a right angle to its direction of travel with the totally destroyed Honda Bike and the little girl under it. The westernmost skid mark, or that made by the right wheel of the automobile, was unbroken on the pavement for a distance of 37 feet 8 inches. The easternmost skid mark, made by the left wheel of the Welter vehicle, was broken. The first segment was 26 feet long. After a skip it continued on the same arc for another 21 feet 9 inches. There was a gouge mark in the pavement at the end of the westernmost skid mark and about the middle of the second, or southernmost, portion of the easternmost skid mark. There was no debris left in the southbound traffic lane. There were no gouge marks in the southbound traffic lane. The gouge marks described by the investigating trooper commenced near the east edge of the pavement in the northbound traffic lane and continued to the edge of the pavement and into the area under the car where it came to rest.

Mrs. Welter testified that she had never travelled over 50 miles per hour on Highway 95 and that she slowed down a "tiny bit" as she approached the Ramsey Grocery because of the cars parked there. She said that when she first saw the minibike, it was right on the edge of the highway and she was in front of the store, and she could not tell whether it was stopped or moving, but that in a split second it came across the road in front of her.

It was not unreasonable for the jury to believe that Mrs. Welter approached the intersection at an excessive speed for the conditions then existing and that she did not maintain a proper lookout and control of her vehicle, particularly in view of the fact that it might be deduced from the physical facts that the minibike was struck near the edge of the pavement in

the northbound traffic lane. It would be difficult to explain how this could have happened, if the vehicle were under proper control. To say the least, we cannot say that the Curry boy's version of the incident is either physically impossible or inherently improbable.

Since we find error in the judgment in favor of James Curry, Jr., but not in that in favor of Jeanna Curry, we are faced with the difficult problem of disposing of the judgment in favor of their parents. The jury returned a verdict in their favor for $15,000 for their damages on account of the injuries to both children. They sought damages for the children's medical bills, the loss of their services, and the mother's care and nursing during their recovery. A review of the record reveals no means of ascertaining what part of this verdict was attributable to the injuries to James, Jr. and what part to Jeanna.

Our cases on the subject do not seem to reach the question of the effect of a reversal of a judgment in favor of a minor upon the judgment in favor of the parent. We have said that they are independent causes of action. See *Ennis* v. *Brainerd,* 240 Ark. 16, 397 S.W. 2d 809. Yet, we have analogized the situation of a parent and a child seeking to recover from an alleged tortfeasor to that where an injured party seeks recovery from an agent and principal in that a verdict in favor of the agent exonerates the principal, because the agent is the primary party and the principal is the secondary party, i.e., liability of the principal is based wholly upon negligence of the agent. *Pigage* v. *Chism,* 237 Ark. 873, 377 S.W. 2d 32. By this analogy, we held that an injured child could not claim advantage of inconsistent verdicts allowing his parents recovery but holding against him as to liability, saying that the minor was asking that the "tail wag the dog." Although the defendant there was willing to accept the inconsistent verdicts, we said in dictum that the defendant could have complained, in which case, presumably, the dog would wag the tail, as we said that the verdict in the case of the primary party was the controlling verdict. This decision definitely puts us in the category of jurisdictions that recognize that the causes of action are independent but that the independent cause of action of the parents is for consequential damages,[1] and

[1]See 59 Am. Jur. 2d 212, Parent & Child, § 112; *Shiels* v. *Audette,* 119 Conn. 75, 174 A. 323, 94 ALR 1206 (1934), cited with approval in *Pigage.*

secondary, and that of the child primary.

There is an analogy to the situation where husband and wife have causes of action against a tortfeasor for injuries to the wife. We have classified the husband's cause of action for loss of consortium and for medical expenses as derivative and subject to the defense of comparative negligence of the wife, and to the bar of a judgment adverse to the wife on her cause of action, even though the causes of action may be prosecuted independently. *Lopez* v. *Waldrum Estate,* 249 Ark. 558, 460 S.W. 2d 61. Of course, the parents' right of action is somewhat similar to that of the husband for personal injuries to his wife. 59 Am. Jur. 2d 211, Parent & Child, § 112.

From the above holdings, we definitely fall into that category of jurisdictions having the rule that a parent cannot recover on his cause of action unless the child can recover on his cause of action arising out of the same negligent act of the party against whom both seek recovery and that the child's contributory negligence may be asserted against the parents, even though that negligence is not imputable to them. See *Shiels* v. *Audette,* 119 Conn. 75, 174 A. 323, 94 ALR 1206 (1934) (quoted with approval in *Pigage,* supra); *Dudley* v. *Phillips,* 218 Tenn. 648, 405 S.W. 2d 468, 21 ALR 3d 462 (1966); *Callies* v. *Reliance Laundry Co.,* 188 Wisc. 376, 206 N.W. 198, 42 ALR 712 (1925); *Fekete* v. *Schipler,* 80 N.J. Super. 538, 194 A. 2d 361 (1963); *Jones* v. *Schmidt,* 349 Ill. App. 336, 110 N.E. 2d 688 (1953); *Tidd* v. *Skinner,* 225 N.Y. 422, 122 N.E. 247, 3 ALR 1145 (1919). See also, 67 CJS Parent and Child, §§ 41a, 45, 47, pp. 742, 748, 752; 59 Am. Jur. 2d 222, Parent & Child, § 121; Restatement, Law of Torts, § 703.

In spite of the fact that the errors which require reversal of the judgment against the son relate to damages only, on remand, a new trial on all issues, including that of the negligence of the boy as a proximate casue of the injuries is required. Because we cannot separate the damages awarded the parents for the injuries for the two children, we must set aside the judgment in favor of the parents in its entirety. See *Clark* v. *Arkansas Democrat Co.,* 242 Ark. 497, 413 S.W. 2d 629.

The judgment in favor of James Curry, Jr. and the judgment in favor of James Curry and Sharon Kay Curry, as

father and mother and next friends of James Curry, Jr. and Jeanna Curry, are reversed and the cause is remanded for a new trial as to these parties.

Mr. Justice GEORGE ROSE SMITH and Mr. Justice BYRD would reverse all judgments and dismiss the action.

Jimmy Lee DYAS *v.* STATE of Arkansas

CR 75-192 539 S.W. 2d 251

Opinion delivered July 19, 1976

Appellant, *Pro Se.*

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

JOHN A. FOGLEMAN, Justice. Appellant Jimmy Lee Dyas was convicted by a jury of capital felony murder for his part in the killing of Curtis Eugene Zachry, husband of Carolyn Dianne Zachry, who has likewise been convicted of the murder in a separate trial and whose appeal has earlier come

befo e *Zachry* v. *State,* 260 Ark. 97, 538 S.W. 2d 2 eceived a sentence of life imprisonment witho this conviction and sentence Dyas took his orig

Foll r from this court reinvesting the trial court with appellant filed a motion in the circuit court of Li unty for new trial on 6 January 1976. The motion ed and appellant has brought a supplemental l told, appellant offers fifteen points for reversal. n h, we have concluded, merits reversal. They are in the order in which they were presented, the e being treated together for convenience. We wi iew testimony except as it becomes necessary to treat points because it is very similar to the testimony sum d in *Zachry* v. *State,* supra.

1

The Court Erred in Admitting Into Evidence Statements Made By A Witness For The State, Before The Jury, Identifying The Source Of Two Rings Belonging To The Murder Victim, The Court And The State Being Well Aware That The Rings Had Been Turned Over To The Court And Law Enforcement Officials For The State By Appellant's Defense Attorneys.

2

The Court Erred In Allowing The Prosecuting Attorney For The State To Comment Upon The Source Of The Two Rings Belonging To The Murder Victim In Violation of Appellant's Attorney-Client Privilege.

3

The Court Erred In Admitting Into Evidence Statements Made By A Witness For The State Concerning The Alleged Source Of Two Rings Belonging To The Murder Victim, Because The Statements Constituted Hearsay.

The testimony upon which all of these points hang was

given during the state's redirect examination of Sgt. Carroll Page, who investigated the murder. However, the first mention of the rings was made by appellant's principal attorney during his cross-examination of Page. It came about thus:

> Q. (Cont'd by Mr. Boyd Tackett, Sr.) Do you know of anything that I have done during your investigation since the 9th day of the month, since the 9th day of January that wasn't trying to cooperate with you and the other officers. Have I tried to keep anything from you?
>
> A. You furnished some information. Some good and some ——
>
> Q. I even brought you the two rings taken off the dead man, didn't I?
>
> A. Yes, sir.
>
> Q. MR. BOYD TACKETT, SR.: Judge, if this is wrong, you can tell me, and I will stop.
>
> THE COURT: Yes, sir.

He pursued the line of questioning despite the fact the items mentioned were not in evidence and finally drew an objection from the state. The record follows:

> Q. (Cont'd by Mr. Boyd Tackett, Sr.) All right, there is evidence here that there was a key ring taken off the dead body and there was two diamond rings taken off the dead body. They've been introduced.
>
> MR. GEORGE STEEL, JR.: No, sir, they have not.
>
> MR. BOYD TACKETT, SR.: They have not?
>
> Q. (Cont'd by Mr. Boyd Tackett, Sr.) Well, anyway, before it gets to that, there's testimony that there was a watch taken off the body. Have you ever found the watch?

MR. GEORGE STEEL, JR.: Judge, I submit that this is not proper cross examination. We haven't even gone into that yet.

THE COURT: He is making him his own witness, Mr. Steel. When he does that, he is bound by his answers.

MR. BOYD TACKETT, SR.: That's right, I am bound by his answers.

THE COURT: All right.

On redirect examination, Sgt. Page testified without objection to an explanation allegedly given him by Tackett about how he came into possession of the rings.

Q. I show you two diamond rings, Officer Page, and I ask you, sir, are those the rings that Mr. Tackett refers to that he gave to you, sir?

A. Yes, sir.

Q. And have you in the course of your investigation determined that those rings belonged to the deceased, Eugene Zachry?

A. I have, sir.

Q. I believe Mr. Tackett has stated that he turned those rings over to you, is that correct, sir?

A. That is true.

Q. When he did that, Officer Page, where did he say he obtained them?

A. From Jimmy Dyas' wife, Bunkie.

Q. Now, did he go any further than that, Officer Page? Did he say where she got them?

A. From a lock box — safety deposit box in the bank.

Q. Now, Sgt. Page, I ask you, sir, have you since that time attempted to determine of your own knowledge where the rings came from?

A. Yes, sir.

Q. Have you been able to determine anything different than what Mr. Tackett told you on the night he gave them to you?

A. I've been told a different story by Mr. Tackett — one or more different stories.

And, on recross-examination, appellant's attorney sought to elicit a different version of their exchange, as follows:

Q. Now, Carroll, I want you to remember something real close. When you asked me where I got those rings, didn't I tell you, "Carroll, I can't tell you that."

A. You did not, sir.

Q. I told you that I got them from Bunkie?

A. Yes, sir.

Q. Now, Carroll, don't you know I didn't tell you that?

A. Yes, you did, sir.

MR. GEORGE STEEL, JR.: Judge, if Mr. Tackett made Sgt. Page his witness for this purpose, I submit that he can't cross examine him.

MR. BOYD TACKETT, SR.: I submit I am entitled to get on that witness stand and tell the truth.

THE COURT: Not at this time, Mr. Tackett.

MR. BOYD TACKETT, SR.: I know.

Q. (Cont'd by Mr. Boyd Tackett, Sr.) I gave you those rings, and when I handed you those rings, I was in the hall with J. O. Moore present, didn't you ask me where those rings came from and I said, "Carroll, I can't tell you, I represent three people."

A. You told me this at Judge Steel's house, sir.

Q. Well, I know that, but I didn't tell you that at Judge Steel's house. I told you that at the jailhouse, didn't I?

A. No, sir.

Q. When I handed you those rings after I identified them through Dianne that those were Eugene's rings, didn't you turn around and say, "Boyd, where did you get those rings"? And I said, "Carroll, I can't tell you"?

A. Actually, I received the rings at Judge Steel's house and had them in my possession, handed them to you when we went into the jail and you showed them to Dianne and then you handed them back to me. I signed a receipt for them at Judge Steel's house at which time you told me that you got them from Mrs. Dyas.

In support of his first point for reversal appellant seeks to analogize the case of *State* v. *Olwell,* 64 Wash. 2d 828, 394 P. 2d 681, 16 ALR 3d 1021 (1964), wherein the court decided that, where an attorney must and does surrender evidence to be used in the prosecution of his client, and the state attempts to introduce such evidence, it should take precautions to make certain the source of the evidence is not disclosed to the jury where it is within the protection of the attorney-client privilege. But, to be protected as a privileged communication, the court concluded, information or objects acquired must have been communicated or delivered to the attorney by his client and not merely obtained by the attorney while acting on behalf of his client, for if the evidence, in *Olwell* a knife, were obtained from a third person with whom there was no attorney-client relationship, the communication would not be privileged. Thus, according to *Olwell,* the privilege applies only to evidence if it is received by the attorney from his client

and, if this is the case, the concern is that the immediate source of the evidence be held in confidence.

Page's testimony indicated that Attorney Tackett's source was not the appellant. Therefore, *Olwell* is readily distinguishable. But, even if the privilege is stretched to protect evidence given to a defendant's attorney by defendant's spouse, *Olwell* is still inapt.[1] It was appellant's attorney who opened the door to the examination of the witness about the source of the rings by his questions and disclosures during his cross-examination. See *McDonald* v. *State,* 165 Ark. 411, 264 S.W. 961; *Smith* v. *State,* 172 Ark. 156, 287 S.W. 1026. If there was any violation of the attorney-client privilege, it was by appellant's attorney, who disclosed that he was the source of the rings by his questioning of Page, and who revealed to Page how he in turn had acquired them, if he made the statement attributed to him by Page.

Following the prosecutor's objection that appellant's attorney was exceeding the limits of cross-examination, appellant's attorney agreed that he had made Page his own witness and would be bound by his answers. See, *St. Louis, I.M. & S. Ry. Co.* v. *Raines,* 90 Ark. 398, 119 S.W. 665. He did not object at any time during Page's testimony on redirect examination. Rather, he chose to question the witness about that testimony and sought to elicit a retraction. And, in spite of the fact that Page had become his own witness on the matter of the rings, the court suffered him to attack Page's redirect testimony, thus, in effect, permitting appellant to confront the witness and seek to undermine his credibility. We emphasize that the record discloses that the rings had not been introduced in evidence and their whereabouts had not been mentioned, prior to the examination of Page on the subject by appellant's attorney.

Finally, appellant's attorney expressed a wish to testify on the matter himself and raised an objection based on hearsay only the next day, as part of a motion for mistrial, after

[1]Appellant's wife later took the witness stand as a witness for appellant and, without any claim of privilege, testified that she had never seen the rings until Tackett showed them to her when she was in the automobile with the Tackett law firm on the way to Judge Steel's residence where the rings were surrendered by Tackett.

nine other witnesses had testified and Sgt. Page had twice been recalled to the witness stand. This was decidedly too late. *Montgomery* v. *First National Bank of Newport,* 246 Ark. 502, 439 S.W. 299. Denial of a motion to strike testimony of a witness is not an abuse of the trial court's discretion, if no objection or motion is made until after other witnesses have testified. *Arkansas State Highway Commission* v. *Stallings,* 248 Ark. 1207, 455 S.W. 2d 874. We find no error in the admission of the testimony of Sgt. Page.

Because it was appellant's attorney who first mentioned the rings taken from the victim and revealed himself as the source, thus opening the door for testimony about them, it is doubtful that the matter remained in any respect privileged. Furthermore, appellant's attorneys failed to make timely objection to any of the remarks of the prosecuting attorney they now insist are prejudicial. The issue cannot be raised for the first time on appeal. *Payne* v. *State,* 246 Ark. 430, 438 S.W. 2d 462; *O'Neal* v. *State,* 253 Ark. 574, 487 S.W. 2d 618. Therefore, we cannot say that the court erred in permitting, or that prejudice arose from, requests by the prosecution that it be allowed to examine witnesses who could corroborate Sgt. Page's testimony regarding the conversation he had with appellant's attorney at the time the rings were turned over. These requests were made in conjunction with the state's timely objection to appellant's attorney's questioning of another witness, the wife of appellant, about the same transaction. At that time, appellant's attorney expressed his willingness to agree to the examination of such witnesses if he, too, were allowed to testify. The court said that he would be permitted to do so only if he disqualified himself from further participation in the case. He did not disqualify himself. After Mr. Dyas had testified and near the close of defendant's case, the trial judge advised Tackett that he would be permitted to testify. Thereafter, just before appellant's case was rested, and before commencing rebuttal, the prosecuting attorney asked if Mr. Tackett was going to testify. Tackett's partner assisting him in the trial responded, "No, sir, he is not at the request of his client." The state's attorney again mentioned its witnesses only after the close of testimony when a juror said he wanted to ask about the rings and appellant's attorney indicated he didn't mind if this case were reopened for this purpose. Nothing came of the request.

Appellant's first, second and third points for reversal are without merit.

4

There Was Insufficient Evidence Upon Which To Base A Jury Verdict And Court Judgment Finding Appellant Guilty Of Capital Felony Murder.

Charles Bean's testimony placed Dyas at negotiations regarding the murder at the Zachry home when the first attempt was made to lure Mr. Zachry out and murder him, at the scene of the crime, and in possession of a portion of a sum of money given to Bean by Mrs. Bessie Tolleson, mother of Carolyn Diane Zachry, as payment for the killing.

In his testimony about the actual killing, Charles Bean specifically mentioned that either he or appellant ordered Eugene Zachry to "turn out his pockets" as they intended to rob him. He also explained that he had Zachry remove his shoes and that appellant, as they returned from the scene of the crime, threw them into the creek from which they were later recovered. He also said that they robbed Zachry of all valuables and split the contents of his wallet. According to Albert C. Moore, who found Zachry's body, Zachry's pockets were turned out and his shoes were gone. Sheriff Surber and Sgt. Page both testified that there were no jewelry or valuables on the body when found, indicating that Zachry had been robbed. All of this enhanced the credibility of Bean's testimony, since, if an accomplice is corroborated as to some particular fact or facts, the jury is authorized to infer that he speaks the truth as to all. *Payne* v. *State,* 246 Ark. 430, 438 S.W. 2d 462.

Of course, the testimony of an accomplice must be corroborated by other evidence tending to connect the defendant with the commission of the offense in order to support a capital felony murder conviction. Ark. Stat. Ann. § 43-2116 (Repl. 1964). The requisite corroborating evidence must be of a substantial character and, of itself and independently of the statement of the accomplice, tend to connect the defendant with the commission of the crime but it need not in itself

be sufficient to support a conviction. *Shipp* v. *State,* 241 Ark. 120, 406 S.W. 2d 361.

Appellant admitted in his testimony that he accompanied Charles Bean during the murder. He said that he drove Bean to Zachry's house and then drove them to the scene of the murder, which he witnessed. He acknowledged that a .38 caliber pistol which he was carrying in his car was used by Bean to administer the coup de grace to Zachry, after Bean had emptied his own gun. He vowed that he was unaware of Bean's intentions, that he was an unwilling and unwitting companion, and that Bean threatened him in order to get him to cooperate. Yet, he admitted meeting Bean two days after the murder and giving him the .38 caliber pistol for disposal and later accepting two one hundred dollar bills from him, money which Bean had testified he received from Dianne Zachry's mother in payment for the killing.

We have held in a somewhat similar case in which the defendant was accused of murder during the commission of a robbery that the testimony of the defendant in which he admitted that he was present at the crime, but denied participation in the homicide, was itself sufficient corroboration to satisfy the statute and support a conviction. Ark. Stat. Ann. § 43-2116. *Ford* v. *State,* 205 Ark. 706, 170 S.W. 2d 671. While corroborating evidence must do more than raise a suspicion of defendant's guilt, it need not be direct, but may be circumstantial so long as it is substantial and tends to connect the defendant with commission of the offense. *Jones* v. *State,* 254 Ark. 769, 496 S.W. 2d 423. Presence of an accused in proximity to the crime, opportunity, association with persons involved in a manner suggesting joint participation and possession of instruments used in the commission of the offense are relevant factors in determining the sufficiency of corroboration by circumstantial evidence. *Jackson* v. *State,* 256 Ark. 406, 507 S.W. 2d 705. A witness, Raymond Cole, identified appellant as the person who accompanied Charles Bean and the driver of the car in which Bean arrived when, on the day of the murder, Bean borrowed the .22 caliber pistol used in the killing from George McClure. He also testified that Dyas was with Bean at the place and time McClure testified the pistol was returned. As noted already, appellant admitted that he had a .38 caliber pistol in his car on the night of the

murder and that Bean had used it to make sure Zachry was dispatched. Dr. Rodney Carlton, the State Medical Examiner, testified at the trial that he found a .38 caliber bullet in the victim's head. Loyse Zachry, the victim's father, testified that he saw appellant and Bean at the Zachry residence on the afternoon preceding the murder. William Lumpkin testified that on the night appellant was arrested and placed in a cell with him, appellant had asked him to provide him with an alibi for the night of the murder. Lumpkin also told of an earlier trip with Bean and Dyas to look the Zachry house over, during which he said the conversation related its purpose to the killing of Zachry.

There was sufficient evidence and sufficient independent corroboration of the testimony of Charles Bean to support the conviction of appellant.

5

The Court Erred In Admitting Into Evidence, Over The Objection Of Appellant, Statements Made By One Alleged Co-conspirator, Charles Watson Bean, To Another Alleged Co-conspirator, Carolyn Dianne Zachry, And The Substance Of Statements Made By Carolyn Dianne Zachry To Charles Watson Bean, All In The Absence Of Appellant.

In his testimony, Charles Bean related that he had spoken by telephone with Carolyn Zachry in early December, 1974 to arrange a meeting, and that they later met and Bean offered to kill Eugene Zachry. Upon appellant's objection, the trial court directed that Bean's testimony be limited to what he had said in the conversation and not relate what Mrs. Zachry may have said to him. In testifying about his meeting with Mrs. Zachry, Bean said that she had indicated that she was in a hurry and wanted him to "do it" as soon as possible. Appellant's attorney again objected to the admission of that which was said in the absence of the appellant. The objection was sustained and the court instructed the jury to disregard the information obtained by Bean from Mrs. Zachry.

Appellant argues that the conversation was inadmissible

hearsay. We agree that anything said by Mrs. Zachry was, but Charles Bean's own words were not, hearsay. The court limited his testimony in advance to this part of the conversation and properly admonished the jury to disregard the testimony about what Mrs. Zachry indicated. Any error was cured by prompt action and appellant was not manifestly prejudiced. *Moore* v. *State,* 251 Ark. 436, 472 S.W. 2d 940. Appellant did not move for a mistrial.

Appellant also suggests that the testimony was improper because appellant had not yet become involved in the conspiracy and the state had not yet established a prima facie case of conspiracy against appellant. He concedes, however, that evidence of previous acts of co-conspirators may be admissible against a defendant once a prima facie case of conspiracy has been proved and the nature and objectives of the conspiracy shown by the state. *Willis* v. *State,* 67 Ark. 234, 54 S.W. 211. We have held that it is within the discretion of the trial court to permit the statement of an alleged conspirator to be introduced in a prosecution of a fellow conspirator before evidence tending to prove the conspiracy has been introduced. *Easter* v. *State,* 96 Ark. 629, 132 S.W. 924. Here, as in *Easter,* it was later in the testimony of the same witness that the evidence tending to establish the conspiracy was introduced and it was a matter within the sound judicial discretion of the court to control the order in which the testimony should be adduced. *Easter* v. *State,* supra. After the trial judge had permitted Bean to state what he had said to Mrs. Zachry, over appellant's objection that Mrs. Zachry was not on trial, Bean testified that he had met with Mrs. Zachry immediately after the telephone call, told her that he had been told that she wanted her husband done away with, thought he could arrange it if they could get together on the price, that they did agree on it, and he told her that he was relatively sure Monroe Lindsey would not do the job, and that he was alone that day, but did not intend to do the job alone. No objection was made to any of this testimony. It was when appellant testified that he told Mrs. Zachry that he would have to have a few days to get things lined up and that she was in a hurry to get it done and wanted him to do it as soon as possible, that appellant first objected to what was *said* in his absence. The trial court then admonished the jury to completely disregard information Bean obtained from Mrs.

Zachry. Appellant made no further objection, asked no further admonition and did not move for a mistrial. Bean then proceeded, without any objection being made, to relate that he made several trips to Ashdown to meet with Mrs. Zachry and that Dyas was present on some of the occasions. No objection was made to this testimony. We find no error in the admission of Bean's testimony, insofar as objections made are concerned.

6

The Court Erred In Admitting Into Evidence, Over The Objection Of Appellant, Statements Made By Witnesses For The State, Concerning Financial Arrangements Made By Alleged Co-conspirator, Carolyn Dianne Zachry, In The Absence Of Appellant.

The state called and examined two witnesses who testified about financial transactions carried out by Carolyn Dianne Zachry. In response to appellant's first objection that he had not been present when these transactions took place, the state answered that the testimony was offered to establish the motive and the court permitted the testimony. Mr. Bill Brown, president of the Bank of Ashdown, said that Carolyn Dianne Zachry had executed two promissory notes, and that he had made two loans to her before and after the killing. The first was in the amount of $2,000 on 29 October 1974. Admittedly the transaction predated appellant's involvement in the conspiracy under any view of the evidence. Bean testified that it was in December that he proposed that Dyas join him in the murder scheme and Dyas agreed to participate. However, it is significant that Bean made a promise of money to interest Dyas in the scheme.

Bean said he approached Dyas by inquiring whether Dyas would be interested in helping Bean do something in which quite a bit of money, approximately $5,000, was involved, on a fifty-fifty basis, and that Dyas agreed that he would. Thereafter, according to Bean, Dyas became involved in negotiations with Mrs. Zachry when she decided that she would not be able to pay until after the commission of the crime, and the price was doubled. Bean said that this agreement was reached in December and that he met and talked

with Dyas about the murder of Zachry on other occasions. He said that after he and Dyas had decided to do this together, they came to Ashdown on numerous occasions and, when a money problem arose, Dyas was with him when he met Mrs. Zachry at a carwash on the New Boston road in Texarkana. Bean could not recall whether Dyas had first seen Mrs. Zachry on this occasion or on the occasion of a meeting at a Piggly Wiggly store, but said that he believed that, at the meeting at the carwash, Mrs. Zachry had been unable to come up with the money to pay them $5,000 so it was agreed that they would wait until after the killing for the money, but that the price would be $10,000. He said that Dyas was present when the matter was discussed with Mrs. Zachry.

Mr. Brown testified that the second loan in the amount of $1,500 was made on 16 January 1975, eight days after the killing, and certainly after Dyas is alleged to have joined the conspiracy. There was no error in the admission of this evidence of the latter transaction by him as co-conspirator. *Easter* v. *State,* supra.

The second witness, Miss Mary Lou Moore, manager of the Ashdown branch of First Federal Savings and Loan, testified about a certificate of deposit issued to and two withdrawals made by Carolyn Dianne Zachry on 29 October 1974. Like the first transaction testified to by Mr. Brown, this transaction admittedly came before any involvement by appellant in the conspiracy. In light of the fact that money was the only inducement and motive for Bean's and Dyas' involvement in the murder, this testimony certainly cannot be said to have been irrelevant as appellant contends, particularly when viewed in the light of other testimony of Bean regarding his receipt of money from Carolyn Dianne Zachry and her mother. Furthermore, previous acts of a co-conspirator may be admissible against a defendant once a prima facie case of conspiracy is proved when such acts show the nature and objectives of the conspiracy. *United States* v. *Morton,* 483 F. 2d 573 (8th Cir., 1973). Although we have said that the acts and declarations of any conspirator, in furtherance of a common enterprise, are admissible against any or all of the others, such acts or declarations must be done or said while the conspiracy is in progress and not before it has begun. *Willis* v. *State,* supra. Still, we cannot say

that the testimony about the transactions was devoid of probative value in the establishment of the state's case of a contract murder and conspiracy. Bean's testimony would show that Dyas entered into an ongoing conspiracy and would tend to explain the connection and joint action of the parties in the premises. See, *Lesieurs* v. *State,* 170 Ark. 560, 280 S.W. 9. In the light of this testimony and other strong independent evidence of appellant's guilt, we cannot say that there was reversible error in the admission of any of the testimony to which objection was made.

7

The Court Erred In Admitting Into Evidence, Over The Objection Of Appellant, Statements Made By Witnesses For The State, Concerning Life Insurance Policies Taken Out By The Murder Victim, In The Absence Of Appellant, And Remote In Time.

Testimony by James E. Cobb and Wetzell Ward showed that Eugene Zachry had in the past purchased three policies of insurance on his life and that these were still in force at the time of his death. Appellant argues that their testimony was irrelevant and constituted hearsay.

Appellant does not demonstrate why the testimony about the issuance of the policies should be regarded as hearsay. In both cases the witnesses themselves had sold the policies about which they testified to Zachry. We find no error in this respect in admitting the testimony.

The testimony was relevant as it related to the motive underlying the conspiracy and murder. It was probative as to the motivation of Carolyn Dianne Zachry, appellant's co-conspirator. We have already discussed the evidence which showed that Bean originally contracted with Mrs. Zachry to do the killing for $5,000 and that he used a promise of big money to interest appellant in the crime. The testimony objected to was perhaps most relevant to the negotiations that took place between Mrs. Zachry and the killers after Dyas had joined the conspiracy and Mrs. Zachry decided that she was unable to pay in advance. The new agreement called for $10,000 payable after the murder, according to Bean. It

might reasonably be inferred that there was a relevant connection between the existence of these policies and Mrs. Zachry's ability to pay twice as much after the death of her husband than the original contract had stipulated. Appellant's point is without merit.

8

The Court Erred In Admitting Into Evidence Radio Logs And Statements Concerning Radio Logs Maintained By The City Of Ashdown, Arkansas, Over The Objection Of Appellant That Said Logs And The Testimony Of Witnesses Concerning The Logs Constituted Hearsay.

The logs about which appellant complains were made on the evening of 28 December 1974 by the dispatcher for the Ashdown City Police Department, Betty Davis, on the basis of whose testimony they were admitted into evidence. This was the evening, according to Charles Bean, on which Dyas had accompanied Bean to the Zachry residence and attempted to persuade Eugene Zachry to admit them to the house by telling him that there had been a wreck down the road and asking to use his phone. Bean said that Zachry spoke to them through a window, refused them admittance and said he would phone himself. The telephone log showed that a wreck had been falsely reported at 11:15 p.m. on the evening of the 28th. The log next showed that some thirty-five minutes later Eugene Zachry telephoned and said that he was the one who had made the earlier call reporting the wreck. The log contained a physical description of a man Zachry said had come to his door requesting to use the phone to report the wreck and noted that Zachry had opined that the person had "just wanted to get into the house." W. D. Webster, Chief of Police for Ashdown, testified that he was the custodian of the records of the police department, including the telephone logs. He identified the logs as official records of the City of Ashdown and stated that they were kept in the due course of business. Upon appellant's objection, the court held an in-chambers hearing to decide the admissibility of the logs where it was adduced that Webster had kept the logs for four years, that they were always accurate, never altered and checked daily. After the hearing in camera,

Webster identified the log. When he was asked to read the item pertaining to Zachry's call, the circuit judge interjected, and, out of the hearing of the jury, indicated that it should not be read to the jury until it had been substantiated by the dispatcher who recorded it. The judge then stated in open court that the record would not be read at that time to the jury. The record was then marked for identification and the court and appellant's attorney agreed that this was done with the limitation that it be substantiated and that it was not for the purpose of establishing the truth of the matter but that it was introduced only for establishing the fact that it was the official record. The prosecuting attorney then stated that he had no further question and that he didn't suppose there would be any cross-examination of the witness, but appellant's attorney, Moore, stated that he would like to cross-examine and was permitted to do so. The cross-examiner then proceeded to read the item and Webster confirmed his reading, in spite of the prosecuting attorney's protest that he didn't want appellant's attorney to read the log and then object to it. The cross-examining attorney then established by the testimony of Chief Webster that the description given by Zachry could fit numerous persons, including the attorney himself. He further emphasized through this examination the absence of any limp by the person described. This was pertinent because other testimony had established that one of Dyas' legs was shorter than the other and indicated that he walked with a decided limp. The logs were thereafter admitted into evidence under the exception to the hearsay rule for records made in the regular course of business, during the testimony of the dispatcher. Ark. Stat. Ann. § 28-928 (Repl. 1962) permits the introduction into evidence of records made in the regular course of business, the entries having been made to record "any act, transaction, occurrence or event, if made in the regular course of business." There was sufficient evidence in the record to meet the requirements of the statute to show that the records were regularly kept and made within a reasonable time after the event recorded. *Harrison* v. *State Farm Mutual Ins. Co.,* 230 Ark. 630, 326 S.W. 2d 803. Therefore, we find no error in the court's admission of the logs as they reflected that the two calls were received on the evening in question from Zachry, the nature of the report given by Zachry and the fact that the police investigated and found the report to be false. These

were the sort of "transactions" the statute contemplates. No objection was made to the reading of the log by the prosecuting attorney after it had been authenticated by the testimony of the dispatcher as to accuracy. The prosecuting attorney then asked permission to pass the log to the jury but, before doing so, remarked that someone had indicated the pertinent part by marking it with blue ink, and inquired whether there were any objections to this mark and received a negative response from appellant's chief counsel. Thereafter, one of appellant's attorneys established by cross-examination of the witness that she knew Eugene Zachry and recognized his voice when he called, that Zachry didn't describe any limp or other physical characteristics of the person who came to the window, that she knew Dyas, and would describe him as walking with a limp.

Appellant is in no position to complain about the admissibility of Zachry's description of the person who came to the Zachry house and Zachry's opinion, because appellant's attorneys brought out the most damaging part of it, insofar as Dyas was concerned, apparently in an effort to emphasize through the state's witnesses the generality of the description and the lack of mention of what seems to have been Dyas' most obvious physical characteristic. At any rate, no further objection was made after the cross-examination of Webster and no request was ever made to limit the record evidence to that which was admissible under the Business Records Act.

9

The Court Erred In Admitting Into Evidence A .22 Caliber Revolver Allegedly Belonging To Appellant, Said Revolver Being Immaterial To The Facts And Matters In Issue And Being Inherently Prejudicial To Appellant And In Violation Of His Constitutional Rights.

The pistol to which appellant refers was not listed on the search warrant used for a search of appellant's house during the investigation of the murder. But it was taken from appellant's automobile at the time of the search. The state points out that appellant's attorney, J. O. Moore, first elicited testimony about a pistol owned by appellant other

than the .38 caliber one used in the crime during his second cross-examination of Charles Bean. Bean was unable to describe the pistol accurately and so on redirect the prosecutor showed the .22 pistol to Bean who was still unable to identify it as the one he had seen. When the pistol was finally offered into evidence, appellant admittedly interposed no objection. Not having objected during the trial, appellant cannot complain for the first time on appeal.

We do not agree, as appellant has asserted, that this is the sort of plain or fundamental error which renders an objection unnecessary. Furthermore, appellant would be hard pressed to argue that the admission of the pistol prejudiced him in light of his own testimony that he had the pistol with him in the console of his car on the night of the murder and yet did not use it to try and prevent the killing.

10

Appellant Jimmy Lee Dyas Personally Insists That The Court Erred In Trying His Case Because Of The Relationship Between The Trial Judge And The Prosecuting Attorney.

Not only did appellant fail to object to Judge Steel's hearing of the case or request that he disqualify himself, but his brief reveals that his attorneys declined to accept Judge Steel's offer to disqualify himself prior to the trial. Appellant argues only that his attorneys should have consulted him before assenting to Judge Steel's continued handling of the case. The actual record is deficient on this point and appellant's complaint is too late and cannot be raised for the first time on appeal. We note that the identical surnames of the judge and the prosecuting attorney were obviously known.

11

SUPPLEMENTAL ABSTRACT — CHARLES WATSON BEAN SENTENCING ACTIVITIES: The Court Erred In Refusing To Entertain Appellant's Motion For A New Trial, In Obedience To A Supreme Court Order; And Misinterpreting The True En-

titlements Of Appellant To The Sentencing Activities Of Charles Watson Bean.

The majority relies upon its reasoning and maintains the same conclusions it reached on the same issue in *Zachry* v. *State,* 260 Ark. 97, 538 S.W. 2d 25 (1976), although the writer adheres to the same views he expressed in his concurrence in *Zachry* v. *State,* supra.

12

The Arkansas criminal statutes upon which appellant Jimmie Lee Dyas was convicted and sentenced to life imprisonment Ark. Stat. Ann. § 41-4702 (A) 4711 and 2205 there committing him without the privilege of a parole, are unconstitutional, in that they abridge the constitution of the United States and the state of Arkansas, they violate appellant's Eighth-amendment assurances — nor shall cruel and unusual punishment be inflicted.

We have already specifically determined that Ark. Stat. Ann. § 41-4702 (Supp. 1975) is not violative of the Arkansas Constitution. *Rogers* v. *State,* 257 Ark. 144, 515 S.W. 2d 79.

Appellant does no more than offer the flat assertion that a sentence of life imprisonment without parole is violative of Amend. VIII of the United States Constitution. We do not consider a life sentence cruel or unusual in the light of pertinent standards. See, *Hinton* v. *State,* 260 Ark. 42, 537 S.W. 2d 800 (1976). If a sentence is, as here, within the limits established by the legislature, it is valid against the insistence that the punishment is unconstitutionally excessive. *Rogers* v. *State,* supra; *Smith* v. *U.S.,* 407 F. 2d 356, cert. den. 395 U.S. 966 (8th Cir., 1968). His contention that his accomplice Bean's receipt of a lesser sentence somehow entitles him to relief is without merit. See *Thornton* v. *State,* 243 Ark. 829, 422 S.W. 2d 852.

Appellant does not show how he was denied assistance of counsel. He seems to weave into his argument on this point, the same argument made about a recording device in *Zachry* v. *State,* supra. The record here gives less support to the

argument than it did in *Zachry*. His suggestion that he was denied assistance of counsel is without merit.

13

> The court erred when failing to bring the charges before a grand jury the state failed to provide equal protection by such failure in that the state had no proof that would cause the jury to return an indictment and didn't have until co-defendant Charles Watson Bean was Bribed thus there was a definite of probable cause initially.

We have long recognized that a criminal defendant may be properly charged either by indictment or information. Ark. Stat. Ann. Const. Amend. 21; Ark. Stat. Ann. § 43-806 (Repl. 1964); *Davis* v. *State,* 246 Ark. 838, 440 S.W. 2d 244, cert. den. 403 U.S. 954 (1971); *Ellingberg* v. *State,* 254 Ark. 199, 492 S.W. 2d 904.

14

> The State failed to provide equal protection when making a show of the trial a sham by not moving the trial to another county the court erred in permitting a public expose of economical and political enhancement to the prosecuting attorney.

Appellant neither moved for a change of venue nor raised any timely objection based on the assertions he makes in this point. His attempt to raise these issues on appeal is too late and cannot be considered.

15

> The Court erred and the state failed to provide appellant Jimmie Lee Dyas equal protection when allowing evidence obtained by illegal search and seizure to be introduced.

No objection was raised in the trial court either as to the validity of the search of appellant's automobile or the introduction of a .25 caliber pistol which was found in a pawn shop. The .38 caliber pistol listed in the search warrant was

never recovered or introduced into evidence. We will not consider appellant's objections for the first time on appeal.

We have examined the record and have considered all other objections raised therein and found none that merit consideration.

The judgment is affirmed.

ARKANSAS SAVINGS AND LOAN ASSOCIATION BOARD et al *v.* WEST HELENA SAVINGS AND LOAN ASSOCIATION et al

76-12 538 S.W. 2d 560

Opinion delivered July 19, 1976

*Harold E. Anderson Jr.*, for appellants.

*Joe N. Peacock; Schieffler & Yates*, by: *Eugene L. Schieffler*, and *Smith, Williams, Friday, Eldredge & Clark*, by: *Hermann Ivester*, for appellees.

*Wright, Lindsey & Jennings*, for intervenor appellants and for Arkansas Savings and Loan League, Amicus Curiae.

*Hardin, Jesson & Dawson*, for Arkansas Savings Savings and Loan League, Amicus Curiae.

J. Fred Jones, Justice. This is an appeal by Arkansas Savings and Loan Association Board, et al., from a judgment of the Pulaski County Circuit Court holding Ark. Stat. Ann. § 67-1831 (Repl. 1966) unconstitutional as a delegation of legislative authority to a federal agency. The pertinent provisions of the statutes pertaining to savings and loan associations, Ark. Stat. Ann. §§ 67-1801 — 67-1862 (Repl. 1966), as applied to the questions here involved appear as

follows:

67-1824. The Board shall not approve any charter application unless the incorporators establish and the Board shall have affirmatively found from the data furnished with the application, the evidence adduced at such hearing and the official records of the Supervisor that:

(1) All the prerequisites for the approval of a charter set forth in this act [§§ 67-1801 — 67-1862] have been complied with.

(2) The character, responsibility and general fitness of the persons named in the articles of incorporation and who will serve as directors and officers of such association are such as to command confidence and warrant belief that the business of the proposed association will be honestly and efficiently conducted in accordance with the intent and purpose of this act and the proposed association will have qualified full-time management.

(3) There is a public need for the proposed association and the volume of business in the area in which the proposed association will conduct its business is such as to indicate a successful operation.

(4) The operation of the proposed association will not unduly harm any other existing association or federal savings and loan association or other financial institution.

If the Board so finds, its findings shall be stated in writing, and the supervisor shall indorse on the proposed articles of incorporation and by-laws the approval of the Board, whereupon the proposed association shall be a corporate body and may exercise the powers of a savings and loan association as set forth in this act. A copy of the articles of incorporation of such association bearing the approval of the Supervisor shall be filed in the office of the Supervisor, with the Secretary of State and with the county clerk of the county in which the home office of the association is located.

67-1825. If the Board does not make the findings as required by this act [§§ 67-1801 — 67-1862], it shall issue a written statement of its grounds for such refusal and this statement shall be promptly mailed to the chairman

of the incorporators by certified mail.

67-1826. An association shall furnish satisfactory evidence to the Supervisor that it has commenced business within six [6] months from the date its articles of incorporation are approved. If any association whose charter has been approved fails to commence business within six [6] months after the date of such approval and the Supervisor so finds after notice and hearing, he shall enter an order canceling such charter, unless good cause is shown for such failure, in which event the Supervisor shall grant a reasonable extension of the time for commencing business, not to exceed twelve [12] months, to give such association an opportunity to overcome the cause for the delay. The Supervisor shall file a copy of any order canceling such charter with the Secretary of State and with the county clerk of the county in which the home office of such association is located.

67-1831. No association hereinafter chartered under this act [§§ 67-1801 — 67-1862] shall carry on the business of a savings and loan association in this State until it has filed with the Supervisor satisfactory evidence that its savings accounts are insured by the Federal Savings and Loan Insurance Corporation or other similar agency or corporation of the United States.

The facts appear as follows: On August 22, 1972, the appellant savings and loan association board, hereafter referred to as "the board," granted a charter to the appellee West Helena Savings and Loan Association authorizing it to operate as a savings and loan association in Arkansas. The charter was to expire on February 22, 1973, and was conditioned upon the association obtaining insurance of accounts from the Federal Savings and Loan Insurance Corporation,[1] or some other similar agency or corporation of the United States, before commencing business as provided in § 67-1831, *supra*.

[1]The Federal Savings and Loan Insurance Corporation will hereafter be referred to as "FSLIC."

West Helena Savings and Loan Association made application for the requisite insurance of accounts but the application had not been approved by February 22, 1973, and on that date West Helena Savings and Loan Association obtained an extension of its charter to February 22, 1974, as provided in § 67-1826, *supra*. West Helena Savings and Loan continued its efforts to obtain the requisite insurance but its application therefor was protested by Helena Federal Savings and Loan and by First Federal Savings & Loan Association of Helena. Apparently the Federal Housing Loan Bank Board, FHLBB, conducted hearings on the application for insurance and the application was denied because of lack of public need for additional savings and loan service in the area. On April 16, 1974, West Helena Savings and Loan Association filed suit in federal court against FSLIC and its superintending corporate agency, FHLBB, to force the issuance of insurance of accounts to West Helena Savings and Loan Association and that suit was still pending on October 29, 1973, when West Helena Savings and Loan Association applied for an additional extension of its charter to February 22, 1975. On November 12, 1973, the board's supervisor conducted a hearing on the application and by order of the supervisor on November 21, 1973, the application for further extension was denied. West Helena Savings and Loan appealed from the order of the supervisor to the board and also made direct application to the board for the additional extension. Following a hearing by the board on February 29, 1974, the supervisor's previous order was upheld and the application for extension was denied.

On May 1, 1974, the supervisor held a hearing to determine whether or not West Helena Savings and Loan had "commenced business" by February 22, 1974, and upon finding that it had not, its charter was canceled by order of the supervisor dated May 23, 1974. West Helena Savings and Loan appealed the cancellation order to the board pursuant to Ark. Stat. Ann. § 67-1809 (Repl. 1966) and the board upheld the ruling of the commissioner on the cancellation. West Helena Savings and Loan then appealed to the Circuit Court of Pulaski County as provided in § 67-1811 contending that § 67-1831 was unconstitutional as a delegation of legislative authority to a federal agency and, as already stated, the circuit court agreed. Helena Federal Savings & Loan Associa-

tion, First Federal Savings and Loan Association of Helena and the Woodruff County Savings and Loan Association intervened. The appellees, West Helena Savings and Loan and Woodruff County Savings and Loan have cross-appealed, and the Arkansas Savings and Loan League has filed an amicus curiae brief.

The appellant Arkansas Savings and Loan Association Board has designated the points on which it relies as follows:

I

The circuit court of Pulaski County, Arkansas, erred in holding that Arkansas statutes section 67-1826 was invalidly applied to West Helena Savings and Loan Association in the canceling of its charter.

II

The circuit court of Pulaski County, Arkansas, erred in finding Arkansas statutes section 67-1831 unconstitutional as an unlawful delegation of legislative authority to a federal agency.

Helena Federal Savings and Loan Association and First Federal Savings and Loan Association of Helena, as intervenors, joined with the board in contending that the court erred in holding § 67-1831 an unconstitutional delegation of legislative authority. West Helena Savings and Loan Association and Woodruff County Savings and Loan Association have designated the points they rely on as follows:

I

The circuit court did not err in holding that Ark. Stat. Ann. § 67-1831 is unconstitutional and that the application of Ark. Stat. Ann. § 67-1826 to West Helena Savings and Loan Association was invalid.

II

The circuit court erred in denying American Savings Insurance Company's motion for leave to intervene.[2]

[2]This company was originally a cross-appellant but dismissed its appeal after the record and briefs were filed herein.

III

The circuit court erred in not admitting into evidence the exhibits submitted by the appellees.

IV

The circuit court erred in limiting West Helena Savings & Loan Association's time within which to commence business to six months.

V

West Helena Savings and Loan Association commenced business prior to expiration of its charter.

VI

West Helena Savings & Loan Association was entitled to an extension of its charter.

The board argues under its first point that we need not reach the constitutional issue on this appeal because there was evidence that the appellee association had not procured an indemnity bond as required by Ark. Stat. Ann. § 67-1833 (Repl. 1966) or paid an annual fee as required by Ark. Stat. Ann. § 67-1854 (Repl. 1966), and that this evidence alone was sufficient to show that the appellee association had not commenced business. The board argues that this is especially true since the board is subject to the Arkansas Administrative Procedure Act under which judicial review of decisions of agencies is limited to a determination of whether there is any substantial evidence to support the action of the board or commission, and the courts do not evaluate the weight or preponderance of the evidence. *Ark. Racing Comm'n* v. *Emprise Corp.*, 254 Ark. 975, 497 S.W. 2d 34 (1973).

The fallacy in this argument lies in the use of the term "commenced business" in § 67-1826. The Savings and Loan Association Act does not specify that procuring an indemnity bond or paying annual fees are prerequisites for *commencing business*. Indeed, since the annual fee is not due under § 67-1854 until an annual report is filed, it could be logically argued that the payment of such fee is a requirement for "carrying on business" rather than for "commencing business." Furthermore, it is clear that the failure to secure FSLIC insurance was the primary, if not the only, reason the

association had not commenced business and the supervisor and board so found. The requirement for FSLIC insurance is for "carrying on business." Section 67-1831, *supra; Morrilton Fed. S & L* v. *Ark. Valley S & L,* 243 Ark. 627, 420 S.W. 2d 923 (1967). In *Fl sheim Bros. Dry Goods Co.* v. *Lester,* 60 Ark. 120, 29 S.W. 34 (1895), this court quoted with approval from *Cooper Mfg. Co.* v. *Ferguson,* 113 U.S. 727 (1885), as follows:

> The meaning of the phrase "to carry on," when applied to business, is well settled. In Worcester's Dictionary the definition is: "To prosecute, to help forward, to continue, as to carry on business," etc.

This definition implies the continuing of something already begun. Therefore, it could be argued just as logically that the trial court judgment could be affirmed rather than reversed without considering the constitutionality of § 67-1831 since the supervisor and the board erred in considering factors not prerequisites for "commencing business" in denying the charter. We find no merit in the appellant's first contention.

The primary controversy in this case boils down to a rather simple question of law as to whether § 67-1831 is an unconstitutional delegation of legislative power to a federal agency as found by the trial court and whether the trial court erred in so holding as contended by the appellant board under its second point. The question of law is rather simple but the answer to the question is not. The appellants and the appellees agree as to the following basic rule of law:

> [T]he functions of the Legislature must be exercised by it alone. That power cannot be delegated to another authority. Ark. Const. Art. 4. *Oates* v. *Rogers,* 201 Ark. 335, 144 S.W. 2d 457 (1940); *Walden* v. *Hart,* 243 Ark. 650, 420 S.W. 2d 868 (1967).

The appellants and also the appellees cite 16 Am. Jur. 2d Constitutional Law, § 242, which reads in part as follows:

> As has already been indicated, the rule of nondelegability is applicable to legislative powers only; the rule does not bar Congress or other legislatures from delegating such of their powers as are not legislative in nature.

> Thus, the rule is that in order that a court may be justified in holding a statute unconstitutional as a delegation of legislative power, it must appear that the power involved is purely legislative in nature — that is, one appertaining exclusively to the legislative department. It is the nature of the power, and not the liability its use or the manner of its exercise, which determines the validity of its delegation.

The FSLIC was organized by an act of Congress and became a body corporate in 1934. It was placed under the authority of the FHLBB an entirely separate federal corporate entity. FSLIC was organized primarily for the purpose of insuring federal savings and loan accounts with power to borrow from the United States treasury. As a part of its authority Tit. 12, USCA, § 1726 (a), provides as follows:

> It shall be the duty of the Corporation to insure the accounts of all Federal savings and loan associations, and it may insure the accounts of building and loan, savings and loan, and homestead associations and cooperative banks organized and operated according to the laws of the State, District, Territory, or possession in which they are chartered or organized.

The Act then provided for investigative procedures and requirements for obtaining insurance, and subsection (c) of § 1726 provides as follows:

> The Corporation shall reject the application of any applicant if it finds that the capital of the applicant is impaired or that its financial policies or management are unsafe; and the Corporation may reject the application of any applicant if it finds that the character of the management of the applicant or its home financing policy is inconsistent with economical home financing or with the purposes of this subchapter. Upon the approval of any application for insurance the Corporation shall notify the applicant, and upon the payment of the initial premium charge for such insurance, as provided in section 1727 of this title, the Corporation shall issue to the applicant a certificate stating that it has become an insured institution. In considering applications for such

> insurance the Corporation shall give full consideration to all factors in connection with the financial condition of applicants and insured institutions, and shall have power to make such adjustments in their financial statements as the Corporation finds to be necessary.

It would thus appear that FSLIC has no discretion in rejecting applications for insurance except as provided in the Congressional Act. Certainly it would appear that in administering the Act by borrowing funds from the United States treasury and insuring state savings and loan accounts, FSLIC should not be totally unrestricted in determining the insurability of its insured. Whether the authority for rejecting applications for insurance thus delegated to FSLIC by the Congress was a delegation of administrative or legislative authority is really not before us on this appeal. If FSLIC did exercise legislative authority in denying West Helena's application for insurance, it either exercised such authority under its delegation from Congress or it unlawfully exercised a legislative authority it did not possess. In any event the Arkansas Legislature delegated no such authority to FSLIC.

There is no question that the Legislature has the power to regulate savings and loan associations under the police power of the state and the legislative authority to require insurance on savings and loan accounts as a prerequisite to doing business is not seriously questioned in this case. In 78 ALR at page 1090 is found an annotation as follows:

> In view of the general scheme and purpose of building and loan associations, the state, under its police power, may assert rights of inspection and supervision over them which it may not deem necessary with respect to corporations organized for profit generally. *Union Sav. & Invest. Co.* v. *District Ct.* (1914) 44 Utah, 397, 140 Pac. 221, Ann. Cas. 1917A, 821.
>
> The business of building and loan associations is subject to regulation under the police power of the state, as well as the business of banking and of insurance. *Mechanics Bldg. & L. Asso.* v. *Coffman* (1913) 110 Ark. 269, 162 S.W. 1090. In this instance the court sustained the validity, as applied to a building and loan association, of

> the Arkansas statute making it the duty of the insurance commissioner to conduct an examination of investment companies coming within the provisions of the act, at the expense of the companies, and declaring, among other things, that, if he found a company solvent and its constitution and by-laws and proposed plan of business to be fair, just, and equitable, he should issue a permit to do business, — otherwise he should refuse such permit. Provision was also made, in case the right of any investment company to do business in the state was refused or revoked, for the institution of a suit to annul such refusal or revocation. The statute was held not to confer upon the insurance commissioner judicial or legislative power, and not to make an arbitrary or unreasonable classification.

By Ark. Stat. Ann. § 67-1831 (Repl. 1966) the Legislature simply required that all savings and loan associations thereafter chartered furnish "satisfactory evidence that its savings accounts are insured by the Federal Savings and Loan Insurance Corporation or other similar agency or corporation of the United States." The FSLIC was not told or requested to do anything and FHLBB was not even mentioned in the Act.

The parties to this litigation have cited numerous cases but none of them are squarely in point with the question here involved and our own research has revealed no such case. The Idaho case of *Idaho S & L Ass'n* v. *Roden,* 350 P. 2d 225, comes as near to the point involved as any case we have found. Legislative authority was unlawfully delegated by the Idaho Legislature in *Roden* but such delegation was discreetly avoided by the Arkansas Legislature in the case at bar. The trial court in *Roden* attempted to sever the unconstitutional delegation of legislative authority portion of the Act from that portion of the Act requiring the savings and loan associations to obtain the insurance. The pertinent portions of the *Roden* decision read as follows:

> Idaho Code, § 30-1301Q, subsection 2, exempted corporations which had been in continuous operation for a period of more than 15 years from the requirement that they procure insurance of accounts with the Federal

Savings and Loan Insurance Corporation.

The trial court entered a judgment holding I.C., § 30-1301Q, subsection 2, void and ineffective, quoting the void and ineffective portion, to wit:

"* * * except such as shall have been in continuous operation for a period of more than fifteen years prior to the effective date hereof * * *"

in that it violated the Idaho Constitution, Article 1, secs. 1 and 2, and the Fourteenth Amendment to the Constitution of the United States.

After holding there was no reasonable basis for making a distinction between corporations having been in continuous business 15 years or longer and other corporations, the trial court then held all savings and loan associations of the State of Idaho were required to insure their accounts with the Federal Savings and Loan Insurance Corporation.

[1] In accordance with *Morey* v. *Doud,* 354 U.S. 457, 77 S. Ct. 1344, 1 L. Ed. 2d 1485; *Fidelity & Deposit Company of Maryland* v. *Logan,* 230 Ky. 776, 20 S.W. 2d 753; *State* v. *Glidden,* 228 N.C. 664, 46 S.E. 2d 860; *Eslin* v. *Collins, Fla.,* 108 So. 2d 889; *Northwestern National Ins. Co.* v. *Fishback,* 130 Wash. 490, 228 P. 516, 36 A.L.R. 1507; *Crom* v. *Frahm,* 33 Idaho 314, 193 P. 1013; *Newland* v. *Child,* 73 Idaho 530, 254 P. 2d 1066, the trial court was correct in holding the distinction arbitrary, unreasonable, and discriminatory as to corporations of the same classification, such as we have in savings and loan associations in the State of Idaho. However, the trial court erred in striking that provision from the Act and in effect bringing the exempted savings and loan associations within the purview of the Act.

The trial court also held the Idaho Legislature unlawfully delegated its authority to an agency of the United States government in enacting the following sections: I.C. § 30-1301A, 30-1301H, subd. 3, 30-1301M, 30-1301Q, subds. 1 and 2, in that a savings and loan

association, as a condition precedent to obtaining insurance of accounts with the Federal Savings and Loan Corporation, is required to abide by and conform with rules and regulations of the Federal Home Loan Bank Board adopted after enactment of the Idaho legislation, and to abide by and conform with any amendment to Title 4 of the Housing Act relating to insurance of accounts which may become effective after the date of the Idaho act. After holding these provisions to be an unlawful delegation of legislative power to the Federal government and its agency, the trial court struck those provisions from the Act on the ground they were severable. Plaintiff agrees to the unconstitutionality of delegation or authority, but argues the delegation of power is not severable.

Subsequent to the enactment of the provisions of this Act which the plaintiff is contesting, the Federal Home Loan Bank Board and the Federal Savings and Loan Insurance Corporation have enacted several modifications of the rules and regulations governing applicants and members. Defendants argue that future rules and regulations should not be considered herein as they do not affect the plaintiff. This argument is not persuasive, inasmuch as the question to be resolved is whether or not the Legislature of the State of Idaho, contrary to the Idaho Constitution, Article 3, section 1, unlawfully delegated its authority to the federal government and an agency thereof.

[2] The legal axiom that all legislative power is vested in the Legislature of the State of Idaho has been set forth in *State* v. *Nelson,* 36 Idaho 713, 213 P. 358. The legislature cannot delegate its authority to another government or agency in violation of our Constitution. *State* v. *Nelson, supra; State* v. *Heitz,* 72 Idaho 107, 238 P. 2d 439.

[3, 4] In dealing with the problem as to whether the unconstitutional provisions are severable, we must look to the effect upon the legislation of the deletion of these provisions. Under the decision of the trial court, the plaintiff is not required to observe future rules and regulations of the Board nor future amendments of the

> National Housing Act. But an agreement to observe and be bound by future amendments to the National Housing Act and future rules and regulations of the Board is exacted as a condition to granting the insurance, and also to continuing it in force. Hence, appellant can neither obtain the insurance nor continue it in force without being compelled to abide by the unconstitutional provisions of the Idaho act. Thus, it is demonstrated that the unconstitutional provisions delegating to the Congress and the Home Loan Bank Board the legislative power and function to make future laws and regulations governing appellant's business and its right to remain in business, are not severable from the provisions requiring appellant to obtain insurance of accounts by the Federal Savings and Loan Insurance Corporation. The provisions requiring such insurance are therefore unconstitutional and void.
>
> The judgment to the extent that it holds the unconstitutional provisions of the Act severable from those requiring insurance of accounts and holding the insurance of accounts requirement valid is reversed, and the cause is remanded with directions to enter judgment in conformity herewith.

We conclude the trial court erred in holding Ark. Stat. Ann. § 67-1831 (Repl. 1966) invalid as a delegation of legislative authority.

We consider it unnecessary to discuss the other points designated by the parties except the last point designated by the appellee that "West Helena Savings and Loan Association was entitled to an extension of its charter." The appellees, in their brief, argue this point in part as follows:

> [T]he only reasonable construction of Ark. Stat. Ann. § 67-1826 is that the Supervisor has authority to cancel the charter of an association which has not commenced business within the initial or an extended period of time, and that he must grant successive extensions of time not exceeding 12 months each (now two years) upon an association's showing that it has good cause for its failure to commence business. This is the only construc-

tion which is consistent with the legislative intent underlying the statute; it is the only construction which will avoid undue and unnecessary hardship to newly chartered associations; and it is the construction given to the statute by Supervisors in the past.

We agree that the Supervisor has the authority under § 67-1826 to cancel the charter of an association which has not commenced business within the initial or an extended period of time. We do not agree that the Supervisor *must* grant successive extensions of time not exceeding 12 months each (now two years)[3] upon an association's showing that it has good cause for its failure to commence business. We do agree, however, that the Supervisor *may* grant additional extensions to accomplish the purpose of the Act and that such extensions should have been granted under the facts of record in this case. Section 67-1826 does not deal with the granting of charters but deals with the revocation of charters for failure to commence business. The only purpose in requiring the Supervisor to grant a reasonable extension of time for commencing business not to exceed 12 months upon the showing of good cause, is "to give such association an opportunity to overcome the cause for the delay." Certainly the associations delay in the case at bar was because FSLIC refused to insure the accounts of the association and the association could have had no better reason for not commencing business under the requirements of the statute.

It must be remembered that the association's suit in federal court to force FSLIC to issue the insurance was pending when the association's request for additional extension was denied and its charter was revoked. The statute does not limit the Supervisor's authority to one single extension at the end of which the charter must be revoked. We agree with the appellees' contention "this is the only construction which is consistent with the legislative intent underlying the statute; it is the only construction which will avoid undue and unnecessary hardship to newly chartered associations."

For the error indicated the judgment of the trial court is reversed and this cause is remanded for entry of judgment not

[3]See Ark. Stat. Ann. § 67-1826 (Supp. 1975).

inconsistent with this opinion.

Reversed and remanded.

FOGLEMAN, J., concurs in part and dissents in part.

JOHN A. FOGLEMAN, Justice, concurring in part, dissenting in part. I fully agree that Ark. Stat. Ann. § 67-1831 (Repl. 1966) is constitutional. I have reservations about the court's construction of Ark. Stat. Ann. § 67-1826 (Supp. 1975) as permitting more than one twelve-month extension. It seems to me that the arguments favoring appellant's construction are stronger than those favoring the construction given it by the majority. Appellant says that the act provides that, after failure of the recipient of a charter to commence business within six months, the Supervisor, upon a showing of good cause, shall grant *a* reasonable extension *not to exceed* twelve months. I suppose the matter is arguable, and I defer to the wisdom of the majority since it seems that, prior to the tenure of the Supervisor who acted in this case, Supervisors had construed the Act to permit successive extensions totalling more than twelve months. Of course, administrative construction is not controlling, only persuasive. *Brawley School District* v. *Kight,* 206 Ark. 87, 173 S.W. 2d 125. See also, *International Shoe Co.* v. *Pinkus,* 278 U.S. 261, 49 S. Ct. 108, 73 L. Ed. 318 (1928).

I disagree with this court's holding that the extension in this case should have been granted. This matter has not been considered by either the trial court or the Savings & Loan Association Board or even by the Supervisor. The showing of good cause for an extension certainly involves more than showing that efforts to obtain deposit insurance have been unsuccessful. It is a matter of common knowledge that changes can take place in conditions pertinent to the grant of a charter in a matter of a few months. There must be some latitude of discretion in the matter. Otherwise, a chartered association could interminably prolong efforts to obtain insurance and the Supervisor would be required to grant extension after extension. Clearly the legislature did not intend for this to happen. The Supervisor expressly stated that he did not reach the question whether there was good cause for the

Association's failure to commence business. The Board's first order recited that the Supervisor, not the Board, was empowered to issue extensions, subject to appeal to the Board, but that there was no provision for a direct application to the Board for an extension, which the West Helena Association had made. The Board then, on appeal from the Supervisor, simply sustained the Supervisor's holding that he had no authority to grant further extensions. The charter was cancelled later.

The trial court sustained demurrers to jurisdiction on all orders except the order of cancellation by the Board. The circuit court retained jurisdiction over that order only. In his opinion, the circuit judge found it necessary to consider only one point, i.e., the constitutionality of the act.

Consequently, this court is ruling on a question never considered by the Supervisor, the Board or the trial court. I would remand the case with directions to the circuit court to remand it for consideration by the Supervisor of extension of the charter in light of this decision.

Joseph HELTON et al *v.*
MISSOURI PACIFIC RAILROAD COMPANY et al

75-34 538 S.W. 2d 569

Opinion delivered July 19, 1976

*Holloway & Haddock,* by: *Bill R. Holloway,* for appellants.

*Herschel H. Friday, Robert V. Light,* and *Williamson, Ball & Bird,* by: *Samuel N. Bird,* for appellees.

J. Fred Jones, Justice. This is an appeal by Joseph Helton and Elgin Bush, individually, and as next friends of their minor sons Danny Helton and Donald Bush, hereafter referred to as "Helton" and "Bush," in a suit they filed against the appellees Missouri Pacific Railroad and Robert D. Selby.

The facts appear as follows: Helton was 16 years of age and owned a Honda motorcycle. Bush was 14 years of age. The two boys were close personal friends and Bush was in the habit of riding around with Helton on Helton's motorcycle. On November 19, 1974, Bush was riding behind Helton on the motorcycle with Helton driving as they crossed the Missouri Pacific Railroad tracks at an elevated street crossing inside the city limits of Lake Village. As the boys approached the railroad crossing, they were unable to see what was

beyond the crossing and at that point they observed a pickup truck belonging to, and being driven by, the appellee Selby backing into the street approximately 92 feet ahead of the motorcycle and in the same lane of traffic. Another automobile was approaching from the opposite direction the motorcycle was traveling and the motorcycle collided with the back portion of the pickup truck. The motorcycle was damaged and both boys were injured.

Two separate suits were filed by Bush and Helton and they were consolidated for trial. The complaints alleged that the collision was the result of the negligent acts of Missouri Pacific Railroad in constructing and maintaining an unsafe street crossing on an elevated dump or roadbed in such manner that the vision was obstructed from one side of the crossing to the other; that Selby was negligent in his failure to yield the right-of-way; failure to keep a proper lookout for oncoming traffic and in driving his vehicle from a private driveway into the plaintiffs' traffic lane in violation of statute. A jury trial resulted in verdicts for the defendant-appellees Missouri Pacific and Robert D. Selby in both cases.

On appeal to this court the appellants have designated the points on which they rely for reversal as follows:

A. Appellant Bush—

I

The trial court erred by instructing the jury that passenger assumed the risk of his injuries when the uncontradicted facts show that the passenger could not have known or anticipated the risk that appellee would illegally back his vehicle into the motorcycle's lane of traffic from a private driveway when under the law there is no duty to assume that another person will violate the law.

II

The trial court committed reversible error in instructing the jury on joint enterprise as between operator and passenger of a motorcycle when the ride was within the corporate limits of Lake Village and for no particular purpose except pleasure.

B. Appellant Helton—

I.

The trial court erred by submitting an instruction to the effect that the mere happening of an accident is not of itself, evidence of neligence when there was uncontradicted proof in the record that appellee had been negligent by violating Ark. Stat. Ann. 75-624 by failing to yield the right-of-way by pulling his vehicle from a private driveway into a public street.

Appellant Bush, the passenger on the motorcycle, contends the trial court erred in giving AMI Instruction 612 as the court's instruction 17. This instruction permitted the jury to render a verdict in favor of Selby if the jury determined that Bush had "assumed the risk" for his injuries. Bush argues that the evidence failed to show that Bush assumed the risk for Selby's actions. Appellee Selby argues that the risk Bush assumed was not the risk of negligent acts on the part of Selby, but the risk of appellant Helton's negligent acts in the operation of the motorcycle and, therefore, Selby contends instruction 17 was proper.

In Prosser, Torts § 68 (4th ed. 1971), appears the following:

> It is here that is the greatest misapprehension and confusion as to assumption of risk, and its most frequent misapplication. It is not true that in any case where the plaintiff voluntarily encounters a known danger he necessarily consents to negligence of the defendant which creates it. A pedestrian who walks across the street in the middle of a block, through a stream of traffic traveling at high speed, cannot by any stretch of the imagination be found to consent that the drivers shall not use care to avoid running him down. On the contrary, he is insisting that they shall. This is contributory negligence pure and simple; it is not assumption of risk. And if A leaves an automobile stopped at night on the traveled portion of the highway, and his passenger remains sitting in it, it can readily be found that there is consent to the negligence of A, but not to that of B, who runs into the car from the rear. This is a distinction

> which has baffled a great many law students, some judges, and unhappily a few very learned legal writers.

Thus, if Bush did assume the risk of Helton's negligent driving, the proper instruction should have been one concerning Bush's comparative neligence, that is, Bush was negligent in riding with Helton. The jury should have been instructed to compare the negligence of Bush and Selby instead of ruling in favor of Selby because Bush assumed the risk. See AMI 2102.

Appellee Selby cites a portion of 61 C.J.S. Motor Vehicles, § 486 (7), quoted by this Court in *J. Paul Smith Co.* v. *Tipton,* 237 Ark. 486, 374 S.W. 2d 176 (1964), and in *Hass* v. *Kessell,* 245 Ark. 361, 432 S.W. 2d 842 (1968), as authority for the questioned instruction.

> A guest's assumption of risk, in case of a motor vehicle collision, applies only as between the guest and his host, and does not bar recovery from a third person for injuries to which the third person's negligence proximately contributed, unless the acts of the host, in which the guest acquiesces, operate as the cause of the collision.

Neither this rule from C.J.S. nor the Arkansas cases where it was quoted call for the instruction 17. Bush was not suing the driver Helton for negligence; the C.J.S. rule limits the assumption of risk defense to the driver charged with negligence. Cases from other jurisdictions, *Calahan* v. *Wood,* 24 Utah 2d 8, 465 P. 2d 169 (1970); *Keowen* v. *Amite Sand & Gravel Co.,* 4 So. 2d 79 (La. App. 1941); *Guile* v. *Greenberg,* 192 Minn. 548, 257 N.W. 649 (1934), as well as the two Arkansas cases, *supra,* clarify the last clause of the C.J.S. ("unless the acts of the host, in which the guest acquiesces, operate at the cause of the collision.") Where the host causes the collision, the recovery of the guest is affected by the guest's comparative negligence in riding with the negligent host. However, the guest's recovery is not barred by assumption of risk. In *J. Paul Smith Co.* v. *Tipson, supra,* Tipton was a passenger in an automobile driven by Woolsey. Woolsey drove his automobile into the rear of a truck which negligently drove onto the highway. Tipton was killed in the collision and the Tiptons sued the truck company and driver *and also sued Woolsey.* The jury found that Woolsey contributed 20% of

the negligence and that the truck driver contributed 80% of the negligence which caused the death of young Tipton; and, that the negligence of Woolsey, as well as the negligence of the truck driver, was a proximate cause of the injuries and death. Contributory negligence did not go to the jury. The verdict for Tipton fixed the amount of damages and the trial court reduced the amount by 20% in the judgment against the truck company. It seems that the Tiptons waived their right to any judgment against Woolsey. On appeal the truck driver and truck company asserted assumption of the risk and contended:

> that the boys should not be allowed to recover because they "assumed the risk of the harm that might come to them through the negligent acts of Billy Joe Woolsey in the operation of the vehicle in which they were riding." This contention is based partly on the fact (as found by the jury) that Woolsey was 20% negligent and that his negligence was a proximate cause of the injuries. It is contended that under the well established "assumption of the risk" rule they could recover nothing, and that this rule was not affected in any way by our comparative negligence statute.

In affirming the judgment of the trial court this court said:

> To adopt the rule which appellants appear to espouse would lead to an illogical and unjust result. It would allow Woolsey (the negligent driver) to recover, but it would deny recovery to the boys who had no control over the car.

*Hass* v. *Kessel, supra,* was the consolidation of two lawsuits resulting from an automobile collision. The driver of car 1, Morris, sued the driver of car 2, Hodges, and the passenger of car 1, Kessell, sued the driver of car 2, Hodges. Hodges was killed in the accident and Hass, the appellant, was the administrator of the Hodges estate. The case was submitted to the jury on interrogatories and the jury found the following percentages of negligence:

| | |
|---|---|
| Hodges 44% | Hodges 75% |
| Morris 56% | Kessell 25% |

The trial court reduced the amount of Kessell's damages by 25% and entered judgment for Kessell against Hodges' estate. The appellant argued on appeal as follows:

> The Trial Judge erred in refusing to apply the jury's finding that appellee Louis Kessell assumed the risk of riding with his host whose negligence exceeded fifty per cent and further erred in refusing to dismiss appellee Kessell's complaint.

This court on appeal dismissed the appellant's argument saying:

> We are unable to see where assumption of risk as an element separate and apart from contributory negligence enters into the picture in this case at all. * * * Although Kessell assumed the risk of riding with Morris, and although he may have been negligent in doing so, he was not driving the Morris automobile, nor was he directing Morris in its operation at the time of the collision. Kessell did not sue Morris, but he did sue Hodges' estate for damages he sustained because of Hodges' negligence. The jury found that the combined negligence of Hodges and Kessell caused the damages sustained by Kessell and that Hodges contributed 75% and Kessell contributed 25% of this total negligence causing Kessell's injuries, and the court correctly found that as between Kessell and Hodges, Hodges was only liable for 75% of Kessell's damages.

Although a jury instruction was not in issue in *Hass* v. *Kessell, supra,* the majority opinion indicates there is no need for any assumption of the risk instruction where the plaintiff guest in a motor vehicle is not suing his host driver.

Under the rationale of the concurring opinion in *Hass, supra,* the negligence of Helton, which the jury found to be greater than the negligence of Selby, might have been imputable to Bush because Bush assumed the risk of riding with Helton; and, therefore, Bush's negligence was greater than Selby's. But the instruction 17 given in the case at bar did not require the jury to hold against Bush if it determined that Bush assumed the risk of riding with Helton, and if it deter-

mined that Helton was more negligent than Selby. Rather, instruction 17 is the classic assumption of the risk instruction to the effect that a plaintiff who assumes the risk is barred from receiving recovery from the defendant. See AMI 612.

We conclude that the trial court erred in giving instruction 17 on assumption of risk because assumption of the risk by appellant Bush for the negligent acts of appellee Selby was not involved.

Under his second point the appellant Bush contends that there was not sufficient evidence to justify the trial court in instructing the jury on joint enterprise, and the trial court erred in giving AMI 712 as the court's instruction No. 18. The appellant argues that there was no evidence showing the second element of joint enterprise under AMI 712: "An equal right to share in the control of the operation of the vehicle."

In *Wymer* v. *Dedman,* 233 Ark. 854, 350 S.W. 2d 169 (1961), this court quoted with approval from 4 Blashfield, Chapter 65, as follows:

> It is commonly a question of fact, for the jury to say, whether a joint enterprise existed between the driver and another occupant of an automobile, except where the evidence as to the existence of such a relation is insufficient to go to the jury.
>
> The doctrine of joint adventure, in connection with the operation of motor vehicles, should be restricted to those cases where the common right to control its operation and the correlative common responsibility for negligence in its operation either are clearly apparent from the agreement of the parties or result as a logical and necessary conclusion from the facts as found.

As already pointed out, the evidence in the case at bar shows that the appellants, two teenaged boys, were riding together on appellant Helton's motorcycle and that appellant Bush was the guest on the motorcycle. Helton testified that he and Bush often made such rides and that he would take Bush to destinations Bush suggested. Bush testified that Helton would take him to destinations in the community

which Bush wanted to visit. Bush also testified as to his role in controlling the speed of the motorcycle when he rode with Helton.

> Q. Let me ask you this, Donald. If you were ever going too fast, in your opinion, do you feel like you would have had the authority to tell him to stop, and let you off that thing?
> A. I would have, but I wouldn't know how, it is hard to judge how fast you are going on the back.
> Q. You just ride on the back, and the speed is up to him?
> A. Yes, sir.
> Q. If you ever had the sensation that this thing was just going too fast for you, would you have felt like you could say, "Stop and let me off?"
> A. Yes, sir.
> Q. You think you could have done that?
> A. Yes, sir.
> Q. If he had ever been driving the motorcycle in such a manner that you felt like he was reckless, would you have felt like you could have said, "Stop and let me off?"
> A. Yes, sir.
> Q. And would he have honored that request?
> A. Yes, sir.

We are of the opinion the evidence does not establish equal control of the motorcycle between the driver and his passenger. The answers of the appellants simply say that Helton, as a friend of Bush, would take Bush where Bush wanted to go. There is no testimony that Bush had the right to determine the destination of the pair over the objection of Helton. Bush's testimony as to his control of the speed of the motorcycle indicates that he left the speed up to Helton and that Bush had the right to have the vehicle stopped so he could get off.

In Restatement of Torts (2d), § 491 (1965), is found language as follows:

> [I]f there is no prearrangement for a substantial sharing of the expenses of the trip, . . . the trip is not a joint enterprise merely because it is made at the request of the

> plaintiff, because he and his host have a common destination, because the destination or any change in it is to be determined by mutual agreement, because it is arranged that the guest is to drive alternatively with his host, or even because they are going to the common destination to accomplish a purpose in which they have a common but not a business interest. No one of these facts, nor indeed all of them together, is sufficient to justify a jury or other trier of fact in finding that the trip was a joint enterprise.

In *Woodard* v. *Holliday,* 235 Ark. 744, 361 S.W. 2d 744 (1962), the court found error in instructing the jury on joint enterprise because the testimony failed to show equality of control between the passenger and host of an automobile. The case involved two salesmen who traveled together; they took turns suggesting locations where they should go to call on customers. In that case this court said:

> Joint control and joint responsibility should go hand in hand; neither should exist without the other. If the passenger shares the responsibility for the physical control of the vehicle then it is proper for him to share the liability for the driver's negligence. But if the responsibility of control is not shared then the liability ought not to be shared. In the case at bar the trial court's error lies in permitting the jury to infer the existence of the second requirement from proof of the first, which in effect amounted to doing away with the second requirement altogether.

We conclude that the trial court erred in giving instruction 18 under the evidence in this case.

The appellant Helton contends that the trial court erred by submitting AMI instruction 603 as the court's instruction 16, to the effect that the mere happening of an accident is not of itself, evidence of negligence when there was uncontradicted proof in the record that appellee had been negligent by violating Ark. Stat. Ann. § 75-624 (Repl. 1975) by failing to yield the right-of-way by pulling his vehicle from a private driveway into a public street. We find no error in giving this instruction. The appellant could have requested the court to

give AMI 601 as follows:

> A violation of Ark. Stat. Ann. 75-624 although not necessarily negligence, is evidence of negligence to be considered by you along with all of the other facts and circumstances in the case.

The judgment as to Bush v. Selby is reversed and that cause remanded for a new trial. The judgment as to Bush v. Missouri Pacific and the judgment as to Helton v. Missouri Pacific and also v. Selby are affirmed.

Affirmed in part; reversed in part.

MIDWEST MUTUAL INSURANCE COMPANY
*v.* ARKANSAS NATIONAL COMPANY,
a Corporation, and Robert E. LYDDON

76-38 538 S.W. 2d 574

Opinion delivered July 19, 1976

*Wright, Lindsey & Jennings,* for appellant.

*Laser, Sharp, Haley, Young & Boswell, P.A.,* for appellees.

J. FRED JONES, Justice. This is an appeal by Midwest Mutual Insurance Company from an adverse summary judgment in a suit it filed against the appellees Arkansas National Company, Inc. and Robert E. Lyddon for $6,850, plus interest and costs.

We can do no better in stating the background facts than to reiterate the statement made by the appellant in its brief. The appellee, Arkansas National Company, was an independent insurance agency in Hot Springs, Arkansas, and the appellee Robert E. Lyddon was one of its agents. The agency acquired an assigned risk liability insurance policy for Red Top Cab Company of Hot Springs through Farm Bureau Mutual Insurance Company covering certain taxicabs owned by Red Top. On August 7, 1970, pursuant to the request of Red Top, Arkansas National caused a certain taxicab to be deleted from the coverage while undergoing repairs and another taxicab substituted in its place. There was a standing agreement between Arkansas National and Red Top that substitution of taxicabs under the coverage would be effective as of the day the request was made. On August 11, 1970, after the original taxicab had been repaired, Red Top requested Arkansas National's agent, Lyddon, to delete the replace-

ment vehicle and reinstate the original taxicab under the coverage; Lyddon, however, neglected to cause the original taxicab to be reinstated and, on August 20, 1970, it was involved in a collision in Hot Springs with a motorcycle driven by Robert A. Bratton and owned by Archie Lee Lowe.

On May 24, 1971, Bratton and Lowe instituted suit against Red Top for personal injuries and property damage. Red Top made demand on Farm Bureau to provide it with a defense and pay any judgment that might be entered and Farm Bureau declined. Before the case reached trial, Bratton and Lowe took a voluntary nonsuit. Bratton then made claim against the appellant Midwest under the uninsured motorist provisions of a policy of insurance the appellant had issued covering the motorcycle. The appellant settled Bratton's claim by the payment of $5,250. Bratton and Lowe again instituted suit against Red Top for personal injuries and property damage, and the appellant claimed subrogation to the extent of $5,250 it paid in settlement to Bratton. Red Top filed a third party complaint against Arkansas National seeking judgment over against it; Arkansas National filed a motion to strike the third party complaint and the motion was granted by the trial court on April 17, 1973. The third party complaint alleged that "third party defendant negligently failed to obtain the insurance as per its agreement, and its negligence has forced defendant to defend this action which should have been done by its insurance carrier"; and, Red Top prayed "judgment over against third party defendant for any judgment obtained by plaintiff plus its costs and attorney's fees in defending this action."

In granting the motion to dismiss, the trial court said:

Your motion is granted. To start with:

Number 1. The contract specifically between Farm Bureau and Red Top Cab precludes such a Third Party Complaint until judgment is recovered.

Number 2. Arkansas National Company is not the general agent of Farm Bureau, but the agent of the insured.

The case proceeded to trial on August 8, 1973, resulting in a verdict in favor of Bratton and Lowe against Red Top for $6,850, and judgment for that amount together with interest and costs was entered on September 11, 1973. Thereafter, for valuable consideration, Red Top duly assigned to the appellant its "chose in action" against appellees for failure to reinstate insurance coverage on the taxicab involved in the collision and, on March 29, 1974, Midwest filed suit against the appellees Arkansas National and its agent Lyddon for $6,850. The appellees answered alleging, as affirmative defenses, that the suit was barred by limitations and that the assignment was not valid. Motions for summary judgments were subsequently filed by both sides. The parties stipulated that appellee Lyddon was negligent, that his negligence resulted in the judgment against Red Top, and that the sole question to be determined by the trial court was the validity of the affirmative defenses as a matter of law. The trial court held that Red Top's assigned cause of action accrued on August 11, 1970, when Arkansas National negligently failed to reinstate the insurance coverage and the three year statute of limitations as set out in Ark. Stat. Ann. § 37-206 (Repl. 1962), started running on that date. The trial court granted appellees' motion for summary judgment from which comes this appeal.

On appeal to this court the appellant has designated the following point on which it relies for reversal:

> The court erred in not granting appellant's motion for summary judgment and in granting summary judgment for appellees, because appellant is entitled to judgment as a matter of law.

The parties to this appeal have stipulated that this is a cause of action for negligence, consequently the three year statute of limitations provided in § 37-206 is applicable. It would further appear, from the arguments presented, that the parties are in basic agreement that appellant, as assignee, had no greater rights, and was subject to the same defenses, an would have applied to Red Top. *Davis* v. *So. Farm Bur. Cas. Ins. Co.*, 231 Ark. 211, 330 S.W. 2d 276 (1960). Consequently, the question as to limitations on this appeal boils down to when Red Top's cause of action against its insurance agent,

Midwest, accrued. The appellees contend it accrued on August 11, 1970, as found by the trial court, and the appellant contends that it accrued not earlier than May 24, 1971, when suit was filed against Red Top and it first learned that it had no insurance coverage through Farm Bureau's refusal to defend. It was at this point Red Top was required to assume the cost of its own defense because of the appellee's negligence in failing to obtain insurance coverage. So we are forced to the conclusion that the appellant is right in its contentions on this point.

The appellees, and apparently the trial court, relied heavily on our decisions in *Field* v. *Gazette Pub. Co.,* 187 Ark. 253, 59 S.W. 2d 19 (1933), and *Faulkner* v. *Huie,* 205 Ark. 332, 168 S.W. 2d 839 (1943). Both of these cases involved personal injury with delayed results — lead poisoning requiring multiple surgical procedures before final diagnosis in the *Field* case, and loss of hearing six years after an automobile collision in the *Huie* case. We consider the case at bar more in point with the cases found *not in point* in the *Huie* case than with the *Field* and *Huie* cases. In *Huie* we said:

> The appellant cites several cases which, he contends, show that the doctrine followed in the *Field* case does not apply here. These cases are not in point.
>
> In *C., R. I. & P. Ry. Co.* v. *Humphreys,* 107 Ark. 330, 155 S.W. 127, L. R. A. 1916E, 962, the railway company had constructed a culvert on its right-of-way. Damages to the adjoining property resulted. This court held that the statute of limitations would not begin to run at the time of the construction if it were known at that time merely that damage could not be reasonably known and estimated at that time. The construction of the culvert was lawful unless it had a damaging effect and the passage of time alone would reveal whether it would have a damaging effect — whether any wrongful act had been committed at all. Here the wrongful act was complete at the moment the car was turned over.
>
> The same principle is involved in the case of *Brown* v. *Arkansas Central Power Company,* 174 Ark. 177, 294 S.W. 709. The action there complained of was the construc-

> tion of a power plant which was lawfully constructed upon the defendant's lands, but which, it was claimed, through its operation, constituted a nuisance. This court held that it could not say as a matter of law that the plant was of such a nature that it could be known at the beginning that damage must necessarily result and that the nature and extent of such damage could have been reasonably ascertained and estimated at the time of construction. If not, the statute of limitations would not begin to run at the time of the construction.

In *Schenebeck* v. *Sterling Drug, Inc.*, 423 F. 2d 919 (8th Cir. 1970), a case in which the defendant argued that the statute of limitations ran from the day of the wrongful act, the United States Court of Appeals for the Eighth Circuit said:

> While it is true that the Arkansas Supreme Court has referred to the statute of limitations governing negligence actions as commencing "from the time when the injury was first inflicted * * *," *Field* v. *Gazette Publishing Co.*, 187 Ark. 253, 59 S.W. 2d 19, 20 (1933), and that court has specifically held that a plaintiff who discovered more than three years after an automobile accident that his loss of hearing was traceable to the accident could not recover since the ". . . wrongful act was complete at the moment the car was turned over," *Faulkner* v. *Huie,* 205 Ark. 332, 168 S.W. 2d 839 (1943), nevertheless, an analysis of the Arkansas cases, we believe, demonstrates that appellant reads them too narrowly. As we construe the Arkansas cases, in the instances where there has been delay between the negligent act and the damage, the occurrence of harm marks the beginning of the period. Thus, in *Field* v. *Gazette Publishing Co., supra,* also dealing with a slow-developing disease, the court approved an instruction authorizing the jury to determine whether the statute of limitations had run by determining whether the plaintiff ". . . contracted the malady of which he complains . . ." prior to a specified crucial date. This same test was again mentioned as a dictum in *Barksdale* v. *Silica Products Co.*, 200 Ark. 32, 137 S.W. 2d 901 (1940). Even though defendant has completed a negligent surgical operation, Arkansas has held that the statute need not

commence running with the negligent act if discovery of the damage has been delayed. See *Burton* v. *Tribble,* 189 Ark. 58, 70 S.W. 2d 503 (1934) (patient's malpractice action against surgeon commenced more than three years following surgical procedure to recover for damage attributable to a foreign object left in the body, held not barred).[1] In an action for damage to land subsiding because of loss of subjacent support caused by defendant's earlier negligent act, Arkansas Court has held the cause accrues from the time the damage to the surface becomes apparent rather than when the defendant removed the underground support. *Western Coal & Mining Co.* v. *Randolph,* 191 Ark. 1115, 89 S.W. 2d 741 (1936). A traditional element of a cause of action in a negligence action requires the invasion of another's interest. See Restatement (Second) of Torts, § 281 (1965); Prosser, The Law of Torts, 146-148 (3d ed. 1964). Ordinarily, the plaintiff must suffer some actual loss or damage in order to bring an action. Slight damage initiates the accrual of the cause of action. See *Faulkner* v. *Huie,* 205 Ark. 332, 168 S.W. 2d 839 (1943); Prosser, *supra,* at 146-148.

It is entirely possible that Red Top may have had a cause of action against Arkansas National for breach of contract accruing on August 11, 1970, when Arkansas National failed to reinstate the insurance coverage. That apparently was the trial court's view when on April 17, 1973, Red Top attempted to join Arkansas National as a third party defendant in the tort action brought by Bratton and Lowe against Red Top. The parties stipulated that the action resulting in the judgment, from whence comes this appeal, was an action sounding in tort and not in contract. We conclude that Red Top had no tort action against Midwest until a tort against Red Top was committed by Arkansas National and that Arkansas National's negligence in its failure to convert the insurance coverage did not become tortious as to Red Top and for which a cause of action would lie, until at least some element of damage accrued to Red Top because of the negligence of Arkansas National. According to the record before us, Red Top's cause became actionable against Arkan-

[1]The statute has since been changed in medical malpractice cases.

sas National on or after May 24, 1971, when Red Top was forced to bear its own expense in defending litigation because of Arkansas National's negligence in failing to transfer the insurance coverage.

Both parties to this litigation filed motions for summary judgment. We conclude that the statute of limitations had not run against Red Top in favor of Arkansas National when suit was filed by Midwest on March 29, 1974, but the appellant's secondary argument concerning the validity of the assignment from Red Top to Midwest is another matter. As already indicated, we are of the opinion Red Top could have asserted a cause of action for breach of contract against Arkansas National on August 11, 1970, when the breach occurred by failure to reinstate the insurance but Red Top could not interplead such breach of contract action into the personal injury and property damage tort action filed by Bratton and Lowe against Red Top as the trial court correctly pointed out.

In other words, it would appear that Red Top had an election of two separate remedies or causes of action against its insurance agent. Arkansas National, in this case. It could have sued for damages for breach of contract when the breach occurred as above set out, or it could sue for damages in tort when the tort occurred and became actionable as above set out. The same three year statute of limitations applied in either the breach of contract or the tort action. It would appear that in order to avoid the statutory bar to an action in contract, the appellant was careful to lay the suit it did file in tort rather than in contract. It is clear that had the suit been for breach of contract it would have been barred by the statute. Since the suit was in tort it was within the statute but we conclude it was not assignable.

It must be remembered that the assignor Red Top did not assign a judgment for $6,850 to the appellant Midwest in this case. Red Top did not *own* the judgment; Red Top *owed* the judgment for $6,850 to Bratton and Lowe who were complete strangers to the transactions between Red Top and its insurance agency Arkansas National. Bratton's and Lowe's claims against Red Top were liquidated by judgments for $6,850 but the subject of the assignment of this case was Red Top's separate tort damage claim against its insurance agent.

The pertinent part of the written assignment appears as follows:

> On September 11, 1973, judgment was rendered against Red Top in favor of Robert A. Bratton and Archie Lee Lowe in the total sum of $6,850.00 together with interest thereon from that date until paid at the rate of six percent (6%) per annum and costs. The chose in action herein assigned is that cause of action which Red Top had against the producing agent, Arkansas National for negligently failing to provide coverage as promised resulting in the judgment debt against Red Top.
>
> We hereby authorize Midwest Mutual Insurance Company, in its own name and at its own cost, to make any demands, institute any and all legal proceedings and exercise all powers and rights which would be ours to enforce this claim and to receive any or all of same to its own use and hereby relinquish forever all our claims thereto or rights therein.

We agree with the trial court's observation that Red Top's assigned claim and rights of recovery against Arkansas National were not necessarily limited to the judgment for $6,-850 obtained by Bratton and Lowe against Red Top.

As between the parties to the litigation in this case, Red Top's actionable claim against Midwest amounted to an unliquidated tort claim and it was not assignable. See *So. Farm Bur. Cas. Ins. Co.* v. *Wright Oil Co., Inc.*, 248 Ark. 803, 454 S.W. 2d 69; *Lowrey* v. *Lowrey,* 260 Ark. 128, 538 S.W. 2d 36 (1976). See also *Nat'l Fire Ins. Co.* v. *Pettit-Galloway Co.,* 157 Ark. 333, 248 S.W. 262.

The judgment is affirmed.

FOGLEMAN, J., dissents.

JOHN A. FOGLEMAN, Justice, dissenting. I dissent because I would hold that the claim was assignable. This holding, in my opinion, would not conflict with our holdings that tort claims for personal injuries are not assignable. There is no sound reason why such a claim as the one involved here should not be assignable under the circumstances prevailing.

Johnny R. WHITE *v.* STATE of Arkansas

CR 75-204 538 S.W. 2d 550

Opinion delivered July 19, 1976

*Robert L. Shaw,* for appellant.

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

CONLEY BYRD, Justice. Appellant Johnny R. White was charged by information with the offense of possessing marijuana for the purpose of delivery allegedly committed on November 22, 1974. The jury found him not guilty of the offense charged but returned a verdict finding him guilty of only possessing marijuana. From a judgment assessing a $250 fine and a one year jail sentence, appellant appeals contending that mere possession of marijuana was not a misdemeanor offense under Act 590 of 1971, as amended by Act 186 of 1973.

Act 590 of 1971, being the Uniform Controlled Substance Act, comprises in excess of 38 pages in the 1971 Acts. Section 1, containing 24 different definitions provides in so far as here pertinent, as follows:

"SECTION 1. As used in this Act:

. . .

(d) 'Controlled substance' means a drug substance, or immediate precurson in Schedules I through V or Article II of this Act."

Article II of Act 590 of 1971 contained Schedules I through V and marijuana was classified as a substance in Schedule I.

Section 1 of Article IV of Act 590 of 1971 provided as follows:

SECTION 1. (a) Except as authorized by this Act, it is unlawful for any person to manufactur, deliver, or possess with intent to manufacture or deliver, a controlled substance.

(1) Any person who violates this subsection with respect to:

(i) a controlled substance classified in Schedule I or II which is a narcotic drug, is guilty of a crime and upon conviction may be imprisoned for not more than fifteen (15) years or fined not more than $25,000, or both;

(ii) any other controlled substance classified in Schedule I, II, or III, is guilty of a crime and upon conviction may be imprisoned for not more than five years, fined not more than $15,000 or both;

(iii) a substance classified in Schedule IV, is guilty of a crime and upon conviction may be imprisoned for not more than 3 years, fined not more than $10,000.-00, or both;

(iv) a substance classified in Schedule V, is guilty of a crime and upon conviction may be imprisoned for not more than one year, fined not more than $5,000, or both.

(b) Except as authorized by this Act, it is unlawful for any person to create, deliver, or possess with intent to deliver, a counterfeit substance.

(b) (1) Any person who violates this subsection with respect to:

(i) a counterfeit substance classified in Schedule I or II which is a narcotic drug, is guilty of a crime and upon conviction may be imprisoned for not more than 15 years, fined not more than $25,000 or both;

(ii) any other counterfeit substance classified in Schedule I, II, or III, is guilty of a crime and upon conviction may be imprisoned for not more than 5 years, fined not more than $15,000, or both;

(iii) a counterfeit substance classified in Schedule IV, is guilty of a crime and upon conviction may be imprisoned for not more than 3 years, fined not more than $10,000, or both;

(iv) a counterfeit substance classified in Schedule V, is guilty of a crime and upon conviction may be imprisoned for not more than one year, fined not more than $5,000, or both.

(c) It is unlawful for any person knowingly or intentionally to possess a controlled substance unless the substance was obtained directly from, or pursuant to, a valid prescription or order of a practitioner while acting in the course of his professional practice, or except as otherwise authorized by this Act. Any person who violates this subsection is guilty of a misdemeanor. Provided, any person who is convicted of a third or subsequent offense for violation of this subsection shall be guilty of a felony and shall be subject to imprisonment in the Penitentiary for not less than two (2) nor more than five (5) years."

In Act 186 of 1973 marijuana was removed from Schedule I of Article II and placed in a new Schedule VI. No amendment was made at that time to Section 1 of Act 590

which defined a "controlled substance" as a "drug, substance, or immediate precursor in Schedules I through V of Article II of this Act." However, Act 186 of 1973 did provide:

> SECTION 2. Subsection (a) of Section 1 of Article IV of Act 590 of 1971 as amended the same being Arkansas Statutes Section 82-2617 (a) is hereby amendeh to read as follows:
>
> '(a) Except as authorized by this Act, it is unlawful for any person to manufacture, deliver, or possess with intent to manufacture or deliver, a controlled substance.
>
> (1) Any person who violates this subsection with respect to:
>
> (i) a controlled substance classified in Schedule I or II which is a narcotic drug, is guilty of a felony and upon conviction may be imprisoned in the state penitentiary for not less than five (5) years nor more than thirty (30) years or fined not more than $25,000, or both;
>
> (ii) any other controlled substance classified in Schedule I, II, III, or VI is guilty of a felony and upon conviction may be imprisoned in the state penitentiary for not less than three (3) years nor more than ten (10) years, fined not more than $15,000, or both;
>
> (iii) a substance classified in Schedule IV, is guilty of a felony and upon conviction may be imprisoned in the state penitentiary for not less than one (1) year nor more than three years, fined not more than $10,000, or both;
>
> (iv) a substance classified in Schedule V, is guilty of a felony and upon conviction may be imprisoned in the state penitentiary for not less than one (1) year nor more than two (2) years, fined not more than $5,000, or both.'
>
> SECTION 3. Subsection (c) of Section 1 of Article IV of Act 590 of 1971 as amended, the same being Arkansas Statutes Section 82-2617 (c) is hereby amended to read as follows:

(c) It is unlawful for any person knowingly or intentionally to possess a controlled substance unless the substance was obtained directly from, or pursuant to, a valid prescription or order of a practitioner while acting in the course of his professional practice, or except as otherwise authorized by this Act. Any person who violates this subsection is guilty of a misdemeanor. Provided, any person who is convicted of a third or subsequent offense for violation of this subsection shall be guilty of a felony and shall be subject to imprisonment in the penitentiary for not less than two (2) nor more than five (5) years. Provided however, any person who unlawfully possesses a controlled substance listed under Schedule I of this Act shall be guilty of a felony and upon conviction thereof, shall be imprisoned in the state penitentiary for not less than two (2) years nor more than five (5) years."

Obviously subsection (c) of Section 1 of Article IV as amended by Act 186 of 1973 does not make the mere possession of marijuana a misdemeanor if the definition in Section 1 (d) of Act 590 of 1971, is substituted for the term "controlled substance." Under that construction only possession of drugs appearing in Schedule I through V are classified as misdemeanors.

To avoid the definition of a "controlled substance" as used in Section 1 (d) of the Uniform Controlled Drug Act, the State makes two arguments — *i.e.* (1) appellant did not properly raise the issue in the trial court, and (2) "it would indeed he an absurd result to construe the failure of Act 186 to amend § 82-2601 (d) [Section 1 (d) of Act 590] to include possession of marijuana, the crime of which appellant stands convicted." To do so, says the State, "would clearly thwart the obvious intent of the Legislature."

We find no merit to the contention of the State that the issue was not properly raised in the trial court. Such issues go to the jurisdiction of the trial court and can be raised at any time, even after a guilty plea by certiorari, *Switzer* v. *Golden, Judge,* 224 Ark. 543, 274 S.W. 2d 769 (1955).

Neither can we agree with the State as to its second con-

tention for the rule of law with respect to statutory construction of penal provisions is that nothing will be taken as intended which is not clearly expressed and all doubts must be resolved in favor of the accused, *Bennett* v. *State,* 252 Ark. 128, 477 S.W. 2d 497 (1972). This rule comes to us from the early common law and is well known to lawyers and legislators alike. Consequently, when the doubts as to the construction of the use of the term "controlled substance" in subsection (c) of Section 1 of Article IV of Act 590 of 1971, as amended by Act 186 of 1973, is considered in the light of the strict construction rule, we must agree with the appellant that the mere possession of drugs classified in Schedule VI of Article II of the Uniform Controlled Substance Act as amended by Act 186 of 1973, do not constitute a misdemeanor.[1]

Reversed and dismissed.

JONES, J., dissents.

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

The Uniform Controlled Substances Act of 1971 (Act 590 of 1971) separated the controlled drugs and substances into five general classifications referred to as "schedules" according to their nature and potency. The Act included marijuana, along with 16 other named substances among the "hallucinogenic substances" classified under Schedule I. The Act then provided a penalty for possession with intent to deliver non-narcotic controlled substances under Schedules I, II or III as imprisonment for not more than five years and a fine of not more than $15,000, or both. The Act then provided that mere possession of such substance would constitute a misdemeanor except that a third or subsequent offense would constitute a felony.

Act 186 of 1973 amended the 1971 Act and as recited in the enacting clause was for the purpose, among other things, "to Create a New Schedule to be Designated 'Schedule VI' to Include Marihuana and to Provide a Penalty for the Posses-

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[1] § 82-2601(d) was amended by Act 305 of 1975 to include Schedule VI.

sion Thereof; and for Other Purposes." I cannot accept the apparent reasoning of the majority that possession of marijuana was legalized by Act 186 of 1973 for lack of definition. By passing Act 186 of 1973 the Legislature simply concluded that marijuana, classified as the tenth numbered substance among the 17 hallucinogenic substances in Schedule I under Section 4 (a) of Act 590, was simply in the wrong schedule penalty-wise and was entitled to a separate numbered schedule. Consequently, by Act 186 of 1973, the Legislature provided in Sections 13, 14 and 15 of the Act as follows:

> SECTION 13. There is hereby established a Schedule VI for the classification of those substances which are determined to be inappropriately classified by placing them in Schedules I through V. Schedule VI includes controlled substances listed or to be listed by whatever official name, common or usual name, chemical name or trade name designated.
>
> SECTION 14. The Coordinator shall place a substance in Schedule VI if he finds that:
>
> (a) the substance is not currently accepted for medical use in treatment in the United States;
>
> (b) that there is lack of accepted safety for use of the drug or other substance even under direct medical supervision;
>
> (c) that the substance has relatively high psychological and/or physiological dependence liability; and,
>
> (d) That use of the substance presents a definite risk to public health.
>
> SECTION 15. Unless specifically excepted or unless listed in another schedule, any material, compound, mixture, or preparation, whether produced directly or indirectly from substances of vegetable origin, or independently by means of chemical synthesis, or by a combination of extraction and chemical synthesis, which contains any quantity of the following substances, or which contains any of their salts, isomers, and salts of

isomers whenever the existence of such salts, isomers, and salts of isomers is possible within the specific chemical designation are included in Schedule VI:

1. Marihuana.

2. Tetrahydrocannabinol.

Act 186 then provided, as did the previous Act 590, felony penalty for violation in connection with controlled substances under Schedules I and II when the substance is a narcotic drug, and raised the penalty from imprisonment for not more than 15 years or fine not more than $25,000, or both, to "imprisonment in the state penitentiary for not less than five (5) years nor more than thirty (30) years or fined not more than $25,000, or both."

Article IV, Section 1 (a) (1) (ii) of original Act 590 pertaining to possession with intent to deliver recited as follows:

> Any person who violates this subsection with respect to: . . . any other controlled substance classified in Schedule I, II, or III, is guilty of a crime and upon conviction may be imprisoned for not more than five years, fined not more than $15,000 or both.

This subsection was amended by Act 186 to read as follows:

> Any person who violates this subsection with respect to any other controlled substance classified in Schedule I, II, III, or VI is guilty of a felony and upon conviction may be imprisoned in the state penitentiary for not less than three (3) years nor more than ten (10) years, fined not more than $15,000, or both.

Section 3 (c) of Act 186 simply re-enacted the misdemeanor provision for mere possession under Act 590 (subsection [c] of Section 1 of Article IV of Act 590) with the additional proviso: "Provided however, any person who unlawfully possesses a controlled substance listed under Schedule I of this Act shall be guilty of a felony and upon conviction thereof, shall be imprisoned in the state penitentiary for not less than two (2) years nor more than five (5) years."

The appellant was simply charged with the possession of controlled substance, to-wit: Marijuana, with the intent to deliver said substance to other persons. Under Section 1 of Act 590 of 1971 many words and terms "*as used in this Act*" were defined. These words included "Administer," "Agent," "Bureau," "Controlled substance," "Deliver," "Dispense," "Dispenser," etc. The Act then provided administrative authority for the Commissioner to add to or delete from the various Schedules drugs and substances. Then Section 4 of the Act named 42 opiates as being included in Schedule I and also named 22 opium derivatives as being included in Schedule I and then, as already stated, named 17 hallucinogenic substances as included in Schedule I.

Act 590 was approved on April 17, 1971, and Act 186 of 1973 was approved on March 2, 1973, and the appellant White was accused of having possessed marijuana on November 22, 1974. He now says that there could be no violation of law as charged because the amendatory Act 186 removed marijuana from Schedule I under Act 590; and, consequently, since Act 590 defined "controlled substance" as a substance mentioned in Schedule I through V of Article 2 of that Act and since Act 186 of 1973 did not amend the *definition* of "controlled substance" to include substances in Schedule VI, there was no violation of the law by possession of marijuana since the re-enactment of Act 186 of 1973.

Under Act 590 of 1971 the Legislature set up five classifications for the drugs and substances being controlled. The drugs and substances were not controlled because they fell into one of the five classified schedules, they fell into one of the five schedules because they were being controlled, and their nature and derivation were important to their classification in providing the penalties in connection with violations pertaining to them. The Legislature concluded that under Act 590 marijuana was erroneously included under Schedule I, and if the Legislature did amend marijuana out of the definition of a controlled substance by Act 186, it certainly did not leave the mere possession of marijuana, or the possession of marijuana with intent to deliver, without penalty. In other words, by Act 186 the Legislature did not legalize the possession of marijuana by lack of definition and if Act 186 did take marijuana out of the definition of a controlled sub-

stance in Act 590, it placed marijuana back within the definition of a controlled substance when the Legislature in Section 13 of Act 186 said:

> There is hereby established a Schedule VI for the classification of those substances which are determined to be inappropriately classified by placing them in Schedules I through V. Schedule VI includes controlled substances listed. . . .

Section 14 of the Act then provided for the Coordinator to add substances to or subtract them from Schedule VI. Section 15, *supra,* of Act 186, defined what substances were to be included in Schedule VI and specifically mentioned marijuana. Then Act 186, under Section 3 (c) just simply reenacted the penalty clause contained in Act 590 for mere possession with the exception that since marijuana was given a designated schedule, possession of the other substances listed in Schedule I of the Act was made a felony.

I would affirm on the point here involved.

E. B. FENDLEY et al *v.* Johnnie Faye LASTER

75-246 538 S.W. 2d 555

Opinion delivered July 19, 1976

*Bailey, Trimble & Holt,* for appellants.

*Frances D. Holtzendorff* and *Kay L. Matthews,* for appellee.

ROBERT HAYS WILLIAMS, Special Justice. This Appeal involves the validity of a gift causa mortis.

Briefly, Stanley Claude Fendley owned the Economy Drug Stores in Little Rock and the Appellee, Johnnie Faye Laster, was his trusted employee for many years. On December 23, 1967, Fendley suffered a severe and disabling heart attack from which he remained hospitalized for approximately two months.

On March 1, 1968, after returning home, he wrote and delivered a check to Johnnie Faye Laster for $10,000.00, which is the subject of the purported gift. In the lefthand corner he penned the following words, "Only Good In Case of Death SCF."

After the heart attack he only returned to the active management of his business affairs on a part time basis for the period of about a year. He died on June 21, 1973 at the age of 71. Prior to his death, on the 16th day of October, 1972, E. B. Fendley and C.B. Fendley were appointed Co-Guardians of the Person and Estate of Stanley Claude Fendley, because of his mental and physical incompetency.

Fendley died testate and Appellants who were appointed Co-Executors of his Estate, disallowed the claim of Johnnie Faye Laster for $10,000.00. Subsequently, the Probate Court of Pulaski County allowed it as a gift causa mortis.

Under these facts, about which there is no dispute, most of them having been stipulated, there is no question but that Stanley Claude Fendley attempted to make a gift to Johnnie

Faye Laster of $10,000.00 and effectively delivered the check representing the money to her. Also, in the opinion of the Court, there is no doubt but that he was apprehensive of death at the time he wrote and delivered the check to her. It is not difficult to conceive his state of mind at that time, having just undergone such a serious brush with death.

We reaffirm the rule announced in the case of *Smith, Administratrix,* v. *Clark,* 219 Ark. 751, 244 S.W. 2d 776, that a check may be the subject of a gift causa mortis.

There is no difficulty, therefore, in finding that the subject matter of a gift has been delivered by the donor to the donee at a time when the donor was under the apprehension of death from some existing disease, two of the requirements of a valid gift causa mortis.

The difficulty in this case, however, comes with the third requirement, that is, that the donor must die without recovering from the disease (or surviving the peril).

Did Fendley die without recovering from the disease which placed him in a state of apprehension during the last few days of 1967 and the first two months of 1968?

Under the stipulation of facts, Fendley did not return to full time management of his businsss interests but during the period between the heart attack and his death he did actively conduct some of his business affairs on a part time basis for about one year; and ultimately died from the existing heart condition on June 21, 1973. From the stipulation of the parties with reference to the testimony of John W. McCracken it appears that Fendley and McCracken, during this same period of time, went together to the Ochsner Clinic in New Orleans, Louisiana during which trip Fendley discussed the specific question here involved together with other business and personal matters. He also discussed this matter with Reeves Anderson as well as with the witness, Mrs. L. D. Bursott, and also discussed it with Joe Meek, Jr.

The cause of death as reflected on the Death Certificate signed by the attending physician was "acute pulmonary edema, arterioscleriotic heart disease, congestive heart failure

chronic".

In view of the time that Fendley lived after the apprehensive incident, in excess of five years, and of his activities during that period of time, though limited to some extent, we are of the opinion that it is not reasonable to say that he had not recovered from the disease which caused his apprehension and that the effort to establish a gift causa mortis must fail.

The case of *Ellsworth* v. *Cornes,* 204 Ark. 756, 165 S.W. 2d 57, quoted the rule from *Pomeroy's Equity,* 4th Ed., P. 2669, with reference to gifts causa mortis as follows:

> "When a gift causa mortis is made during sickness, it is essential, in order to perfect it and prevent a revocation, that the donor should die of the very same sickness from which he was then suffering, and there should be no intervening recovery between the illness and his final death; and it seems that the donee must affirmatively show the existence of all these facts."

The Courts as well as the text writers agree generally on the essentials as above quoted. None give any great amount of guidance as to what "recovery" should be limited or defined. In the case of *Smith, Administratrix* v. *Clark, supra,* the Court did say that in many of the reported cases the gift was made weeks, and even months, before the death of the donor. So that time of life subsequent to the incident is not the sole criteria.

That Fendley did leave his hospital bed and the hospital and did show some interest and activity in his business is at least convincing evidence that he "recovered" from the depth of the disease that caused him to be overly concerned about his chances of prolonged life. This, in addition to five years of prolonged life, convinces the Court that there was an intervening recovery between the illness and his final death.

This cause is, therefore, reversed and remanded to the Lower Court with directions to enter its Order consistent herewith.

Special Justice SAM HILBURN joins in this opinion.

JONES, J., dissents.

HOLT and ROY, JJ., disqualified and not participating.

UNITED STATES FIDELITY AND GUARANTY COMPANY *v.* Monroe LOVE

75-281 538 S.W. 2d 558

Opinion delivered July 19, 1976

*Bridges, Young, Matthews & Davis,* for appellant.

*Lee A. Munson,* Prosecuting Atty., 6th Judicial Circuit, by: *John Wesley Hall Jr.,* Dep. Prosecuting Atty., Civil Litigation Division.

JAMES A. ROSS, JR., Special Chief Justice. This case involves an action by appellant, United States Fidelity and Guaranty Company, to recover attorney's fees from appellee, Sheriff Monroe Love, under the terms of an indemnity agreement. Monroe Love, while serving as Sheriff of Pulaski County, was required by Arkansas Statute Annotated § 12-1101 (1968 Repl.) to execute a bond to the State of Arkansas. In December of 1970 Sheriff Love applied to U.S.F. & G. to act as surety for this bond and he executed an application form prepared by U.S.F. & G. containing an indemnity agreement "to indemnify the Company against any loss, damage and expense of any kind incurred by it by reason of the execution of any such bond."

Later, a civil rights action was filed in federal district court against Sheriff Love and U.S.F. & G. (as surety on the bond) seeking damages alleged to have been caused by one of the sheriff's deputies. The Prosecuting Attorney for the Sixth Judicial District defended Sheriff Love, but he declined to defend U.S.F. & G. on the grounds that a prosecuting attorney could not represent a private entity. Separate counsel was retained by U.S.F. & G.

Judgment was entered against Sheriff Love in the federal action, and he paid the judgment in full. Then, U.S.F.&G. instituted this action to recover the sum of $1,962.50 which it paid to its defense attorney. Both Sheriff Love and U.S.F. & G. filed motions for summary judgment and the Circuit Court granted the motion of Sheriff Love. This order is appealed by U.S.F. & G.

The issue before the Court is an interpretation of the language of the indemnity agreement to determine if this includes attorneys' fees actually expended for the defense of U.S.F. & G. in the federal civil rights action.

This case is distinguishable from *Title Guaranty & Surety Co.* v. *Burke,* 134 Ark. 499, 204 S.W. 215 (1918), because the language involved in the U.S.F. & G. indemnity agreement is broader and more inclusive than the language of the indemnity agreement in the *Burke* case. The case of *Fausett Builders, Inc.* v. *Globe Indemnity Co.,* 220 Ark. 301, 247 S.W. 2d 469 (1952), is not controlling here because that case involved a

contract of suretyship and not an indemnity contract.

In a recent case, attorneys' fees were recovered under the terms of an indemnity agreement in which such fees were not specified. *Buck* v. *Monsanto Co. et al,* 254 Ark. 821, 497 S.W. 2d 664 (1973). However, the issue of inclusion of attorneys' fees within the language of that indemnity provision was not raised before the Court.

This Court has given broad construction to language similar to the indemnity provision here by holding such language includes interest on the principal sum from the date it was paid by the indemnitee in its capacity as surety on a bond. *Kincade* v. *C. & L. Rural Electric Coop. Corp.,* 227 Ark. 321, 299 S.W. 2d 67 (1957). Finding no Arkansas cases directly in point on the issue of attorneys' fees, the Court looks to the decisions of other jurisdictions.

This Court adopts the general rule that this indemnity apreement does include attorneys' fees. *B. & G. Electric Co.* v. *G. E. Bass & Co.,* 252 F. 2d 698 (5th Cir. 1958); *Fidelity & Casualty Co. of New York* v. *Mauney,* 273 Ky. 400, 116 S.W. 2d 960 (1938); 11 APPLEMAN, Insurance Law and Practice, § 6677; 41 AM. JUR. 2d, *Indemnity,* § 36; 42 C.J.S., *Indemnity,* § 13.

A number of cases are cited by Sheriff Love from other jurisdictions denying recovery of attorneys' fees under an indemnity agreement. However, as U.S.F. & G. points out, most of these cases involve attorneys' fees expended by the indemnitee in an action on the indemnity agreement against the indemnitor. Such fees are not recoverable and are not being allowed in this case. Other cases cited bv Sheriff Love represent the minority rule. 11 APPLEMAN, Insurance Law and Practice, *supra.*

To be recoverable by the indemnitee, the attorneys' fees must be reasonable, proper, necessary and incurred in good faith and with due diligence. *Fidelity & Casualty Co. of New York* v. *Mauney, supra; U.S.F. & G.* v. *Garrett,* 156 S.C. 132, 152 S.W. 772 (1930); 11 APPLEMAN, Insurance Law and Practice, *supra.* These are factual questions to be determined by the trier of fact, and when properly placed in dispute are not matters to be disposed of on motion for summary judg-

ment. Sheriff Love does, by sworn answers to interrogatories, place in issue the question of reasonableness of the fees paid. Accordingly, this case is reversed and remanded to the trial court for a determination of the reasonableness of the attorneys' fees.

Special Justices JAMES E. WEST and LEE TUCKER join in this opinion.

JONES, J., dissents.

HARRIS, C.J., and FOGLEMAN and ROY, JJ., not participating.

J. FRED JONES, Justice. I do not agree with the majority opinion in this case. I agree with the majority that the sheriff was required by statute to enter into bond to the State of Arkansas with good and sufficient security condition that he would well, truly and faithfully discharge and perform his duties as sheriff; and, I agree that in his application for bond Sheriff Love agreed to pay the premium in advance and "to indemnify the company against any loss, damage and expense of any kind incurred by it by reason of the execution of any such bond."

I also agree that to be recoverable by the indemnitee as a proper item of expense attorney's fees must be reasonable, proper, necessary and incurred in good faith and with due diligence; but, I do not agree with the majority that the attorney's fees expended by United States Fidelity and Guaranty Company in this case were necessary at all.

It is my view that this was a proper case for summary judgment but in my opinion the summary judgment should have been rendered in favor of Sheriff Love. If Sheriff Love was liable for the acts of his deputy in the civil rights action in federal court, then his bonding company was, in my opinion, automatically liable because its liability to the state, for the use and benefit of Pulaski County, was secondary to the liability of Sheriff Love and depended wholly and entirely on the liability of Sheriff Love. If Sheriff Love was liable, so was his bonding company and it had no separate defense under the record in this case. If Sheriff Love was not liable, neither

was his bonding company. Sheriff Love's defense was the defense of his bonding company.

It is my view that United States Fidelity and Guaranty Company had no separate defense requiring the services of its own separate attorney at the expense of Sheriff Love. I would reverse and dismiss.

In Re: Petition of Wayne R. Williams to Surrender Attorney's License

July 19, 1976

PER CURIAM

This matter involves the petition of Wayne R. Williams which states that a complaint is pending against him before the Supreme Court Committee on Professional Conduct.

Mr. Williams admits the allegations against him are substantially true, and he petitions the Court as follows:

> I therefore petition this Court to accept my surrender of my Attorney's License and to remove me from the list of attorneys authorized to practice law in the State of Arkansas for a period of two (2) years and that following the said period of two (2) years that I then be considered eligible for reinstatement as a licensed attorney in Arkansas *subject to such conditions as may be set by this Court concerning any pertinent considerations for re-admission including, but not limited to, establishment of my then good character and my good conduct during the suspension period* [italics supplied].
>
> I make this request without any reservations and hope this matter will be handled without any undue publicity. I herewith tender my license certificate to this Court.

The Court also has received from the Executive Secretary of the Committee on Professional Conduct the

following letter:

> The Committee on Professional Conduct has held two long hearings concerning the alleged misconduct of Attorney Wayne R. Williams, formerly charged with bribery in state courts. An extensive investigation was conducted on behalf of the committee. Mr. Williams was afforded the opportunity to voluntarily surrender his license to practice law in lieu of a disbarment suit being filed by the committee. He expressed a desire to do this, and there has been considerable negotiation to draft a Petition to surrender his license that was satisfactory to Mr. Williams and would be acceptable to the committee for a recommendation to the Court to accept it.
>
> I have today received a Petition executed by Mr. Williams acceptable to the committee, along with his license certificate, and have delivered them both to Jimmy Hawkins for filing with the Court. I am instructed by the committee to recommend to the Court it accept this Petition according to the terms therein.

This Court is most fortunate in having on the Professional Conduct Committee seven outstanding members of the bar, men of the highest caliber, men dedicated to maintaining high standards in the legal profession. Their duties entail careful investigation of complaints questioning the ethical conduct of attorneys and then taking whatever action may be prescribed by the Rules of Professional Conduct governing attorneys. When deemed appropriate, recommendations are made to this Court. These men are called upon to take long hours from their own busy professional schedules to serve the larger interest and welfare of the entire bar of this State in carrying out these responsibilities.

As indicated in the letter of transmittal from the Committee, after two long hearings, much deliberate consideration and lengthy negotiations the Committee recommended that we accept the petition according to its terms. Certainly we attach great weight to the recommendation of the Committee which heard the testimony of petitioner and other witnesses who came before it. The members of the Committee

are in a much better position to gauge appropriate action in this matter than this Court which has not seen the witnesses nor heard the testimony.

This Committee ably carries out the responsibilities delegated to it, and in performing their duties the members of the Committee gave consideration not only to the Code of Professional Responsibility but also to the action taken and pronouncements made by this Court in applying sanctions in previous cases.

Accordingly we deem it appropriate to accept surrender of petitioner's license for a two-year period, but this does not mean petitioner will be automatically reinstated at the end of this period. *Petitioner will only be readmitted upon a satisfactory showing to the Board of Law Examiners that his character and integrity are such that he deserves readmittance.* Another condition of the suspension is that petitioner refrain from assisting any other attorney engaged in the practice of law and from accepting employment by any other attorney in any capacity whatever during the term of his suspension. The burden of proof shall rest upon petitioner in making those showings to the Board of Law Examiners.

## In re: SUPREME COURT PROCEDURE FOR SITTING IN DIVISIONS

July 19, 1976

PER CURIAM

The court's caseload has more than doubled in the past fifteen years and continues to increase from year to year. As a measure necessary to keep the docket current the court has unanimously decided that, at least until the procedure proves to be unsatisfactory or there is some other change in circumstances, the court will exercise its constitutional, statutory and inherent authority to sit in divisions. There will be two divisions, each consisting of the Chief Justice and three associate justices, with the makeup of the divisions

rotating from time to time. Whenever a division is not unanimous the case will be referred to the full court. The court will also sit in banc from the outset in cases presenting a substantial question arising under the Arkansas Constitution, in criminal cases in which capital punishment has been imposed, in cases of original jurisdiction under Rule 17, and in other cases designated by the Court. All opinions in all cases will be circulated to all seven judges and considered in conference before their release. As in the past, no decision will be reached without the concurrence of at least four members of the court. No other change in the court's procedure or rules is expected to be necessary.

Roy James POWELL and Georgia Marie POWELL *v.* STATE of Arkansas

CR 76-68 540 S.W. 2d 1

Opinion delivered September 13, 1976

*Skillman, DeWitt & Davis,* for appellants.

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

CONLEY BYRD, Justice. For reversal of their convictions for possessing more than an ounce of marijuana with intent to sell and deliver, the appellants, Roy James Powell and Georgia Marie Powell raise the following issues:

1. The trial court erred in not granting appellants' motion to quash search warrant and to suppress any items obtained from such search.

2. The trial court erred in not directing a verdict for appellants.

3. The trial court erred in not permitting appellants to impeach the testimony of witness, Joe Morgan.

4. The trial court erred in not permitting appellants to introduce into evidence the petition to revoke suspended sentence of witness for the State, Joe Morgan.

5. The trial court erred in not ordering the return of appellant, Roy James Powell, funds confiscated by the officers.

The facts stated most favorably to the jury's findings show that after an informant, Joe Morgan, had made a purchase of a lid of marijuana from the Powells with a marked $20 bill, a search warrant was obtained to search the home. When the searching officers knocked on the door of the

Powell home, there was some resistance by Mr. Powell while Mrs. Powell was seen running through the house and handling a plastic bag. Joe Morgan testified that when he purchased the lid of marijuana, he gave the marked $20 bill to Mrs. Powell and that she went into another room and got him the marijuana and brought him his change — the lid cost $15.00. At the time of the search and arrest $1,264.00, including the marked $20 bill, was taken from the Powells.

POINT I. The attack upon the search warrant is two fold—*i.e.* (1) there is no statutory authority for city officers to serve a search warrant and (2) Officer Presley, who signed the affidavit for the search warrant had no reason to believe Joe Morgan. We find no merit in either contention. Ark. Stat. Ann. § 43-204 authorizes a search by a "public officer" and the city police would certainly fall within the definition of a public officer.

To support the argument that Officer Presley had no reason to believe Joe Morgan, the appellants rely upon portions of Joe Morgan's testimony elicited at the criminal trial to collaterally attack the affidavit presented to the magistrate who issued the search warrant. However, we held in *Liberto & Mothershed* v. *State,* 248 Ark. 350, 451 S.W. 2d 464 (1970), that the validity of the issuance of a search warrant could not be retrospectively attacked by the production of other evidence.

POINT II. We find no merit to the contentions of either of the Powells that they were entitled to a directed verdict. The testimony of Joe Morgan is sufficient to sustain the verdict when viewed from the substantial evidence rule applied to jury verdicts. In addition there was other evidence from the searching officers that tied both of the Powells to the possession for sale of the drugs.

POINTS III & IV. In making the contentions that they were entitled to impeach the credibility of Joe Morgan's testimony on collateral matters appellants recognize that we have ruled to the contrary in *Spence* v. *State,* 184 Ark. 139, 40 S.W. 2d 986 (1931), and in *Swaim* v. *State,* 257 Ark. 166, 514 S.W. 2d 706 (1974), but suggest that those authorities should be overruled. We decline to overrule those authorities which

are based upon Ark. Stat. Ann. § 28-707 (Repl. 1962). Without the restriction on collateral matters a simple trial could be carried on for years. The rule applies also to impeachment of a witness where an indictment has been returned against him, *Anderson* v. *State,* 34 Ark. 257 (1879).

POINT V. Appellants assert that the trial court relied upon Ark. Stat. Ann. § 43-2403 (Repl. 1964), for not returning the money taken from them at the time of the search and arrest. The State contends that the possession of a large amount of cash money had independent relevance to the charge and that the State properly held it for evidence. Except for the marked $20 bill that was in the possession of Powell at the time of his arrest, we can find no authority that would support the confiscation of the Powells' money pending the trial. Ark. Stat. Ann. § 43-2403, was before this court in *Lawson* v. *Johnson & Ashley,* 5 Ark. 168 (1843), and we there stated:

> "This provision of law, we have no doubt, creates a lien in favor of the State, on all of the property of a person charged with a criminal offence, wheresoever it may be within the limits of the State, which attaches upon and binds it, not only in the hands of the accused, but also in the hands of any other person who shall, in any manner, possess or hold it, from the time of the arrest or indictment found, as mentioned in the Statute, until the accused is discharged from the prosecution, or such fines and costs, as shall be adjudged against him, are paid. But it surely was not the design of the law to confiscate the property of the accused, or to divest him of the possession or use of it pending the prosecution."

Except for the marked $20 bill, the money taken from the Powells should have been returned upon a signed receipt identifying the amount and kind of bills. To hold otherwise would run the risk of confiscating a person's property without due process of law.

However, the marked $20 bill, that was used to purchase the illegal drugs, was specifically identifiable as such and was subject to seizure pursuant to Ark. Stat. Ann. § 43-205 (Supp. 1975).

It accordingly follows that the judgment of conviction is affirmed but the trial court is reversed in so far as it refused to refund the money, other than the marked $20 bill, to the appellants.

Affirmed in part and reversed in part.

We agree: HARRIS, C.J., and HOLT and ROY, JJ.

James L. MASON and Bob LAMB *v.*
George O. JERNIGAN, Jr., Secretary
of State of the State of Arkansas

76-197 540 S.W. 2d 851

Opinion delivered September 20, 1976
(In Banc)

[Supplemental Opinion on Denial of Rehearing
delivered October 11, 1976, p. 399.]

Smith, Williams, Friday, Eldredge & Clark, by: *William J. Smith, James W. Moore* and *Robert V. Light,* for petitioners.

*Jim Guy Tucker,* Atty. Gen., by: *Lonnie A. Powers,* Dep. Atty. Gen., for respondents.

*Youngdahl, Larrison & Agee,* for Intervenor, Arkansas State AFL-CIO.

CARLETON HARRIS, Chief Justice. This is an original action. Petitioners, pursuant to Amendment No. 7 to the Arkansas Constitution, on July 9, 1976, filed their petition in this court, seeking to enjoin the Secretary of State from certifying to the State and County Boards of Election Commissioners the ballot title and popular name of a proposed amendment to the Constitution, known as Proposed Amendment No. 59, specifically, a proposed amendment to Amendment No. 34 of our Constitution. It is the contention of petitioners that the popular name given to the proposed amendment is misleading, deceptive, partisan, and obscures the true nature of the content of the amendment. It is also asserted that the ballot title is inadequate and insufficient and is not an impartial nor intelligible description of particular provisions, inasmuch as it distorts or withholds pertinent and vital information concerning the scope and effect of the proposed measure.

The entire amendment[1] is not of great length. The pop-

[1]"Amendment No. 34 to the Constitution of Arkansas is amended to read as follows:

Section 1. No person shall be denied employment because of

ular name given the proposal is "Amendment to the 'Rights of Labor' Amendment" and it is contended that the name given is deficient in that it has a tendency to mislead the voter. Petitioners point out that the present constitutional provision (Amendment No. 34), when adopted at the General Election of 1944, bore the popular name "Freedom to Work;" that this is the name that has been generally used in identifying this particular constitutional provision in legal periodicals and press articles, and that the public is familiar with that title. While this is true, the fact remains that the phrase "Right to Work" is only what might be termed a commonplace, or informal identification of the Act. Actually, the official compilation of the laws of Arkansas characterizes Amendment No. 34 as "Rights of Labor," this designation being approved by the Arkansas Statute Revision Commission,[2] which is charged with the duties necessary to the publication of our statutes, and such designation has been used from 1947 to the present time, appearing in like manner in the last (1975) Supplement to the Digest.

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membership in or affiliation with or resignation from a labor union, or because of refusal to join or affiliate with a labor union; nor shall any corporation or individual or association of any kind enter into any contract, written or oral, to exclude from employment members of a labor union or persons who refuse to join a labor union, or because of resignation from a labor union; nor shall any person against his will be compelled to pay dues to any labor organization as a prerequisite to or condition of employment; provided, however, that the foregoing governmental restrictions shall not apply if all of the following free choices have been made: (a) the employees in an existing collective bargaining unit have had an opportunity to participate in a secret ballot election conducted by an Arkansas state agency and the result of such election is a majority vote to remove the foregoing restrictions for that unit, (b) the affected employer has agreed to an otherwise legal contract provision concerning labor union membership as a condition of employment, and (c) all employees have freedom to participate or not participate in labor union meetings and similar activities.

Section 2. The General Assembly shall have power to enforce this article by appropriate legislation; provided, however, that the Arkansas Department of Labor (or, if there is no Arkansas Department of Labor, such executive department as designated by the Governor) shall have power to establish rules and regulations for the administration of the election provisions of this article, and to conduct such elections."

[2]This Commission is composed of five persons, *viz.*, the Dean of the School of Law of the University of Arkansas, the Attorney General of the State of Arkansas, and three members of the Bar named by the Supreme Court.

The ballot title in question provides as follows:

> "An Amendment to Amendment No. 34, 'Rights of Labor.' To the Constitution of Arkansas: To continue those provisions of Amendment No. 34 which prohibit denial of employment because of membership in, affiliation with, resignation from, or refusal to join a labor union, prohibit any contract which denies employment because of membership, refusal to join, or resignation from a labor union, and prohibit compelling of the payment of labor organization dues as a condition of employment; but to provide that the foregoing provisions shall not apply if three conditions are met: (a) Employees in an existing bargaining unit vote by secret ballot majority vote to remove them in an election conducted by an Arkansas State Agency, (b) The affected employer agrees to contract for labor union membership as a condition of employment, and (c) all employees may participate or not participate in labor union meetings and similar activities; to continue the enforcement power of the General Assembly; but to give the Arkansas Department of Labor (or department designated by the Governor) the power to establish rules and regulations for employee elections and to conduct such elections; and for other purposes."

Before discussing the particular points involved, perhaps it would be well to mention the general principles of law applicable to this type of case. In *Fletcher* v. *Bryant,* 243 Ark. 864, 422 S.W. 2d 698, we pointed out that some significance must be given to the fact that the Arkansas Attorney General approved the ballot title, pursuant to Ark. Stat. Ann. § 2-208 (Repl. 1956); in fact, we quoted from a Colorado case[3] (which quoted the language of a California case),[4] to the effect that only in a clear case, should a title so prepared be held insufficient. In *Fletcher,* citing earlier Arkansas cases,[5] this court said:

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[3]*Say* v. *Baker,* 322 P. 2d 317.

[4]*Epperson* v. *Jordan,* 82 P. 2d 445.

[5]*Coleman* v. *Sherrill,* 189 Ark. 843, 75 S.W. 2d 248; *Armstrong* v. *Sturch,* 235 Ark. 571, 361 S.W. 2d 77.

> "In determining the sufficiency of this ballot title, we will keep in mind that *we give a liberal construction* and interpretation of the requirements of Amendment 7 in order to secure its purposes to reserve to the people the right to adopt, reject, approve or disapprove legislation." [Our emphasis]

We added that:

> "Actions of electors in seeking to exercise this right must not be thwarted by strict or technical construction." *Reeves* v. *Smith,* 190 Ark. 213, 78 S.W. 2d 72.

Also, in *McDonald* v. *Bryant,* 238 Ark. 338, 381 S.W. 2d 736, it was pointed out that the question is not how court members may individually feel about a measure, but rather whether legal requirements for submission of a measure to the voters have been complied with.

We have said that a popular name (as well as a ballot title) must be free from "catch phrases and slogans which tend to mislead and color the merit of the proposal." *Moore* v. *Hall,* 229 Ark. 411, 316 S.W. 2d 207. We cannot see that the present popular name violates those requirements. There is nothing in the name that suggests approval or disapproval of the subject matter that follows; in fact, it would appear that the name "Rights of Labor" is perhaps more non-partisan than the name "Right to Work," since offhand it can certainly be considered that members of the general public favor the right of persons to work. In *Johnson* v. *Hall,* 229 Ark. 400, 316 S.W. 2d 194, we commented that the popular name there involved, "Trainmen Crew Amendment," would appear to have no effect upon the voters' thinking, one way or the other, *i.e.,* it was completely non-partisan.

This brings us to the ballot title itself. We have said that a ballot title must be "free from 'any misleading tendency, whether of amplification, of omission, or of fallacy,' and it must not be tinged with partisan coloring." *Bradley* v. *Hall,* 220 Ark. 925, 251 S.W. 2d 470. In the litigation before us, it somewhat appears that the attack of the petitioners on the ballot title is really an attack on the amendment itself, as be-

ing deceptive and misleading as to the purpose to be accomplished. Petitioners state:

> "While masquerading as an amendment to Amendment No. 34, the proposal in fact is much more drastic than an outright repeal such as advanced in the aborted 1950 attempt. A repeal would leave the General Assembly with authority to occupy, to the extent its legislative judgment prompted, the area of State sovereignty preserved by Sec. 14(b). The proposed measure would enshrine in our Constitution a rigid formula, beyond the competence of the General Assembly to revise, for the imposition of labor union membership and support on the unwilling workers of Arkansas. ***
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> "The elector is first beguiled with the assurance that the very provisions of the Constitution that the proposed Amendment is designed to emasculate will be 'continue(d)', and then reference is made to certain seemingly narrow and unimportant situations in which they 'shall not apply.' The sole purpose of the ballot title is to inform the elector how the proposal would change existing law — change or retention of that law is the choice left to him at the polls. The 'shall not apply' clause is hardly calculated to apprise the voter that adoption of the proposal would repeal existing constitutional prohibitions. ***."

As to the elector being deceived by the fact that there is duplication of the language appearing in the original amendment, it, of course, is true that the original amendment is copied; however, approximately half way through Section 1, the amendment provides that the foregoing restrictions "shall not apply if all of the following free choices have been made." In other words, exceptions are created to the original amendment. In amending statutes, this is generally the procedure followed. Most often, when a statute is amended by the General Assembly, it reiterates all the language of the statute that is retained and simply inserts the changes that are made. Actually, if the original language of Amendment No. 34 is to be retained as a part of the proposed constitutional amendment, such language, of course, must necessarily be placed in the amendment. We do not understand the argument relative

to "shall not apply" referring to "certain seemingly narrow and unimportant situations" for the exceptions are certainly the "meat" of the proposal; no language is pointed out by petitioners wherein the amendment indicates that these changes are only "minor." Of course, the fact that the provisions of Amendment No. 34, presently in effect, would not be applicable to every situation that might arise if proposed Amendment No. 59 is adopted could not, we think, be more clearly made known, than by using the language that under certain conditions, those provisions "shall not apply." There is complaint that the ballot title does not mention "union shop" and "agency shop," but those particular terms do not appear in proposed Amendment No. 59.[6] Let it be remembered that the purpose of a ballot title is *not to "interpret" the amendment,* but only to summarize adequately the provisions of such amendment; nor is it our function in the present litigation to interpret the amendment itself.

The defects which have invalidated some ballot titles in the past as inadequate, partisan, and misleading are illustrated by several cases. In *Johnson* v. *Hall, supra,* the ballot title provided "An Amendment Prohibiting Operation of Trains with Unsafe and Inadequate Crews." In disapproving this title, we said:

> "We think it can safely be said that all citizens are against the operation of trains that do not carry sufficient crews to reasonably assure safety. We cannot conceive that anyone would vote the contrary of this proposition, *viz.,* to *permit* the operation of trains with unsafe and inadequate crews. The amendment itself seeks to declare that to operate trains with inadequate crews, (meaning, of course, a crew less than that provided in the act), ' is detrimental to the safety and welfare of the people. * * *' But there has been no prior determination that this assertion is always true. Actually, this is a fact question, depending upon the circumstances in

[6]In *Moore* v. *Hall, supra,* cited by petitioners, we held a ballot title defective because, says petitioners, "while it was aimed at prohibiting 'featherbedding,' the ballot did not mention that widely understood term." We simply point out that in that proposed amendment, Section 1 provided "Practices known as 'featherbedding' are contrary to the public policy of this state."

each case. Such reasoning is in the nature of 'begging the question,' which is defined as 'founding a conclusion on a basis that needs to be proved as much as the conclusion itself.' Here, the voter is urged to support a measure which provides for a particular crew in the operation of trains, because to operate with a smaller crew is, according to the ballot title, 'unsafe and inadequate' — but the 'unsafe and inadequate' remains to be proved."

In another *Johnson* v. *Hall,* found at 229 Ark. 404, 316 S.W. 2d 197, the ballot title for proposed constitutional Amendment No. 52 was rejected as inadequate, the court stating:

"The ballot title here — An amendment to require adequate safety devices at all public railroad crossings, — obviously, we think, would convey to the voter, or carry the presumption to him, that at present the railroads were not using adequate safety devices at all public crossings and that our present statutes do not provide adequate protection for the highway traveler. Certainly all good citizens would vote for adequate protection at public crossings. There is nothing in this ballot title that tells the voter that this amendment would require all railroads in Arkansas to install and maintain at each public crossing or street electrically controlled warning signals, and in addition electrically controlled boards or gates on each side of the public railroad crossings, without any regard to the distance that said crossing might be from a source of electric power, and that such a requirement would place an additional burden of heavy expense on the railroads of millions of dollars to install and maintain such devices, at an estimated 3,600 public railroad crossings in Arkansas, whether the daily traffic count over such crossings amounted to a dozen vehicles or thousands."

Again, in *Walton* v. *McDonald, Secretary of State,* 192 Ark. 1155, 97 S.W. 2d 81, a proposed constitutional amendment contained forty-nine sections and provided, in brief, levy of a permanent general sales tax of two per cent, and further provided an appropriation of thirty-three and one-third per

cent of the gross proceeds of a tax on horse and dog racing, these taxes to be levied for the benefit of the old age and pension fund. In rejecting the title, this court, in an opinion by Justice Frank Smith, said:

> "The title carries an appeal to all humane instincts. Few would object to some provision being made for the support of the aged and blind; but to levy a general sales tax of two per cent, for that, or any other purpose, is a different question altogether, and would furnish the elector, however generous his impulses might be, serious ground for reflection if that information were imparted to him by the title of the question upon which he exercised his right of suffrage. Especially would this be true if he were also advised that the act appropriates to its purposes thirty-three and one-third per cent. of the gross proceeds of the tax on horse and dog racing, which amounted, during the last biennium, to the gross sum of $379,059.73."

How does the ballot title of proposed Amendment No. 59 comport with the standards, earlier mentioned, which must be followed if a ballot title is to be considered proper and adequate? In other words, is it "free from any misleading tendency, whether of amplification, of omission, or a fallacy, and not tinged with partisan coloring?" Let us compare the amendment and the ballot title.

| PROPOSED AMENDMENT | BALLOT TITLE |
|---|---|
| provided, however, that the foregoing governmental restrictions shall not apply if all of the following free choices have been made: | but to provide that the foregoing provisions shall not apply if three conditions are met: |
| (a) the employees in an existing collective bargaining unit have had an opportunity to participate in a secret ballot election conducted by an Arkansas state agency and the result of such election is a majority vote to remove the foregoing restrictions for that unit. | (a) employees in an existing bargaining unit vote by secret ballot majority vote to remove them in an election conducted by an Arkansas state agency, |

| | |
|---|---|
| (b) the affected employer has agreed to an otherwise legal contract provision concerning labor union membership as a condition of employment. | (b) the affected employer agrees to contract for labor union membership as a condition of employment, |
| and (c) all employees have freedom to participate or not participate in labor union meetings or similar activities. | and (c) all employees may participate or not participate in labor union meetings and similar activities; |

It is apparent that this abstract or summation is adequate and sufficient to summarize the changes proposed to Amendment No. 34 by proposed Amendment No. 59,[7] and is not misleading nor tinged with partisan coloring.

It follows that the petition seeking to enjoin the Secretary of State from certifying to the State and County Boards of Election Commissioners the ballot title and popular name of this proposed amendment, should be denied.

It is so ordered.

FOGLEMAN, BYRD, and ROY, JJ., dissent.

CONLEY BYRD, Justice, dissenting. I can see no reason to depart from our prior rulings upon the sufficiency of ballot titles to Initiative and Referendum petitions. In *Bradley* v. *Hall, Secretary of State,* 220 Ark. 925, 251 S.W. 2d 470 (1952), we had before us a proposal carrying the popular name "Modern Consumer Credit Amendment." In holding both the popular title and the ballot title deficient, we stated the simple basic rules for determining the sufficiency or insufficiency of the ballot title to an initiated proposal in this language:

> "Our decisions upon the sufficiency of ballot titles have been so numerous that the governing principles are perfectly familiar. On the one hand, it is not required that the ballot title contain a synopsis of the amendment or statute. *Sturdy* v. *Hall,* 204 Ark. 785, 164 S.W. 2d 884.

[7]The other provisions are similarly summarized and reflect the full content of the measure.

It is sufficient for the title to be complete enough to convey an intelligible idea of the scope and import of the proposed law. *Westbrook* v. *McDonald,* 184 Ark. 740, 43 S.W. 2d 356, 44 S.W. 2d 331. We have recognized the impossibility of preparing a ballot title that would suit every one. *Hogan* v. *Hall,* 198 Ark. 681, 130 S.W. 2d 716. Yet, on the other hand, the ballot title must be free from 'any misleading tendency, whether of amplification, of omission, or of fallacy, and it must not be tinged with partisan coloring, *Walton* v. *McDonald,* 192 Ark. 1155, 97 S.W. 2d 81.

It is evident that before determining the sufficiency of the present ballot title we must first ascertain what changes in the law would be brought about by the adoption of the proposed amendment. For the elector, in voting upon a constitutional amendment, is simply making a choice between retention of the existing law and the substitution of something new. It is the function of the ballot title to provide information concerning the choice that he is called upon to make. Hence the adequacy of the title is directly related to the degree to which it enlightens the voter with reference to the changes that he is given the opportunity of approving."

To determine the scope and import of the proposed amendment we must first determine what changes would be brought about by the proposal. Since the proposal here involved re-enacts both sections of the "Freedom to Work" amendment but amends each section with a proviso, that portion of the proposal before us which contains the language of the Freedom to Work amendment is hereinafter set out in ordinary type and the provisos added by the sponsors of the proposal are italicized. The proposed amendment sponsored by the Labor Union provides:

"Be It Enacted by the People of the State of Arkansas:

Amendment No. 34 to the Constitution of Arkansas is amended to read as follows:

Section 1. No person shall be denied employment because of membership in or affiliation with or resigna-

tion from a labor union, or because of refusal to join or affiliate with a labor union; nor shall any corporation or individual or association of any kind enter into any contract, written or oral, to exclude from employment members of a labor union or persons who refuse to join a labor union, or because of resignation from a labor union; nor shall any person against his will be compelled to pay dues to any labor organization as a prerequisite to or condition of employment; *provided, however, that the foregoing governmental restrictions shall not apply if all of the following free choices have been made: (a) the employees in an existing collective bargaining unit have had an opportunity to participate in a secret ballot election conducted by an Arkansas State agency and the result of such election is a majority vote to remove the foregoing restrictions for that unit, (b) the affected employer has agreed to an otherwise legal contract provision concerning labor union membership as a condition of employment, and (c) all employees have freedom to participate or not participate in labor union meetings and similar activities.*

Section 2. The General Assembly shall have power to enforce this article by appropriate legislation; *provided, however, that the Arkansas Department of Labor (or, if there is no Arkansas Department of Labor, such executive department as designated by the Governor) shall have power to establish rules and regulations for the administration of the election provisions of this article, and to conduct such elections."*

When the "proviso" in Section 1 is reduced to ordinary language it amends the Freedom to Work Law to permit a labor union when certified as a bargaining unit by the Arkansas Department of Labor to compel an employer to discriminate against persons who refuse to join a union. Included in the amendment is a deceptive requirement that "all employees have freedom to participate . . . in labor union meetings" but of course after the employer is forced to hire only union members, the provision becomes nothing more than window dressing because federal law now guarantees each union member such rights.

The proviso in Section 2 of the labor union proposal is still more deceptive. It abolishes the usual checks and balances of the three departments of government — *i.e.* the

executive, the legislative, and the judicial — and gives to the governor through the Department of Labor the right to legislate the ground rules for determining what shall be a bargaining unit, how and when the employee elections shall be held and the sole power to determine the outcome of the elections.

Now in determining whether the ballot title before us has fulfilled its function of providing the voter with the information concerning the choice that he is called upon to make, we must look to the ballot title which provides:

> "AN AMENDMENT TO AMENDMENT NO. 34, "RIGHTS OF LABOR." TO THE CONSTITUTION OF ARKANSAS: TO CONTINUE THOSE PROVISIONS OF AMENDMENT NO. 34 WHICH PROHIBIT DENIAL OF EMPLOYMENT BECAUSE OF MEMBERSHIP IN, AFFILIATION WITH, RESIGNATION FROM, OR REFUSAL TO JOIN A LABOR UNION, PROHIBIT ANY CONTRACT WHICH DENIES EMPLOYMENT BECAUSE OF MEMBERSHIP IN, REFUSAL TO JOIN, OR RESIGNATION FROM A LABOR UNION, AND PROHIBIT COMPELLING OF THE PAYMENT OF LABOR ORGANIZATION DUES AS A CONDITION OF EMPLOYMENT; BUT TO PROVIDE THAT THE FOREGOING PROVISIONS SHALL NOT APPLY IF THREE CONDITIONS ARE MET: (a) EMPLOYEES IN AN EXISTING BARGAINING UNIT VOTE BY SECRET BALLOT MAJORITY VOTE TO REMOVE THEM IN AN ELECTION CONDUCTED BY AN ARKANSAS STATE AGENCY, (b) THE AFFECTED EMPLOYER AGREES TO CONTRACT FOR LABOR UNION MEMBERSHIP AS A CONDITION OF EMPLOYMENT, AND (c) ALL EMPLOYEES MAY PARTICIPATE OR NOT PARTICIPATE IN LABOR UNION MEETINGS AND SIMILAR ACTIVITIES; TO CONTINUE THE ENFORCEMENT POWER OF THE GENERAL ASSEMBLY; BUT TO GIVE THE ARKANSAS DEPARTMENT OF LABOR (OR DEPARTMENT

DESIGNATED BY THE GOVERNOR) THE POWER TO ESTABLISH RULES AND REGULATIONS FOR EMPLOYEE ELECTIONS AND TO CONDUCT SUCH ELECTIONS: AND FOR OTHER PURPOSES."

While I consider the whole ballot title deceptive, for purposes of demostration, I will particularize with reference to the latter portion of the ballot title which provides:

> ". . . to continue, the enforcement power of the General Assembly, but to give the Arkansas Department of Labor (or Department designated by the Governor) the power to establish rules and regulations for employee elections and to conduct such election; and for other purposes."

No where in the ballot title can it be determined that the General Assembly has no control over what shall constitute a bargaining unit. No where does it appear that the General Assembly cannot provide for a contest of the results of an election held by the Department of Labor. Yet the fair implication of the ballot title is to the contrary. With respect to a similar implication in *Bradley* v. *Hall, Secretary of State,* 220 Ark. 920, 929, 251 S.W. 2d 470, 472 (1952), we said:

> "The ballot title itself is also misleading. It states that the amendment will empower the General Assembly 'to authorize, define, and limit charges, in addition to interest.' The word 'authorize is taken from the measure itself and is accurately used; as we have seen, the amendment does authorize charges in addition to interest. But the term is not used alone; the phrase is 'authorize, define, and limit.' The fair implication of the phrase as a whole is that the legislature is to be given new and additional power to curb charges in addition to interest. Yet this implication has a manifest tendency to mislead, since the true purpose of the amendment is pretty nearly the exact opposite."

While I will not address the matter in detail, I only ask how, a voter, in making his choice, could realize that the scope and import of the proposal is so great that "closed"

shops in governmental agencies (*i.e.* police departments, fire departments, schools, etc.) could result.

Since I believe that the law should be applied alike fairly and impartially to all litigants and all proposals, I can find no good reason not to apply simple test of our former decisions to the ballot title before us. It must be remembered that the citizens of this State have consistently placed restrictions upon the making of amendments to the constitution whether it be a proposal submitted by the General Assembly pursuant to Article 19 § 22 or by a petition of the electorate pursuant to Amendment No. 7.

For the reasons stated, I respectfully dissent.

FOGLEMAN, and ROY, JJ., join in this dissent.

Supplemental Opinion on Rehearing delivered
October 11, 1976

Rehearing denied.

CARLETON HARRIS, Chief Justice. In their petition for rehearing, petitioners contend that this Court's decision is based on a sentence appearing in the opinion, taken from the holding in *Fletcher* v. *Bryant,* 243 Ark. 864, 422 S.W. 2d 698, *viz.*, "and that where reasonable minds might differ as to the sufficiency of the title, same should be held sufficient."

The petitioners are in error as to the basis of our holding in the present litigation. In fact, the quoted language might even be considered *dictum*[1] and, at any rate, means so little to the decision that we herewith amend the opinion by striking said language from same.

The crux of our holding, emphasized throughout the opinion, is that the summation in the ballot title is adequate and sufficient to summarize the changes proposed, is not misleading, and is not tinged with partisan coloring. As stated in *Hoban* v. *Hall,* 229 Ark. 416, 316 S.W. 2d 185, it is our duty to approve the ballot title where it *"represents an impartial summa-*

[1]Petitioners state that this sentence, in *Fletcher,* was *dictum.*

*tion of the measure.*" See also *Moore* v. *Hall,* 229 Ark. 411, 316 S.W. 2d 207, and *Bradley* v. *Hall,* 220 Ark. 925, 251 S.W. 2d 470. That is our finding in this litigation.

Rehearing denied.

John H. HUGHES *v.* STATE of Arkansas

CR 76-72 540 S.W. 2d 592

Opinion delivered September 20, 1976

*Don Langston,* Public Defender, for appellant.

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

GEORGE ROSE SMITH, Justice. Charged with first-degree murder in the shooting of Jason Crutchfield, the appellant was found guilty of second-degree murder and received the maximum sentence, 21 years. His principal argument for

reversal is that the court should have submitted the issue of self-defense to the jury.

The court was right in refusing to submit that issue. We find no substantial evidence from which the jury could have found that Hughes acted in self-defense. According to the State's eyewitnesses, the homicide occurred in a pool hall, during the daytime. Hughes was the aggressor, accusing Crutchfield of being "one of them smart ones." Crutchfield was unarmed and was making no hostile demonstration that might have caused Hughes to be fearful for his own life. According to the proof, Hughes held a pistol some two or three inches from Crutchfield's chest and shot with little or no provocation.

Hughes elected not to testify. His theory of self-defense rests principally upon his own out-of-court statements, which were introduced by the State as part of its case in chief. Immediately after the homicide Hughes fled from the state and was eventually apprehended in Alaska. The State showed that in the course of his flight Hughes admitted to witnesses that he had shot Crutchfield, but he further stated that he was only trying to scare him and that he thought Crutchfield had a gun. There is, however, nothing whatever in the testimony to warrant the jury in finding that Hughes had any reason to believe that Crutchfield, even if he had been armed, had any intention of inflicting bodily harm upon Hughes. There is also testimony that some sort of argument took place between the two men. Needless to say, one who engages in an argument with another person is not entitled to kill his adversary merely because he thinks him to have a gun. Yet here the proof stops at that point and consequently falls short of presenting a submissible issue of self-defense.

The appellant is correct, however, in asking that he be given credit for pretrial jail time. The State admits that when a defendant receives the maximum sentence, as here, he is entitled to credit for pretrial jail time that was attributable solely to his inability to make bail, owing to indigency. *Smith* v. *State,* 256 Ark. 425, 508 S.W. 2d 54 (1974). That is the situation here with regard to the appellant's pretrial confinement in Arkansas from September 28, 1975, until January 30, 1976. Credit must be given for that period. On the other

hand, from August 1 until September 28 Hughes was confined in Alaska, as a fugitive from justice awaiting transportation back to Arkansas. That delay was obviously attributable not to his inability to make bond but to his having fled from Arkansas to Alaska. Consequently no credit should be given for those 58 days.

The judgment, as so modified, is affirmed.

We agree: HARRIS, C.J., and FOGLEMAN and JONES, JJ.

Hoyle Bruce BEDELL *v.* STATE of Arkansas

CR 76-77 541 S.W. 2d 297

Opinion delivered September 20, 1976

[Rehearing denied October 25, 1976.]

*Simpson & Riffel,* by: *Kirby Riffel,* for appellant.

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

GEORGE ROSE SMITH, Justice. This is the second appeal in a prosecution for the offense of manufacturing marihuana. The salient facts were stated in the first opinion and need not be repeated. *Bedell* v. *State,* 257 Ark. 895, 521 S.W. 2d 200 (1975). Upon a second trial Bedell was again convicted and was sentenced to a five-year term and a $2,500 fine. Several points for reversal are argued.

The appellant is mistaken in his argument that the manufacture of a controlled substance for one's own use is not an offense. The personal-use exemption applies only to the preparation or compounding of such a substance. Ark. Stat. Ann. § 82-2601 (m) (Supp. 1975). Manufacture, however, includes production, which in turn includes plan-

ting, cultivating, and growing the substance. § 82-2601 (u). There is abundant proof that Bedell was growing marihuana on his farm. In fact, he so admitted on the witness stand.

There was no prejudicial error in the procedure by which the State introduced the marihuana plants into evidence. The State's expert witness, Manuel Holcomb, a chemist, identified the exhibits as marihuana. His qualifications as a chemist are not questioned. He testified that a chemical analysis is essential in the identification of marihuana. That testimony rebuts the appellant's argument, made without proof, that only a botanist should be permitted to identify the plant. We do not find Holcomb's analysis to have been deficient. He tested at least one of the plants that were taken from the field and visually checked other plants in the same bag. He also tested other specimens of marijuana that were discovered in Bedell's home. There was no defect in the important chain of custody; that is, from the officers' seizure of the plants in the fields to their delivery of the plants to Holcomb. It is true that the exhibits were not kept constantly under lock and key after their use as evidence at the first trial, but that was merely a circumstance to be considered by the jury in weighing the testimony. *Rogers* v. *State,* 258 Ark. 314, 524 S.W. 2d 227 (1975).

Our ruling upon the first appeal, that the prohibition against unreasonable searches and seizures does not extend to open fields and forested areas, has become the law of the case and will not be re-examined. The doctrine known as the law of the case applies to issues of constitutional law. *Feldman* v. *State Board of Law Examiners,* 256 Ark. 384, 507 S.W. 2d 508 (1974); *Miller Lbr. Co.* v. *Floyd,* 169 Ark. 473, 275 S.W. 741 (1925), affirmed, 273 U.S. 672 (1927). Hence it is immaterial that a federal trial court, after our decision upon the first appeal in this case, decided the point the other way. *United States ex rel. Gedko* v. *Heer,* 406 F. Supp. 609 (W.D. Wis. 1975). If the appellant thought our first decision to be wrong he had the opportunity to seek a review by the United States Supreme Court.

Affirmed.

We agree. HARRIS, C.J., and FOGLEMAN and JONES, JJ.

James ROLAND *v.* STATE of Arkansas

CR 76-57 540 S.W. 2d 590

Opinion delivered September 20, 1976

*Bill W. Bristow,* for appellant.

*Jim Guy Tucker,* Atty. Gen., by: *B. J. McCoy,* Asst. Atty. Gen., for appellee.

CONLEY BYRD, Justice. The issue in this case is not what laws, appellant James Roland, may have violated, but whether he was entitled to a directed verdict, upon a charge of an accessory after the fact to the delivery of a controlled substance by one John White. Ark. Stat. Ann. § 41-120 (Repl. 1964), defines an accessory after the fact as follows:

> "An accessory after the fact is a person who, after a full knowledge that a crime has been committed, conceals it from the magistrate, or harbors and protects the person charged with or found guilty of the crime."

The State did not attempt to prove that John White had committed the offense of selling a controlled substance but to the contrary freely admitted that the controlled substance, of which he was charged with selling to the narcotics officer, tested out to be baking soda. The proof submitted against James Roland was that he knew that White was charged in Independence County with selling a controlled substance and

that he had furnished the plane fare to White and transported White to Memphis, Tennessee, to catch a plane. The State also complained to the jury of the fact that James Roland had made it possible for White to consult with White's lawyer in Batesville without being detected by the authorities. Roland testified that John White told him about the charge in Independence County and that it arose out of a sale of caffein to an under cover narcotics agent. That Roland's knowledge of the sale was correct can be seen from the following quote from the opening statement of the State to the jury:

> "One officer, Dan Sanders, with the State Police Narcotics Division thought that he was going to develop sufficient evidence against John White, made a purchase and warrants were issued and it developed that instead of being guilty of selling a controlled substance, John White was even smarter than everybody thought he was, he even went around bragging about it; that a Narc got close to him but he sold him a hundred dollars worth of baking soda, who could tell, white powder is white powder and a narcotics officer is not going to take out a field test kit and test it in front of him, that wouldn't hardly go over. So the State did buy $50.00 or $100.00 worth of baking soda from John White and charged him with selling whatever it was he said it was, THC or heroin; or cocaine I think it was. Later it turned out, as I say, after we sent it to the laboratory, that he is guilty of obtaining money under false pretenses."

The authorities with respect to the conviction of a person as an accessory after the fact generally hold:

> "To constitute a person as accessory after the fact these essentials must appear; (1) The felony must have been committed. (2) The accused must know that the felony has been committed by the person received, relieved or assisted. (3) The accessory must render assistance to the felon personally. . . *State* v. *Potter,* 221 N.C. 153, 19 SE2d 257 (1942)."

Our own cases hold that before one can be convicted as an accessory to a crime he must have full knowledge that the crime has been committed. See *State* v. *Jones,* 91 Ark. 5, 120

SW 154 (1909), and *Stevens* v. *State,* 111 Ark. 299, 163 SW 778 (1914).

It follows that the trial court erred in not directing a verdict for the appellant Roland.

Reversed and dismissed.

We Agree: HARRIS, C.J., and GEORGE ROSE SMITH, HOLT and ROY, JJ.

George O. JERNIGAN, Secretary of State
et al *v.* Walter R. NIBLOCK et al

76-249 540 S.W. 2d 593

Opinion delivered September 20, 1976
(In Banc)

*Jim Guy Tucker,* Atty. Gen., by: *Lonnie A. Powers,* Dep. Atty. Gen., and *Eugene R. Warren,* for appellants.

*Charles A. Brown* and *U. A. Gentry,* for appellees.

ELSIJANE T. ROY, Justice. Appellees instituted this action to enjoin the Secretary of State from certifying to the appropriate election officials Proposed Constitutional Amendment No. 58. Thereafter the Arkansas Medical Society was granted permission to intervene as party-defendant.

Appellees contend *inter alia* that House Joint Resolution No. 17 (H.J.R. No. 17) was not passed with the formalities required by Article 19, § 22 of the Arkansas Constitution. The trial court agreed with appellees and held that the House and Senate had adopted different versions of H.J.R. No. 17 and that the popular name and ballot title of the proposed amendment "are not in accordance with existing case law . . . . " Accordingly, the court enjoined the Secretary of State from taking any further action to place Proposed Constitutional Amendment 58 on the ballot. From said decree this appeal is pursued.

We review the record to see if constitutional requirements have been met. There is no dispute as to what the journals of the House and the Senate reflect. H.J.R. No. 17, in pertinent part, reads as follows:

> SECTION 1. Amendment twentysix (26) to the Constitution of the State of Arkansas is hereby amended to read:

> The General Assembly shall have power to enact laws prescribing the amount of compensation to be paid by employers for injuries to or death of employees, and to whom said payments shall be made. It shall also have the power to enact laws prescribing the amount of compensation to be paid *to persons for injuries or death caused by malpractice performed by practitioners of the healing arts as classified by Title 72 of the Statutes of the State of Arkansas.* It shall have power to provide the means, methods and forum for adjudicating claims arising under said laws and for securing payment of same. Provided, that otherwise no law shall be enacted limiting the amount to be recovered for injuries resulting in death or for injuries to persons or property; and in case of death from such injuries the right of action shall survive, and the general assembly shall prescribe for whose benefits such action shall be prosecuted. (Italics supplied.)

On January 16, 1976, H.J.R. No. 17 was amended (Amendment No. 3) by striking lines 29 and 30 on page 1 and substituting the following:

> To persons for injuries or death caused by malpractice performed by hospitals, nursing homes, certified registered nurse anesthetists, and by practitioners of the healing arts as classified by Title 72 of the Statutes.

The House journal shows the amendment was adopted by more than 51 votes, but the yeas and nays were not recorded.

On January 19, 1976, H.J.R. No. 17 was again spread on the record of the House journal as originally introduced but without making the changes indicated in Amendment 3.

Later the resolution was amended (Amendment 4) by deleting the phrase "as classified by Title 72 of the Statutes of the State of Arkansas," with the yeas and nays being recorded.

On January 26, 1976, the resolution as a whole was read in the House the third time, with the yea and nay vote being recorded, but again the words of Amendment 3 "by

hospitals, nursing homes, certified registered nurse anesthetists" were omitted.

The Senate journal indicates that when H.J.R. No. 17 was called up for a third reading and final passage, it was spread upon the journal, *in extenso,* with the yea and nay vote recorded. The resolution of the Senate included the words "by hospitals, nursing homes, certified registered nurse anesthetists" which did not appear in the H. J.R. No. 17 as finally adopted by the House.

Article 19, § 22 of the Arkansas Constitution in pertinent part reads as follows:

> § 22. Constitutional amendments.-Either branch of the General Assembly at a regular session thereof may propose amendments to this Constitution, and, if the same be agreed to by a majority of all members elected to each house, *such proposed amendments shall be entered on the journals with the yeas and nays.* . . . . (Italics supplied.)

In *McAdams* v. *Henley,* 169 Ark. 97, 273 S.W. 355 (1925), this Court stated:

> We have decided that the provision in § 22, art. 5, requiring the yeas and nays to be entered on the journal on the final passage of a bill, is mandatory, and that the omission renders an enactment void. *Smithee* v. *Garth,* 33 Ark. 17; *State* v. *Bowman,* 90 Ark. 174; *Butler* v. *Board of Directors,* 103 Ark. 109.

In *Bryant* v. *Rinke,* 252 Ark. 1043, 482 S.W. 2d 116 (1972), we reaffirmed that where the journal, *after attempted corrections, did not reflect the yea and nay votes on two resolutions after amendment,* as required by Article 19, § 22 of the Arkansas Constitution, these defects were fatal to the resolution.

In *Coulter* v. *Dodge,* 197 Ark. 812, 125 S.W. 2d 115 (1939), we stated:

> * * * In other words, it was essential that the journals of both the House and Senate show definitely and certainly what amendment had been approved for submission,

> and that both the House and the Senate had concurred in the submission of the same amendment, and that the journals of the two Houses, when read together, make this fact definite and certain.

In distinguishing the case from *McAdams, supra,* the Court said:

> * * * Had the House amended the Senate resolution, as was done in the case of *McAdams* v. *Henley, supra,* then it would have been necessary *for the House to enter the resolution as amended, in extenso,* upon the journal of the House, and if the Senate concurred in the amendment made by the House, *it would also have been necessary for the Senate to again enter upon its journal the amended resolution,* thus showing its concurrence therein. * * * (Italics supplied.)

The entries here do not reflect that the same proposal to amend the Constitution was entered upon the House journal and the Senate journal. Amendment 3 was adopted by *viva voce* vote, the yea and nay vote not recorded in the House journal, and, furthermore, this amendment was not spread upon the record in the final passage of H.J.R. No. 17 by the House. Thus the House and Senate versions of the proposed amendment clearly differ.

Appellants contend, citing the *Coulter, supra* and *McAdams, supra,* cases, that if the Court looks at the "complete record of the passage of this resolution it can come to no other conclusion but that the House and the Senate passed the same version of this resolution." We cannot agree for to reach this conclusion we would have to assume or presume that the final vote of the House was a mistake and that the House did not intend to vote on H.J.R. No. 17 as it is reflected in the journal. We cannot make this assumption or rewrite the journals, but must scrutinize them as recorded.

In *Rice* v. *Palmer,* 78 Ark. 432, 96 S.W. 396 (1906), this Court quoted with approval from *Collier* v. *Frierson,* 24 Ala. 100 (1854), stating:

> The Constitution is the supreme and paramount law. The mode by which amendments are to be made under

> it is clearly defined. It is said that certain acts are to be done, certain requisitions are to be observed, before a change can be effected. But to what purpose are these acts required or the requisitions enjoined, if the Legislature or any other department of the government can dispense with them? To do so would be to violate the instrument they are sworn to support; and every principle of public law and sound constitutional policy requires the court to pronounce against every amendment which is shown not to have been made in accordance with the rules prescribed by the fundamental law.

We are compelled by the record before us to find that constitutional procedures were not followed when the General Assembly adopted Proposed Constitutional Amendment 58.

Appellees also contend, and the trial court found, that the ballot title and popular name failed to meet the requirements of the law. In view of our decision on the first point it is unnecessary to discuss this issue.

For the foregoing reasons, we affirm the decree of the chancellor holding that Proposed Constitutional Amendment 58 should not be placed on the election ballot, and the injunction previously entered is made permanent.

Affirmed.

Barney B. NORTON *v.* STATE of Arkansas

CR 76-54 540 S.W. 2d 588

Opinion delivered September 20, 1976

*Thomas & Nussbaum,* for appellant.

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

ELSIJANE T. ROY, Justice. Certain merchandise was removed from the golf course pro shop at Diamondhead Resort in Garland County. Norman Hall, chief of security, and Richard James, golf course superintendent, were notified and located a missing golf cart used to facilitate removal of the stolen articles. The merchandise was heaped on a canvas cover which had been removed from the cart. Hall and James set up surveillance of the cart and merchandise. Shortly thereafter an automobile approached with three passengers. The occupants of the car while in the process of transporting the stolen items from the cart to the vehicle were confronted by Hall and James. The two men carrying the goods fled, and Hall fired a shot over their heads. One of the men, Robert Lisenby, fell to the ground and was apprehended. The second continued his escape. The third, identified as appellant Barney Norton, fled in the car to a point on the road where he picked up the unknown suspect. As Hall and James approached the car Norton fired three shots at them. Search of Lisenby disclosed a key to a motel room in which appellant Norton was later found and arrested.

Appellant was charged and found guilty of assault with intent to kill by use of a firearm in violation of Ark. Stat. Ann.

§ 41-606 (Repl. 1964)[1] and Ark. Stat. Ann. § 43-2336 (Supp. 1975).

On appeal appellant first questions the procedure utilized by the trial court in impaneling the jurors. Ark. Stat. Ann. § 43-1903 (Repl. 1964) and *Clark* v. *State,* 258 Ark. 490, 527 S.W. 2d 619 (1975), require that the State exercise its peremptory challenges prior to exercise of challenges by the defendant. The court allowed, and appellant participated in, simultaneous exercise of jury challenges without objection. Since no objection was made appellant cannot now rely on the alleged error. *Ford* v. *State,* 253 Ark. 5, 484 S.W. 2d 90 (1972). See also *Tanner* v. *State,* 259 Ark. 243, 532 S.W. 2d 168 (1976).

Appellant also suggests error in the trial court's denial of his request for a directed verdict. Only when no issue of fact exists is a directed verdict proper. The testimony of Norman Hall and Richard James was sufficient to warrant submission of the issue of identification to the jury, and the issue was resolved against appellant. We affirm if there is any substantial evidence to support the verdict. *Burks* v. *State,* 255 Ark. 23, 498 S.W. 2d 336 (1973).

Appellant's counsel at the trial objected to the court's instruction no. 5 as being inaccurate because neither Hall nor James owned the stolen property. The court revised the instruction to show the property as belonging to the Diamondhead Pro Shop. After the court revised the instruction appellant made no further objection. He now complains the instruction in effect made a judicial comment on the evidence. A failure to point out to the court the particular objection and the grounds therefor precludes appellant from raising the point for the first time on appeal. *Ford* v. *State,* supra, and *Cassidy* v. *State,* 254 Ark. 814, 496 S.W. 2d 376 (1973).

Appellant next contends it was error for the State's witnesses to testify that appellant refused to sign the rights form. The burden is upon the State to prove that appellant was advised of his constitutional rights and the questioned

[1]Since repealed by Acts 1975, No. 928, § 3, effective January 1, 1976.

testimony was offered for this purpose. Appellant raised no objection to the introduction of the rights form into evidence at the trial. His failure to object precludes consideration of this contention on appeal. *Ford* v. *State,* supra.

Appellant alleges error in the asking of questions concerning his connection with suspected crimes. A witness on behalf of appellant was asked if he had ever solicited appellant's services for the purpose of burning a restaurant. The record reflects the State accepted the negative answer of the witness. Appellant was also questioned as to his guilt in other suspected crimes occurring in Colorado and Arkansas. Appellant denied any involvement in the mentioned crimes. In no instance did the State argue with appellant about his answers. Neither is there any indication of a lack of good faith since all of the crimes about which appellant was asked appeared on his arrest record. We have held that it is permissible to ask a defendant, in good faith, if he is guilty of committing a named criminal offense. *Moore* v. *State,* 256 Ark. 385, 507 S.W. 2d 711 (1974). See also *Williams* v. *State,* 257 Ark. 8, 513 S.W. 2d 793 (1974).

Appellant also argues that the court erred in allowing the jury to defer to the trial court in the setting of punishment. Although unanimous in determining the guilt of appellant, the jury was unable to agree upon the penalty. Ark. Stat. Ann. § 43-2306 (Repl. 1964) provides that the court may assess the punishment in such cases. Therefore, this contention is without merit.

The court with appellant and his lawyer both present made the following statement before imposing sentence:

> When you were arraigned, you were informed that the penalty on assault with intent to kill involved the possibility of imprisonment for a period of not less than 1 nor more than 21 years and that the use of the firearm permitted the Court to add an additional 15-year sentence which means that the sentences could run from 1 to 36 years without any question.

The court continued:

> Mr. Norton, based upon the jury verdict in finding you guilty of the offense with assault with intent to kill by use of a firearm as charged, the Court finds that you are convicted and it is so adjudged; and it is further adjudged that you are committed to the custody of the Department of Corrections or its authorized representatives for imprisonment for a period of 30 years in the State Penitentiary; and that you are to serve at least 10 years of said term prior to parole.

At no time was any objection made to the sentencing procedure — or any request made for the court to indicate the term imposed under each statute. Ark. Stat. Ann. § 43-2337 (Supp. 1975) provides the term of confinement under the firearms enhancement statute shall run consecutively to the period of confinement for the felony conviction, and appellant has suffered no prejudice by the court's action. Section 43-2306 provides that when a jury fails to agree on the punishment the court shall assess the punishment. Thus the action of the court does not constitute reversible error since the time imposed was within the discretion of the trial court and also within statutory limits. In *Thornton* v. *State,* 243 Ark. 829, 422 S.W. 2d 852 (1968), we observed that:

> * * * It is within the discretion of the trial court to fix sentences *within* the limits prescribed by law, . . . . (Italics supplied.)

There is nothing to show any abuse of discretion by the trial court.

There being no reversible error, the judgment is affirmed.

We agree. HARRIS, C.J., and BYRD and HOLT, JJ.

Debbie LONG *v.* STATE of Arkansas

CR 76-63 542 S.W. 2d 742

Substituted Opinion delivered November 8, 1976

*Jerry C. Post,* for appellant.

*Jim Guy Tucker,* Atty. Gen., by: *B. J. McCoy,* Asst. Atty. Gen., for appellee.

GEORGE ROSE SMITH, Justice. Upon a charge of selling a controlled substance (methamphetamine) the appellant was found guilty and was sentenced to eight years' confinement. For reversal she contends that the court should have directed a verdict in her favor and that the prosecuting attorney was permitted to make an improper closing argument to the jury.

Upon the first point the appellant insists that under Section 41-305 of the new Arkansas Criminal Code the person who made the purchase from her was an accomplice, that his testimony about the sale was not corroborated, and that she was therefore entitled to a directed verdict. This language in the new Code is relied upon:

> Unless otherwise provided by the statute defining the offense, a person is not an accomplice in an offense committed by another person if:
>
> * * *
>
> (b) the offense is defined so that the defendant's conduct is inevitably incident to its commission. [§ 41-305.]

The Code was not yet effective when the present offense was committed, but Section 41-102 provides that with respect to a prior offense a defendant may elect to have "the construction and application of any defense" governed by the Code. Upon that basis the appellant argues that she made such an election in the trial court and is entitled to rely upon the definition of an accomplice set forth in subsection (b) of § 41-305, quoted above.

We cannot sustain that contention. The appellant is correct in arguing that the subsection in question applies to the person who bought the drug from her, even though it refers to the *defendant's* conduct. The section is part of Title 41, Chapter 3, entitled "Parties to Offenses." Section 41-301 provides that a person may commit an offense either by his own conduct or that of another person. The next few sections refer to an accomplice not, as here, with respect to the need for corroboration of his testimony but, instead, with respect to his accountability for the criminal conduct of another person. Hence the subsection in question applies to the appellant's vendee, although he is not now the defendant.

Even so, the appellant's reliance upon the subsection is misplaced, for two reasons. First, the Code provides that with regard to an offense committed before the effective date of the Code the defendant may elect to have the construction of "any defense" governed by the provisions of the Code. This appellant's argument does not involve a "defense," as defined in Section 41-110 of the Code. Wholly apart from the Code, our law has long required that the testimony of an accomplice be corroborated. Ark. Stat. Ann. § 43-2116 (Repl. 1964). The State's failure to adduce proof corroborating the testimony of an accomplice is certainly not a new defense created by the

Code, no matter how the word "accomplice" is defined.

Secondly, under the quoted subsection of the Code, the purchaser in this case was not an accomplice, because his conduct was "inevitably incident" to the commission of the offense charged. That is, there cannot be an unlawful sale of a controlled substance unless someone buys it. It is immaterial that this purchaser may have solicited the sale, because, except for entrapment (which is not involved here, as the buyer was not a police officer), it makes no difference whether the buyer solicited the sale or the seller solicited the purchase. The offense is committed in either situation.

The appellant is correct, however, in her second point for reversal. The prosecutor, in his closing argument, told the jury what he stated to be a true story, to show the harmful effect of drugs. He said that in his own home town a 16-year-old boy had been so affected by drugs that he had run after a railroad train, barking and flapping his arms, because he thought it was the train to glory; that later in the evening the boy had broken dishes and a window to avoid restraint; that early the next morning he was choking his mother, thinking her to be the devil; and that he engaged in other irrational conduct before being subdued. The prosecutor went on to say that at the time of the trial, a year later, the boy was at the State Hospital in Little Rock where he was known as the Serpent Boy, because "he moves around down there like a snake, on his belly, and darts his tongue daily and constantly, because he now thinks that he is the evil serpent." Defense counsel's objection and motion for a mistrial were overruled by the trial judge, with the statement that "it is proper argument."

We consider the prosecutor's statement to have been decidedly improper and manifestly prejudicial. As Wigmore points out, counsel's arguments to the jury may be based upon matters of fact of which evidence has been introduced or which are so well known as to be the subject of judicial notice. But representations of fact must not be made upon counsel's own credit, for he would then become a witness without being subject to cross-examination. Wigmore on Evidence, § 1806 (Chadbourn Rev., 1976). We have frequently found it necessary to award a new trial because of counsel's

overzealousness in arguing to the jury matters of fact not supported by the proof. *Dillaha* v. *State,* 257 Ark. 476, 517 S.W. 2d 513 (1975); *Wilson* v. *State,* 253 Ark. 10, 484 S.W. 2d 82 (1972); *Simmons & Flippo* v. *State,* 233 Ark. 616, 346 S.W. 2d 197 (1961). Those cases are controlling here. The prosecutor's detailed narrative about the Serpent Boy was presented to the jury as a true account, but it had no basis in the evidence. Moreover, the trial court emphasized the error by declaring it to be proper argument. We certainly cannot say with confidence that the remarks were not prejudicial. Complaint is also made with respect to another phase of the closing argument, but there is no reason to expect a recurrence upon a new trial.

Reversed.

We agree. HARRIS, C.J., and FOGLEMAN and JONES, JJ.

William Jessie HARRIS *v.* STATE of Arkansas

CR 76-100 540 S.W. 2d 859

Opinion delivered September 27, 1976

*James A. Neal,* for appellant.

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

CONLEY BYRD, Justice. For reversal of a robbery conviction — with the use of a firearm, appellant William Jessie Harris raises the issues hereinafter discussed.

The record shows that the Scottish Inn Motel was robbed sometime between 11:30 p.m. and midnight on January 21, 1975, by a man brandishing a single shot shotgun. Taken in the robbery was some six hundred dollars in currency and some quarters. The robber also took a moneybag that contained the housekeeper's keys to the motel.

An investigator, Mike Goomeer, was dropping another

officer off at the Scottish Inn around 11:30 to pick up his car. While there he noticed that nobody was at the office desk and that a Ford automobile described as 1968-1970 white over light tan was parked at an odd angle in a parking space away from the other automobiles. Based upon the information given by Mike Goomeer, Officer James Bolin arrested appellant at 12:10 a.m., some twenty minutes after the robbery was reported. Appellant at the time was driving a white over light olive green 1969 Ford. The automobile was fairly dirty at the time. In the automobile the officers found $667.00 consisting of paper money and five rolls of quarters. The search also revealed a single shot shotgun loaded with single "0" buckshot and a red moneybag containing a bronze key attached to an identification tag reading "Scottish Inn Housekeeper." Mike Gooneer identified the automobile driven by appellant as the car he had previously observed at the Scottish Inn.

As can be seen from the foregoing summary of the evidence, we can find no merit to appellant's suggestion that there was no substantial evidence to support the jury's verdict.

The contention of appellant that the trial court erred in admitting evidence concerning property seized from appellant without introducing the property has no merit. See *Swearingin* v. *State,* 251 Ark. 700, 474 S.W. 2d 111 (1971) and *Maynard* v. *State,* 252 Ark. 657, 480 S.W. 2d 353 (1972).

Neither can we find any merit to appellant's contention that he was denied the effective assistance of counsel because of the trial court's refusal to grant a continuance. The record shows that through his retained counsel he had previously obtained two continuances. On the day before trial he switched counsel and asked for another continuance. Obviously a trial court does not abuse its discretion in denying a continuance in such instances. Any other rule would permit a defendant to get successive continuances so long as he had the money to hire a new lawyer for each court setting.

Affirmed.

We agree: HARRIS, C.J., and HOLT and ROY, JJ.

# Joe McMILLAN *v.* MEUSER MATERIAL & EQUIPMENT Co., Inc.

76-21 541 S.W. 2d 911

Opinion delivered September 27, 1976

[Rehearing denied November 1, 1976.]

*Crouch, Blair, Cypert & Waters,* by: *Michael H. Mashburn,* for appellant.

*Davis, Douglas & Penix,* for appellee.

FRANK HOLT, Justice. The trial court, sitting as a jury, found appellant McMillan breached a contract to buy a bulldozer from appellee Meuser and assessed $2,700 as appellee's damages ($2,595 actual and $105 incidental). From that judgment comes this appeal.

On December 13, 1973, the parties entered into their agreement. The purchase price, including a bellhousing, was $9,825, f.o.b. Springdale. Meuser arranged transportation of the bulldozer to Greeley, Colorado, the residence of appellant. On December 24, 1973, McMillan stopped payment on his check asserting that since the agreed delivery date was December 21, the delivery was past due. Appellee's version is that the delivery date was January 1, 1974. After unsuccessful negotiations between the parties or about two months after the appellant purchaser stopped payment on his check, appellee brought this action. On March 5, 1975, or about fourteen months following the alleged breach of the purchase contract, appellee sold the bulldozer for $7,230 at a private sale. During this fourteen month interval, the equip-

ment remained unsheltered, although regularly serviced, on an Arkansas farm, which was its situs when the sale contract was made.

We first consider appellant's assertion that the resale by appellee did not constitute the good faith and commercial reasonableness which is required by Ark. Stat. Ann. § 85-2-706 (Add. 1961). Appellee responds that this defense was not properly raised at trial. We must disagree with appellee. Appellee alleged in its complaint that it had made reasonable efforts to resell the bulldozer. The length of time between the alleged breach and the resale were joined in issue by appellee's direct testimony:

> Q: Bill, at the end of a year what did you do with the bulldozer? Did you decide you wanted to keep it or did you decide to sell it?
> A: No, after I kept the cat the twelve months for the man and he didn't come get it and didn't accept it, and this had all been filed and the paper work, and what-have-you, on it, I turned around and started seeking a buyer for it.

The time of the resale was again referred to, without objection, in the cross-examination of the appellee:

> Q: I believe you also testified that you waited a year after the 13th of December [1973], I guess, before you started trying to sell it again; is that right?
> A: That is true.
> Q: Okay. So from December 13, '73 until approximately December of '74, you kept it?
> A: I didn't try to sell it until after the first of the year, this year. [1975]
> Q: So from December 13th, 1973, until the first of this year, you just let it sit?
> A: I did.
> Q: You didn't try to sell it for a whole year?
> A: Nope.

Furthermore, appellant in his motion for a directed verdict specifically invoked § 85-2-706 and, *inter alia,* stated "[T]hat sale is not commercially reasonable and they cannot

rely on that for damages in this case." As indicated, after review of the record, we are of the opinion that the issue of the commercial reasonableness of the resale was sufficiently raised at trial for our determination of the issue.

We turn now to appellant's contention that the resale by appellee Meuser was not in accordance with the requirements of § 85-2-706. The statute provides in pertinent part:

> (1) Under the conditions stated in § 2-703 [85-2-703] on seller's remedies, the seller may resell the goods concerned for the undelivered balance thereof. Where the resale is made in good faith and in a commercially reasonable manner the seller may recover the difference between the resale price and the contract price together with any incidental damages allowed under the provisions of this Article (§ 2-710 [§ 85-2-710]), but less expenses saved in consequence of the buyer's breach.
>
> (2) Except as otherwise provided in subsection (3) or unless otherwise agreed resale may be at public or private sale including sale by way of one or more contracts to sell or of identification to an existing contract of the seller. Sale may be as a unit or in parcels and at any time and place and on any terms but every aspect of the sale including the method, manner, time, place, and terms must be commercially reasonable. . . .

Thus, in order to recover the damages prescribed in subsection (1), subsection (2) requires that every aspect of the resale including the method, manner, time, place, and terms must be commercially reasonable. The purpose of the resale provisions is discussed in Anderson, Uniform Commercial Code 2d, § 2-706:19, at p. 385, where it is stated:

> . . . . the object of the resale is simply to determine exactly the seller's damages. These damages are the difference between the contract price and the market price at the time and place when performance should have been made by the buyer. The object of the resale in such a case is to determine what the market price in fact was. Unless the resale is made at about the time when

> performance was due it will be of slight probative value, especially if the goods are of a kind which fluctuate rapidly in value, to show what the market price actually was at the only time which is legally important.

In Comment 5 following § 85-2-706, the writers make it clear that "what is such a reasonable time depends upon the nature of the goods, the conditions of the market, and the other circumstances in the case."

In *Bache & Co., Inc.* v. *International Controls Corp.,* 339 F. Supp. 341 (1972), it was held, at least as to the sale of securities, that the resale must be as soon as practicable following notice of the buyer's refusal to accept tender of the goods. There a delay in excess of a month before resale was held unreasonable. In *Uganski* v. *Little Giant Crane & Shovel, Inc.,* 192 N.W. 2d 580 (Mich. 1971), Uganski, the buyer, after his revocation of acceptance, resold heavy equipment, a crane, some two years and two months from the date of his notice of revocation of acceptance. There the court held his two year delay in reselling the crane was commercially unreasonable.

Here, even though we accord a liberal interpretation to the U.C.C., which mandates that remedies be so administered, we are of the view that the resale of the bulldozer, in excess of fourteen months after the alleged breach, will be of "slight probative value" as an indication of the market price at the time of the breach. Appellee Meuser is in the construction business and "deal[s] in bulldozers." Meuser himself testified that he was "aware of the state of the economy in the bulldozer market" and since the time of the alleged breach in December, 1973, the market for bulldozers had declined due to a recession in the construction industry and high fuel prices. As indicated, he testified he made no effort to resell the goods for in excess of a year.

Appellant asserts error in the trial court's granting appellee leave to amend his complaint on the day before the trial. Appellee's original complaint sought recovery for the full purchase price under Ark. Stat. Ann. § 85-2-709 (1)(b) (Add. 1961), alleging unsuccessful reasonable efforts to resell the bulldozer. The permitted amendment was to the effect

that the equipment had been sold by appellee and it sought recovery of damages based on the difference between the contract price and the resale price. Appellant claims that such an amendment made the day before the original trial date was prejudicial on the grounds that it was too late and changed the factual issues before the court. It is well settled that trial courts have broad discretion in the matter of permitting amendments to pleadings and the ruling allowing an amendment will be sustained absent a showing of manifest abuse of discretion which materially prejudices the complaining party. Ark. Stat. Ann. § 27-1160 (Supp. 1975). *Burton* v. *Rice,* 234 Ark. 354, 352 S.W. 2d 568 (1962); and *Hogue* v. *Jennings,* 252 Ark. 1009, 481 S.W. 2d 752 (1972). Further, § 85-2-709 (2), in pertinent part, provides "[T]he net proceeds of any such resale must be credited to the buyer." In the case at bar we find no abuse of the trial court's discretion nor that appellant's rights were materially prejudiced.

Neither can we agree with appellant's contention that the measure of damages provided by § 85-2-706 on resale of goods after breach by the buyer is not applicable here because of asserted noncompliance by appellee with the notice requirements. Subsection (3) of that statute requires "[W]here the resale is at private sale the seller must give the buyer reasonable notification of his intention to resell." § 85-1-201 (26) in pertinent part reads "[A] person 'receives' a notice or notification when (a) it comes to his attention." Appellee's complaint alleged it had made reasonable efforts to resell the goods. In answer to appellant's interrogatories, before the resale, appellee fully described his efforts to resell the bulldozer. Certainly, it must be said that the appellant received notice of appellee's intention to resell the equipment.

Appellant also claims error in the trial court's finding that cancellation of the contract was unjustified. Appellant asserts his cancellation of the contract was valid under Ark. Stat. Ann. § 85-2-504 (Add. 1961). Appellant's argument turns upon a disputed issue of fact as to the actual date of delivery. The appellee adduced evidence that the delivery date was January 1, 1974. This was disputed by appellant whose evidence was to the effect that the delivery date was December 21, 1973. On appeal we are not concerned with determining where the preponderance of the evidence lies,

but only whether there was any substantial evidence to support the verdict which, if supported by any substantial evidence, must be affirmed on appeal. *Nuckols* v. *Flynn,* 228 Ark. 1106, 312 S.W. 2d 444 (1958). In the case at bar, it was for the trial court, sitting as a jury, to resolve the conflicting versions as to the delivery date. There is ample substantial evidence to support the court's finding.

The court's award of $105 for incidental expenses incurred by appellee in servicing the bulldozer during the fourteen months from appellant's breach of the contract until appellee sold the equipment is supported by substantial evidence. In fact, appellee's testimony as to the necessity and the beneficial results of the servicing and maintenance of the equipment appears undisputed. As to the resale of the bulldozer, the appellee, admittedly, is in the construction business, sells bulldozers and was aware of the declining market. As previously indicated, as a matter of law, the long delay in the resale of the bulldozer by the appellee is commercially unreasonable. Consequently, the judgment is affirmed upon the condition that the award of $2,595 for actual damages is offered as a remittitur within the next seventeen days. Otherwise, the judgment is reversed and remanded.

Affirmed upon condition of remittitur.

We agree: FOGLEMAN, JONES, and BYRD, JJ.

Georgie ROBIE et al *v.* Lanita BOLTON

76-281 541 S.W. 2d 310

Opinion delivered October 4, 1976
(In Banc)

*Kenneth L. Schorr,* for appellants.

*Daily, West, Core & Coffman,* for appellee.

GEORGE ROSE SMITH, Justice. A Fort Smith ordinance, adopted in 1972, requires that initiative petitions be filed with the city clerk "at least 90 days before the regular municipal election" at which the proposed measure is to be voted upon. The appellants tendered such a petition to the appellee, as city clerk, some 64 days before the next election (to be held in November). Upon the appellee's refusal to accept the petition the appellants brought this suit for a judgment declaring the tender to have been timely. This appeal is from a decree upholding the city clerk's refusal to accept the petition.

The Constitution provides that the time for filing a municipal initiative petition "shall not be fixed at less than sixty days nor more than ninety days" before the election. Ark. Const., 1874, Amendment 7. The appellants argue that the Fort Smith ordinance is contrary to the Constitution, because, they say, the municipal requirement that the petition be filed "at least 90 days" before the election fixed the filing date one day earlier than the constitutional mandate that it be not "more than ninety days" before the election.

The trial court's decision is right. What the Constitution contemplates is that the city fix the last permissible date for the filing of the petition. That is the only date that is involved, because the proponents of the measure are at liberty to file their petition before that date. *Fine* v. *City of Van Buren,* 237 Ark. 29, 371 S.W. 2d 132 (1963). Unquestionably the city of Fort Smith could have required that the petition be filed "at least 60 days" before the election, because that language is an accurate paraphrase of the constitutional reference to not less than 60 days. That being so, the city must be entitled to move the date forward to any point up to and including "at least 90 days" before the election, as in the ordinance actually in force. Otherwise the 30-day leeway allowed by the Constitution would be reduced to only 29 days. Hence the ordinance is valid.

Affirmed.

Elsie Jean RAWLS *v.* STATE of Arkansas

CR 76-76 541 S.W. 2d 298

Opinion delivered October 4, 1976

*Harold L. Hall,* Public Defender, for appellant.

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

GEORGE ROSE SMITH, Justice. In June of 1975 the appellant killed R. C. Edwards, with whom she was living, by shooting him some fourteen times with a rifle. She was charged by information with second-degree murder and with the commission of that felony by means of a firearm. The jury returned a verdict of guilty upon each count and imposed consecutive sentences of ten and five years.

The appellant makes a twofold constitutional attack upon the firearm statute. Ark. Stat. Ann. §§ 43-2336 *et seq.* (Supp. 1975). It is argued, without the citation of any supporting authority, that the statute denies the equal protection of the laws, because a similar enhanced punishment is not imposed for the commission of a homicide by some other means, as by the use of a knife or poison. Classification, however, is permissible if it has a rational basis and is reasonably related to the purpose of the statute. *Dicks* v. *Naff,* 255 Ark. 357, 500 S.W. 2d 350 (1973), cert. den., 415 U.S. 958 (1974). We think it goes without saying that in view of the ever-increasing number of felonies committed by means of firearms, the legislature was justified in specifying an additional penalty for those offenses. Certainly the appellant has not met her burden of proving facts sufficient to overcome the presumption that the statute is valid.

Alternatively it is asserted, again without the citation of any supporting authority, that the appellant was placed in double jeopardy by the jury's finding (*a*) that she was guilty of murder (actually committed with a firearm) and (*b*) that the sentence should be lengthened by five years under the firearm statute. We rejected a somewhat similar, though not identical, argument in *Barnes* v. *State,* 258 Ark. 565, 528 S.W. 2d 370 (1975).

Here, too, the argument is unsound. Unquestionably the

legislature may adopt a graduated scale of offenses, as by making assault with a deadly weapon a more serious crime than simple assault. In like manner the legislature might have made second-degree murder committed by means of a firearm a more serious offense than simple second-degree murder. In substance the firearm statute achieves just that result, by allowing the jury to find the accused guilty of simple second-degree murder and then to enhance the punishment upon a further finding that the crime was committed by means of a firearm. Inasmuch as the legislature might have reached the same goal by taking either of two routes, it cannot be said that one solution to the problem is constitutional and the other not.

A secondary contention is that the trial court was wrong in refusing to give credit upon the sentence for the appellant's pretrial confinement. In denying counsel's request the trial judge remarked: "They offered her five years, and she wouldn't take it." We do not agree with that reasoning, but the court's denial of the requested credit was nevertheless justified. The record contains an affidavit of indigency as a basis for the appointment of counsel, but we find no proof that the appellant's failure to make bond was due to her indigency. In that identical situation we have sustained the trial court's denial of jail time. *Graves* v. *State,* 258 Ark. 477, 527 S.W. 2d 611 (1975).

Affirmed.

We agree. HARRIS, C.J., and FOGLEMAN and JONES, JJ.

Stanley Ray HIGGINBOTHAM, Alias
REYNOLDS *v.* STATE of Arkansas

CR 76-118 541 S.W. 2d 303

Opinion delivered October 4, 1976

*James C. Luker,* for appellant.

*Jim Guy Tucker,* Atty. Gen., by: *Joseph H. Purvis,* Asst. Atty. Gen., for appellee.

GEORGE ROSE SMITH, Justice. Upon convictions for burglary and grand larceny the appellant Higginbotham received two five-year sentences, to run consecutively. For reversal he questions the sufficiency of the State's proof, the admissibility of a statement made by him, and the trial court's refusal to submit to the jury the lesser offense of petit larceny.

First, the State's proof is amply sufficient to support the convictions. On the morning of December 19, 1975, the prosecuting witness, Steve Scobbee, discovered that a pistol and a shotgun were missing from a gun rack in his home. A side door was damaged, as if it had been hit or kicked. Scobbee had known Higginbotham at work for about a week and considered him to be a friend. At some time before the burglary Scobbee's son had shown Scobbee, in Higginbotham's presence, that the door in question was improperly hung and could be opened simply by means of a blow.

Upon learning that the two guns were missing Scobbee notified the sheriff's office and then went in search of Higginbotham. When the two men saw each other they stopped their cars and alighted. Higginbotham, after saying, "Steve, I want to give you your guns back," took the two missing guns from his car and handed them to Scobbee. Higginbotham also said: "You know I just got out of the penitentiary, and I can't afford any more trouble. Please don't call the law on me." A taxi driver testified that at about 1:00 o'clock on the preceding afternoon he had picked up Higginbotham, as a fare, and had driven him to the Scobbee residence, about five miles out from Wynne. The witness said that Higginbotham knocked on the side door. The witness did not know whether anyone answered the knock, but he did see Higginbotham come out of the house with a pistol, which he made no effort to conceal. On the way back to Wynne, Higginbotham introduced himself and mentioned his employer.

In questioning the sufficiency of the evidence counsel argue that the State failed to prove any criminal intent, because Higginbotham entered the house in the daytime, in the presence of the taxi driver, and voluntarily returned the guns the next day. On the other hand, the jury could have found that Higginbotham forcibly entered the house without permission, took the guns without the owner's consent, and returned them in the hope of avoiding prosecution. Under our decisions the jury could infer criminal intent from proof that the house had been entered, that the guns had been taken, and that they were in Higginbotham's possession a short time later, without sufficient explanation. *Taylor* v. *State,* 254 Ark. 620, 495 S.W. 2d 532 (1973); *Johnson* v. *State,* 190 Ark. 979, 82 S.W. 2d 521 (1935). If the State had to offer additional affirmative proof of criminal intent there would seldom be a conviction for burglary or grand larceny.

Secondly, it is argued that Higginbotham's statement that he had just gotten out of the penitentiary and couldn't afford any more trouble was inadmissible, because it implied Higginbotham's commission of some other offense. Even so, the statement was admissible under the rule that proof of another offense is admissible when it tends to show motive. *Shuffield* v. *State,* 120 Ark. 458, 179 S.W. 650 (1915). Proof of Higginbotham's motive for returning the guns tended to rebut his contention that the original taking was without criminal intent.

It is also argued that after Scobbee testified about the statement in question defense counsel should have been allowed to cross-examine him outside the jury's presence. In his brief counsel argues that a searching cross-examination might have uncovered grounds for exclusion of the statement. We cannot say that the trial judge abused his discretion in refusing to interrupt the trial for such a fishing expedition. Counsel of course had interviewed his own client before the trial, and his cross-examination of Scobbee shows plainly that he had also interviewed Scobbee before the trial. Thus he had had an opportunity to learn all about the dialogue from the two participants.

Thirdly, it is insisted that the court should have submitted the lesser offense of petit larceny to the jury. A theft is petit

larceny if the value of the property taken does not exceed $35.00. Ark. Stat. Ann. § 41-3907 (Repl. 1964). The question is whether the proof would have supported such a finding in this case. *Hall* v. *State,* 242 Ark. 201, 412 S.W. 2d 603 (1967).

Scobbee was the only witness as to the value of the guns. He said that four months before the trial he had acquired the .22-caliber 9-shot high standard pistol by trading for it a brand-new pistol for which he had paid $109.00. He described the shotgun as an antique Cannon breach gun, more than a hundred years old. "There weren't too many guns like that made." He had paid $35.00 for it some two years earlier and had refused an offer of $150 cash for the gun about eight months before the trial. Scobbee owned two other shotguns and said that once in a while he bought, sold, and traded in weapons.

When the evidence shows *conclusively* that the value of the stolen property exceeds $35, as in the theft of more than that amount in cash or of property worth a great deal more, such as a new automobile, the lesser offense obviously need not be submitted. At the other extreme, when there are conflicting estimates of value both above and below $35, the lesser offense obviously must be submitted. Neither extreme is presented here.

We have not had occasion to consider cases falling between the two extremes, but decisions in other jurisdictions have emphasized various considerations of importance. Of course the fundamental rule is that an instruction on petit larceny need not be given if the jury cannot reasonably find from the evidence that the value of the property is below that fixed for grand larceny. Three enlightening Kentucky cases arose under a statute classifying as grand larceny the theft of chickens worth $2.00 or more. In *Bell* v. *Commonwealth,* 222 Ky. 89, 300 S.W. 365 (1927), one witness valued the two stolen chickens at $25.00. The owner valued them at $1.00 apiece. The court held that the refusal of a petit larceny instruction was not error, because there was no testimony to the contrary. In *Henson* v. *Commonwealth,* 242 Ky. 90, 45 S.W. 2d 855 (1932), the owner testified that the 13 stolen chickens were worth more than $2.00, and there was no testimony to the contrary. The court held that there was no reasonable room for a

difference of opinion; so it was not necessary or proper to instruct on petit larceny.

On the other hand, in *Taylor* v. *Commonwealth,* 240 Ky. 286, 42 S.W. 2d 309 (1931), the owner, in fixing the value of a hen and nine chicks at $2.50, relied in part upon the price of chicks at a hatchery — 15 cents each. The court held that evidence to be vague and unsatisfactory, adding that the jury might be familiar with values from personal observation and common knowledge. Hence the lesser offense should have been submitted.

In *State* v. *Enochs,* 339 Mo. 953, 98 S.W. 2d 685 (1936), the minimum value for grand larceny was $30.00. The owner of the three stolen items, which included a wrecking bar worth "about 50 cents," fixed the total value at $30.25. The court found that figure to be so close to the minimum that the issue of petit larceny should have been submitted. The leeway above the minimum was much greater in *Gray* v. *Commonwealth,* 288 Ky. 25, 155 S.W. 2d 444 (1941). There the minimum value for grand larceny was $20. The owner of the stolen welding torch and attachments testified that they had cost $140 and were worth more than $20. The court observed that it would have been better if the prosecution had established the value with more certainty. Nevertheless, the court sustained the trial court's refusal to submit petit larceny, because "we do not think there could be any question" that the stolen property was of a value of $20 or more.

In the case at bar we uphold the trial judge's refusal to submit the issue of petit larceny. No one contradicted Scobbee's testimony. He fixed the cost of the two guns at $144.00, far above the minimum of $35.00. He indicated that he considered the shotgun, for which he had paid $35.00, to be worth more than $150.00, increasing the total estimate to $259.00. He had some expertise in the matter, whereas it is doubtful if the average juror would have any basis for estimating the value of an antique shotgun. Finally, the trial judge had the advantage of observing Scobbee as he testified and of seeing the guns as they were introduced in evidence. In denying the requested instruction on petit larceny the judge stated that the jury, to find that the value of the property did not exceed $35.00, "would have to arbitrarily disregard the

evidence in the case." That statement seems to us to be a fair summation of the situation presented by the proof.

Affirmed.

We agree. HARRIS, C.J., and FOGLEMAN and JONES, JJ.

Tony PEREZ *v.* STATE of Arkansas

CR 76-52 541 S.W. 2d 915

Opinion delivered October 4, 1976

[Rehearing denied November 8, 1976.]

[redacted]

*Laster & Lane,* for appellant.

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

JOHN A. FOGLEMAN, Justice. Appellant was found guilty of possession of a controlled substance (marijuana) with intent to deliver. For reversal he challenges the validity of a search of an automobile which was being driven by him. About 100 kilograms of marijuana were found in its trunk. The trial judge, holding that the search was valid as a "consent search," denied motions to suppress this evidence and to quash the information, both of which were based upon the asserted invalidity of the search. We affirm without reaching the question of the validity of the consent, because we find that the search without a warrant and not incident to arrest was not unreasonable under the circumstances.

At approximately 7:55 p.m. on April 28, 1975, appellant was driving east on Interstate Highway 40 near Lonoke, when he was stopped by Arkansas State Police Trooper Imboden, who was observing traffic along the highway. Imboden testified substantially as follows:

I was sitting approximately two miles west of Lonoke, eastbound, when I noticed a Ford Fairlane, occupied by two persons who appeared to be very young, pass at an extremely slow rate of speed. The occupants were sitting very low in the seat and appeared to be in the 14 year age group. The vehicle was travelling at 37 miles per hour as shown by my "radar" but slowed to at least 30 miles per hour when it passed me. The flow of traffic, which was moderate, was proceeding at 55 to 60 miles per hour, at the least. It seemed to me that the vehicle, which bore California license plates, was blocking traffic and creating a hazard. The car was "sitting down in the back and reared up in the front." It is a part of my duties to see that traffic is flowing smoothly. I pulled out and "pulled them over." I stopped the car for several reasons. The first was because of speed. I stop every car driving at 37 miles per hour in moderate or heavier traffic. I stop vehicles driven by persons sitting low in the seat because I suspect they might be too young to drive. I stop vehicles driving at 37 miles per hour because I suspect drunkenness. I wanted to find out why a person driving all the way from California was going so slow. When I started after them, I suspected it was a stolen car. I got out of the vehicle and directed the driver to come to me at the back of his car. I asked for his driver's license. It was a Texas license. He appeared to be intoxicated, and I suspected alcohol, but I couldn't smell anything. He wasn't coherent and just didn't act right to me. I asked for proof of ownership of the automobile and he produced a registration in someone else's name. Perez, the driver, said the car belonged to a relative or friend. I went to the right front of the car to talk to the passenger, who turned out to be a girl. I asked her who she was and where she was going. She would not respond or look at me at first, but finally after I asked several times, she said that she was going to Tennessee or somewhere, she did not know for sure, and said she was just riding with Perez. When I was at the right front of the car, I noticed a spare tire, a suitcase or two, and some clothes in the back seat. I had been informed through intelligence meetings of the Arkansas State Police that Mexican-Americans that had equipment of this nature in the back seat were possibly carrying illegal contraband or mari-

> juana. I was told through written information and also through contact with CID officers to be on the lookout for Mexican-Americans in a variety of cars from Texas and California carrying spare tires and clothes in the front, with the car sitting down. Except for the information from the State Police, all I had was a hunch or belief about this particular individual. I asked Mr. Perez what he had in the trunk, because it looked suspicious and I wanted to see what his reaction would be. He said he had some clothes. I asked if he minded if I saw what was in the trunk and he did not say anything. I said, "You don't have to, but I would like to see what is in the trunk." Without any further response he went and put the keys in the trunk and opened it. It was difficult for Perez to understand what I was saying but I felt that this was due to his intoxication and not to a language problem.

Perez denied that he was intoxicated. He testified he had smoked a marijuana cigarette about three hours earlier and had taken "speed" about eight hours earlier. He stated that he opened the trunk of his vehicle because of the officer's menacing appearance, demeanor and gestures. He denied that Imboden told him he had a right not to open the trunk. He said that the trooper told him that he had been stopped because the car had "highjacker" shock absorbers. Perez stated that he was driving at a speed of 48 to 50 miles per hour. The testimony of the passenger tended to corroborate that of Perez as to the officer's actions and statements and as to the speed of the vehicle.

It is the duty of the State Police to patrol the highways and to enforce the laws of the state relating to motor vehicles and the use of the highways. Ark. Stat. Ann. § 42-407 (Repl. 1964). Therefore, the original intrusion upon Perez' freedom of movement was justified as a proper investigatory stop, either to determine the reason for the subject vehicle's slow speed, which violated Ark. Stat. Ann. § 75-604 (Supp. 1975) or to determine if the driver was of legal age to operate a vehicle. Ark. Stat. Ann. § 75-309 (Supp. 1975). See *Adams* v. *Williams,* 407 U.S. 143, 92 S. Ct. 1921, 32 L. Ed. 2d 612 (1972). In either event, it was proper for the officer to demand that Perez exhibit his driver's license. Ark. Stat. Ann. § 75-323 (Repl. 1957).

When Officer Imboden actually confronted him the defendant manifested symptoms of intoxication and displayed a driver's license from one state and a registration certificate from another, issued to an entirely different person. In addition, the clues to which Imboden had been alerted by the CID and the State Police were manifested in "plain view." Assuming the officer had no more than a suspicion before he stopped Perez, either Perez' apparent intoxication coupled with evidence that the vehicle may have been stolen or the "plain view" evidence that the vehicle contained contraband justified a thorough search.

It is well established that warrantless searches of automobiles that are constantly movable may be reasonable when, under the same circumstances, a search of a home, store or other fixed piece of property would not be. *Cooper* v. *California,* 386 U.S. 58, 87 S. Ct. 788, 17 L. Ed. 2d 730 (1967); *Brinegar* v. *U.S.,* 338 U.S. 160, 69 S. Ct. 1302, 93 L. Ed. 1879 (1949). An important consideration in contrasting automobile searches with other types is that the extent of police-citizen contact involving automobiles will, of necessity, be substantially greater than such contacts in a home or office; therefore the citizen's expectation of privacy in his auto is not the same as in his home. Also, "community caretaking functions" will more likely bring police officers in plain view of evidence of crimes or contraband in a car than in a home or office. *Cady* v. *Dombrowski,* 413 U.S. 433, 93 S. Ct. 2523, 37 L. Ed. 2d 706 (1973).

Whenever a police officer has reasonable cause to believe that contraband is being unlawfully transported in a vehicle then the vehicle may be the object of a warrantless search. *Gordon* v. *State,* 259 Ark. 134, 529 S.W. 2d 330; *Carroll* v. *U.S.,* 267 U.S. 132, 45 S. Ct. 280, 69 L. Ed. 543, 39 ALR 790 (1925). Determination of the soundness of his concluding that probable cause for the search existed is made in the light of the particular situation, with account taken of all the circumstances. *Gordon* v. *State,* supra; *Brinegar* v. *U.S.,* 338 U.S. 160, 69 S. Ct. 1302, 93 L. Ed. 1879 (1949). See also, *Adams* v. *Williams,* supra; *Sibron* v. *New York,* 392 U.S. 40, 88 S. Ct. 1889, 20 L. Ed. 2d 917 (1968). Even though a stop for a traffic violation may not justify a vehicle search, circumstances surrounding the stopping together with facts becoming apparent

to the officer after the stop has been made may afford probable cause to believe that the vehicle contains contraband. *Gordon* v. *State,* supra. In such cases, given exigent circumstances, the right to search and the validity of the consequent seizure depend on the reasonableness of the cause the seizing officer has for believing that the contents of the automobile offend against the law. *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; *Moore* v. *State,* 244 Ark. 1197, 429 S.W. 2d 122, cert. den. 393 U.S. 1063, 89 S. Ct. 714, 21 L. Ed. 2d 705.

Given probable cause, the search here was valid if it was not reasonably practical to obtain a search warrant. *Tygart* v. *State,* 248 Ark. 125, 451 S.W. 2d 225, cert. den. 400 U.S. 807, 91 S. Ct. 50, 27 L. Ed. 2d 36. See also, *Scott* v. *State,* 249 Ark. 967, 463 S.W. 2d 404; *Maltos-Roque* v. *U.S.,* 381 F. 2d 130 (5 Cir., 1967). Cf. *Coolidge* v. *New Hampshire,* 403 U.S. 443, 91 S. Ct. 2022, 29 L. Ed. 2d 564 (1971).

As pointed out in *Chambers* v. *Maroney,* 399 U.S. 42, 90 S. Ct. 1975, 26 L. Ed. 2d 419 (1970), the circumstances furnishing probable cause to search a particular automobile for particular articles are most often unforeseeable, so that, if an effective search is to be made, it must often be made immediately and without a warrant or the car must be seized and held without a warrant for whatever period is necessary to obtain a warrant. Accordingly, the court held in *Chambers* that, for constitutional purposes, given probable cause to search, either course is reasonable under the Fourth Amendment. Since Imboden was alone and the parties were obviously nonresidents of the state, it would have been foolish for him to have left the vehicle in quest of a search warrant at that hour of the night. The impracticality of obtaining a search warrant in this case is obvious. The chances of successfully executing a search warrant after the passage of time required to obtain one were speculative to say the least. Cf. *Husty* v. *U.S.,* 282 U.S. 694, 51 S. Ct. 240, 75 L. Ed. 629 (1931). It is recognized that normal police procedures in a metropolitan area may be neither normal nor possible on a rural-area roadside. *Cady* v. *Dombrowski,* supra.

The critical inquiry then is whether there was probable cause for Officer Imboden to believe that the contents of the

automobile offended against the law, i.e., were contraband. The question of reasonableness or unreasonableness is one of realistic and not theoretical approach. *Schwimmer* v. *U.S.,* 232 F. 2d 855 (8 Cir., 1956), cert. den. 352 U.S. 833, 77 S. Ct. 48, 1 L. Ed. 2d 52. The rule of probable cause is a practical, non-technical conception. *Brinegar* v. *U.S.,* supra; *Adams* v. *Williams,* supra. Probable cause is to be evaluated from the viewpoint of a prudent and cautious police officer at the time he acts, and not from the vantage point of a library. The question is a pragmatic one to be decided in the light of a particular case and the answers are not to be found by the application of a mathematical formula. Constitutional standards permit common sense and honest judgments by police officers in their probable cause determinations. *Sanders* v. *State,* 259 Ark. 329, 532 S.W. 2d 752. See also, *Brinegar* v. *U.S.,* supra. Judicial review should take into account the fact that a police officer has to act upon the spur of the moment and that he is not a constitutional lawyer, nor is he afforded the luxury of hindsight usually possessed by reviewers of his action. *State* v. *Contursi,* 44 N.J. 422, 209 A. 2d 829 (1965); *State* v. *Johnson,* 230 A. 2d 831 (R.I., 1967). In appraising the evidence, regard must be given to the nature of the believed crime, and the recognized methods or devices of its commission and the common and specialized experience and work-a-day knowledge of policemen taken into account. *State* v. *Contursi,* supra; *State* v. *Miller,* 47 N.J. 273, 220 A. 2d 409 (1966). The question is whether the facts available to the officer at the moment of the search would warrant a man of reasonable caution to believe that the action taken was appropriate, *Terry* v. *Ohio,* 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968); *People* v. *Tassone,* 41 Ill. 2d 7, 241 N.E. 2d 419 (1968), cert. den. 394 U.S. 965, 89 S. Ct. 1318, 22 L. Ed. 2d 567; or whether the search is one which fair-minded persons, knowing the facts, and giving due consideration to the rights and interests of the public, as well as to those of the suspect, would judge to be an unreasonable or oppressive intrusion. *State* v. *Criscola,* 21 Utah 2d 272, 444 P. 2d 517 (1968).

As we see it, the same standards govern probable cause whether the question is validity of a search and seizure or validity of an arrest. In the context of warrantless arrest, we have said that probable cause is a reasonable ground for suspicion supported by circumstances sufficiently strong in

themselves to warrant a cautious man to believe the accused had committed a crime. *Johnson* v. *State,* 249 Ark. 208, 458 S.W. 2d 409; *Sanders* v. *State,* supra. We have also said that probable cause exists when the facts and circumstances within the officer's knowledge and of which he has trustworthy information are sufficient to warrant a man of reasonable caution in the belief that an offense is being committed. *Jackson* v. *State,* 241 Ark. 850, 410 S.W. 2d 766. See also, *Adams* v. *Williams,* supra.

A reasonable suspicion of an officer that the driver of a motor vehicle is intoxicated has been held sufficient justification, not only for stopping the vehicle, but for searching for intoxicants or drugs when driving a motor vehicle while under the influence of intoxicants or drugs is a violation of such statutes as Ark. Stat. Ann. §§ 75-1027 (Repl. 1957), 75-1029 (Supp. 1975) and 75-1026.1 et seq (Supp. 1975). *State* v. *Gustafson,* 258 S. 2d 1 (Fla., 1972). We have held that a person's conduct while under the observation of a police officer is a proper factor to be considered in evaluating probable cause. *Jones* v. *State,* 246 Ark. 1057, 441 S.W. 2d 458. See also, *Terry* v. *Ohio,* supra; *Peters* v. *New York,* sub. nom. *Sibron* v. *New York,* 392 U.S. 40, 88 S. Ct. 1889, 20 L. Ed. 2d 917 (1968). The fact that the rear of the automobile appeared to be low was a significant fact when considered with other information tending to cause the officer to believe that there was contraband in the automobile. See *Burke* v. *State,* 235 Ark. 882, 362 S.W. 2d 695, cert. den. 373 U.S. 922, 83 S. Ct. 1523, 10 L. Ed. 2d 421. See also, *People* v. *Bringardner,* 233 Mich. 449, 206 N.W. 988 (1926); *Nichols* v. *U.S.,* 176 F. 2d 431 (8 Cir., 1949).

In considering the evidence available to Officer Imboden, it was proper for the officer to take into consideration conditions identifiable as the basis for a suspicion that the contents of the vehicle offended against the law in the collective experience of law enforcement officers who have dealt with detection of illegal transportation of a controlled substance. Cf. *Terry* v. *Ohio,* supra. The mere fact that Imboden's information about this experience was hearsay is not destructive of probable cause based in part thereon. See *Jackson* v. *State,* supra; *Jones* v. *State,* supra. Probable cause is evaluated by the courts from collective information of police and not merely on the personal knowledge of the officer making the decision.

*Johnson* v. *State,* supra; *Jones* v. *State,* supra. When the conduct of Perez and the absence of an odor of alcohol were considered in the light of the other information possessed by the officer, what otherwise was only a reasonable suspicion was supported by circumstances sufficiently strong to warrant a reasonably cautious, discreet and prudent police officer in the exercise of common sense to arrive at the honest judgment that the vehicle contained contraband. Nothing more is required. *Husty* v. *U.S.,* supra; *Sanders* v. *State,* supra.

The officer would have been derelict in his duty had he not searched the automobile. Cf. *Russell* v. *State,* 240 Ark. 97, 398 S.W. 2d 213; *Terry* v. *Ohio,* supra. It has been said, in a case involving the search under the rear seat cushion of an automobile for intoxicating liquors, that the search was the duty of the searching officer, who had approached an empty vehicle parked in a dark alley and, upon throwing the beam of his flashlight into the vehicle, had discovered several empty tin cans of one gallon capacity and a back seat cushion so disarranged as to make it appear that something was concealed under it. *Smith* v. *State,* 155 Tenn. 40, 290 S.W. 4 (1927). The Tennessee court aptly pointed out that the policeman is a watchman to seek for probable offenders and offenses against the law, and that the security of citizens is dependent upon the faithful performance of his duties. While that case involved duties of an officer in a metropolitan area, it is recognized that in non-metropolitan areas enforcement of traffic laws and supervision of vehicular traffic may be a large part of the officer's duties. *Cady* v. *Dombrowski,* supra.

The exigencies of the situation made a search of the automobile proper, with or without the consent of the person who was in control of the vehicle. See *Husty* v. *U.S.,* supra. Nor was the scope improper. See *People* v. *Jackson,* 241 Cal. App. 2d 189, 50 Cal. Rptr. 437 (1966); *People* v. *Superior Ct.,* 44 Cal. App. 3rd 207, 118 Cal. Rptr. 586 (1974). Even if appellant consented to the search, he merely consented to what might have been done without his permission. Cf. *Patrick* v. *State,* 245 Ark. 923, 436 S.W. 2d 275.

Since we find the warrantless search to be reasonable, the judgment is affirmed.

We agree: HARRIS, C.J., and GEORGE ROSE SMITH and JONES, JJ.

# OSAGE OIL AND TRANSPORTATION INC. *v.* CITY OF FAYETTEVILLE

76-72 541 S.W. 2d 922

Opinion delivered October 4, 1976
[Rehearing denied November 8, 1976.]

*Esther M. White,* for appellant.

*James N. McCord,* for appellee.

CONLEY BYRD, Justice. The appellant, Osage Oil and Transportation, Inc., contends by this appeal that Section

17B-4(c) of Ordinance No. 1893[1] of the City of Fayetteville is unconstitutional because it provides for summary removal of signs upon an *ad hoc* determination by the City's Building Inspector that a particular sign is unlawfully maintained. In support of its contentions, appellant relies upon *McLean* v. *Fort Smith,* 185 Ark. 582, 48 S.W. 2d 228 (1932). The City of Fayetteville on the other hand relies upon our decisions in *McKibbin* v. *Fort Smith,* 35 Ark. 352 (1880) and *Harvey* v. *DeWoody,* 18 Ark. 252 (1856), which permit summary action by a city when no factual dispute is involved.

In the trial court appellant stipulated that it did not obtain the permit required by the sign ordinance to erect its sign and that the sign otherwise violated the sign ordinance because of the size and set back restrictions in the ordinance. Since appellant readily admits that its sign as erected is in violation of the sign ordinance, we affirm the judgment upon the basis set forth in *McKibbin* v. *Fort Smith* and *Harvey* v. *DeWoody, supra,* without reaching the constitutional issue raised by appellant. This is in accord with our long standing rule that we will not pass upon constitutional questions if the litigation can be determined without doing so, *Searcy County* v. *Stephenson,* 244 Ark. 54, 424 S.W. 2d 369 (1968).

Appellant also suggests that Section 17B-4(c) of Ordinance 1893 of the City of Fayetteville is ultra vires because the penalty provisions set forth in Ark. Stat. Ann. § 19-2829(h) are exclusive. We find no merit in this contention because Ark. Stat. Ann. § 19-2831 provides:

> "This Act [§§ 19-2825 — 19-2831] shall be construed liberally. The enumeration of any object, purpose, power, manner, method, or thing shall not be deemed to exclude like or similar objects, purposes, powers, manners, methods, or things."

Appellee has abstracted additional portions of the record and now contends that it is entitled to recover the costs thereof. We deny this request for two reasons:

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[1]We upheld the validity of this sign ordinance in *Board of Adjustment of Fayetteville* v. *Osage Oil and Transportation, Inc.,* 258 Ark. 91, 522 S.W. 2d 836 (1975). Appellant erected the sign between the date of the trial court's judgment and our reversal but no vested rights were acquired thereby.

(1) the abstract of the appellant was sufficient to present the issue upon which it relied; and

(2) appellee neglected to tell this court the amount of the actual costs or time spent in abstracting the additional portions of the record.

Affirmed.

We agree: HARRIS, C.J., and HOLT and ROY, JJ.

Eddie L. BREWSTER et al *v.* Vannette W. JOHNSON

76-276 541 S.W. 2d 306

Opinion delivered October 4, 1976

*Dickey, Drake & Bynum,* for appellant.

*Coleman, Gantt, Ramsay & Cox,* by: *William C. Bridgeforth,* for appellee.

CONLEY BYRD, Justice. The trial court found as a fact that appellant Eddie L. Brewster had not been a resident of District 54 (being a part of Jefferson County) for one year next preceding the date of election as required by Article 5, § 4 of the Arkansas Constitution and directed the Secretary of State to omit appellant's name from the official list of candidates to be certified to the Jefferson County Election Commission. For reversal appellant contends that the "durational requirements" of Article 5, § 4 of the Constitution of Arkansas are invalid under the Equal Protection Clause, abridge his fundamental right to travel, and infringe his fundamental right to vote as possessed by the electorate of the State. He also contends that the trial court erred in holding that he had not been an elector of District 54 for the required time.

The record shows that appellant was a student at the University of Arkansas at Pine Bluff from April 15, 1972 through the summer term of 1976. When he entered the University he listed his permanent mailing address as 608 Spruce Street, Augusta, Woodruff County, Arkansas, and he continued to do so through the Spring semester, registration which was held in January 1976. On May 31, 1976, while registering for the Summer semester he changed his permanent mailing address to 815 West Barraque Street, Apartment E., Pine Bluff, Arkansas. The same information appears in his own handwriting in his applications for financial aid in attending the University. It is also admitted that from May 30, 1972 through March 9, 1976 appellant was a registered voter and voted in Woodruff County in every election up through and including the March 9, 1976 election. Appellant first transferred his voter registration to Jefferson County on March 18, 1976. He has paid no taxes nor assessed any personal property taxes in Jefferson County until August 13, 1976. The petitions by which appellant seeks to run as an independent candidate for representative from District 54 were filed with the Secretary of State on April 6, 1976. It was stipulated that appellant would testify that he considered himself a resident since 1972.

In reviewing the findings of fact by the trial court on appeal we must affirm them if there is any substantial evidence to support such findings. On the record before us we cannot say that there is no substantial evidence to support the trial court's finding that appellant was not a resident of District 54 for one year before the date of election.

For his contention that Article 5, § 4 contravenes the United States Constitution appellant principally relies upon *Dunn* v. *Blumstein,* 405 U.S. 330, 92 S. Ct. 995, 31 L. Ed. 2d 274 (1972), and the line of cases from California following *Dunn* v. *Blumstein, supra,* such as *Thompson* v. *Mellon,* 9 Cal. 3d 96, 107 Cal. Rptr. 20, 507 P. 2d 628 (1973) and *Smith* v. *Evans,* 42 Cal. App. 3d 154, 116 Cal. Rptr. 684 (1974).

Article 5, § 4 of the Arkansas Constitution provides:

> "No person shall be a Senator or Representative who, at the time of his election, is not a citizen of the United States, nor any one who has not been for two years next preceding his election a resident of this State, and for one year next preceding his election a resident of the county or district whence he may be chosen. Senators shall be at least twenty-five years of age and Representatives at least twenty-one years of age."

Requirements similar to those in the Arkansas Constitution, *supra,* can be found in the Constitutions of nearly every State, except Nevada. Only five states require less than a year. See table set out in *Hayes* v. *Gill,* 52 Hawaii 251, 473 P. 2d 872 (1970). The United States Constitution provides that "no person shall be a representative who shall not have . . . been seven years a citizen of the United States. . . ." [Art. 1, § 2(2)] and a like provision of nine years is required of a Senator, Art. 1, § 3(3).

*Dunn* v. *Blumstein, supra,* involved durational residence laws for voter qualification. Before addressing itself to the merits of the durational residence law, Mr. Justice Marshall in writing for the majority of the court said:

> "To decide whether a law violates the Equal Protection Clause, we look, in essence, to three things: the

character of the classification in question; the individual interests affected by the classification; and the governmental interests asserted in support of the classification. . . . In considering laws challenged under the Equal Protection Clause, this Court has evolved more than one test, depending upon the interest affected or the classification involved. First, then, we must determine what standard of review is appropriate. In the present case, whether we look to the benefit withheld by the classification (the opportunity to vote) or the basis for the classification (recent interstate travel) we conclude that the State must show a substantial and compelling reason for imposing durational residence requirements."

With respect to filing fee requirements for qualification of a candidate in a statutory party primary, Chief Justice Burger in speaking for the Court in *Bullock* v. *Carter,* 405 U.S. 134, 92 S. Ct. 849, 31 L. Ed. 2d 92 (1972), discussed the determination of the test to be applied in this language:

"The initial and direct impact of filing fees is felt by aspirants for office rather than voters, and the Court has not heretofore attached such fundamental status to candidacy as to invoke a rigorous standard of review. However, the rights of voters and the rights of candidates do not lend themselves to neat separation; laws that affect candidates always have at least some theoretical, correlative effect on voters. Of course, not every limitation or incidental burden on the exercise of voting rights is subject to a stringent standard of review. *McDonald* v. *Board of Election,* 394 U.S. 802, 89 S. Ct. 1404, 22 L. Ed. 2d 739 (1969). . . . "

The California Courts, *Thompson* v. *Mellon, supra,* have taken the position that in determining the validity of durational candidate qualifications to cities, the cities must show the same substantial and compelling reason for imposing durational residence requirements to candidate qualification that the United States Supreme Court applied to voter qualification. In applying that test to the durational qualifications, the court struck down a two year durational requirement for candidates for the office of city councilman. Justice Mosk, in a concurring opinion went farther by stating:

". . . indeed, all such durational residential requirements should be rejected because they can be justified solely on a paternalistic theory that the citizens of yesterday knew what is best for the governance of the citizens of today and tomorrow." In a dissent Justice Burke stated his views of the test to be applied as follows:

> "Initially, we must determine what standard governs in measuring the constitutionality of various restrictions imposed upon the right to run for public office. The latest pronouncement of the United States Supreme Court indicates that the traditional 'rational basis' test may be sufficient in the absence of a discrimination based upon wealth or some other 'suspect' classification. (see *Bullock* v. *Carter,* 405 U.S. 134, 142-144, [31 L. Ed. 2d 92, 99-100, 92 S. Ct. 849], applying a 'close scrutiny' test to invalidate a Texas filing fee scheme which tended to exclude from the ballot candidates unable to afford the substantial fees at issue therein.) The residence requirement at issue may operate to restrict the field of candidates from which voters might choose, but, as stated in *Bullock,* 'The existence of such barriers does not of itself compel close scrutiny.' (*Id.* at p. 143 [31 L. Ed. 2d at p. 100].)"

Following the decision in *Thompson* v. *Mellon, supra,* the California Court of Appeal, Third District, in *Smith* v. *Evans, supra,* held invalid a one year durational residence requirement for city council candidates. In so doing the court stated:

> "It is unnecessary to decide here whether the relatively stringent 'compelling interest' test or the relative mild 'reasonable necessity' test is appropriate. Even by the measure of the latter, the one-year durational residence requirement for local candidates fails. Its preference for settled inhabitants and its denial of political opportunity to new inhabitants is restrictive beyond its reasonable necessity for achieving legitimate public ends."

Other courts in considering durational residence requirements of candidates for state offices contained in the state's constitution have arrived at a different result. See

*Gilbert* v. *State,* Alaska, 526 P. 2d 1131 (1974), [state senator]; *Walker* v. *Yucht,* (D.C. Del. 1972), 352 F. Supp. 85 [office of state general assembly]; *Hayes* v. *Gill,* 52 Hawaii 251, 473 P. 2d 872 (1970), [state representative]; *State ex rel Gralike* v. *Walsh,* Mo. 483 S.W. 2d 70 (1970), [state senator]; and *Chimento* v. *Stark,* (1973 D.C. N.H.) 353 F. Supp. 1211, affd. 414 U.S. 802, 94 S. Ct. 125, 38 L. Ed. 2d 39 [Governor of New Hampshire]. In so doing, all of these courts except Hawaii and a concurring opinion in *Chimento* v. *Stark, supra,* have applied the "compelling state interest" test or at least given lip-service to the test.

When one considers that durational residence requirements, usually considered in terms of citizenship or domicile, are required in practically all of the State Constitutions for state officers and that seven and nine years citizenship is required in the United States Constitution for Representatives and Senators respectively, we cannot agree with the statements in *Thompson* v. *Mellon, supra,* that such durational requirements "can be justified solely on a paternalistic theory that the citizens of yesterday know what is best for the governance of the citizens of today and tomorrow." In fact history records that the seven year provision in the United States Constitution Article 1 § 2(2) was inserted by the Constitutional Convention because it was thought that three years, as originally proposed, was not enough time for securing that local knowledge which ought to be possessed by a congressman, *The Constitution of the United States* by *David K. Watson,* Volume I, page 146. The State of Arkansas has had five Constitutions, the Constitution of 1836, the Constitution of 1861, the Constitution of 1864, the Constitution of 1868 and the present Constitution of 1874, all of which have carried the same durational qualifications for candidates to the State Legislature. In fact the 1868 Constitution was approved by Congress June 22, 1868, 15 Stat. 72, Ch. 69. When viewed with this historical setting and the almost unanimous requirement in every state of this Nation, we do not believe that such durational requirements should be considered as "suspect" classification or as "invidious" discrimination. If the classification of State officers is neither "suspect" nor "invidious" then of course the "rational basis" test when applied to the classification under consideration would not invalidate such requirements.

Neither do we interpret the United States Supreme Court decisions as requiring the "Compelling State Interest" test. When viewed by the three tests stated by Mr. Justice Marshall in *Dunn* v. *Blumstein, supra,* we find:

1. The character of the classification is contained in practically every state constitution and a corresponding durational requirement is set forth in the Federal Constitution.

2. The individual interests affected by the classification are the exception rather than the rule. Nearly every community, figuratively speaking, has had its feuds between the Martins and the McCoys that have been settled by unwritten and unpublished compromises — such feuds should not be renewed through ignorance.

3. Furthermore to hold such classification invalid to protect the interest of the few, who fall in the exception, would permit the political bosses in the more wealthy districts of the State of keep the political leaders in the less wealthy or rural districts busy with their home chores through hired agitators as candidates while the wealthy political bosses concentrated their efforts on state wide political races.

Everyone who has learned to drive an automobile has already learned the philosophical lesson — *i.e.* there is a lot of difference between talking about something and doing something. The same philosophy applies to government. It has been less than two decades since headlines in the newspapers of Boston, Massachusetts were telling the citizens of Little Rock, Arkansas, how they should handle their school racial problems. But if one can believe what he presently reads in the newspapers, it seems that some of the good citizens of Boston are now having trouble practicing what was preached to Little Rock during the 1957 Integration Crises. Stated in the words of the old courthouse political wag it seems that "A man ought to wear out at least one pair of shoes in a community before he undertakes to speak for it or tell it how to run its business."

Now obviously it would appear that the "reasonable basis" test ought to be applied to reasonable durational qualifications for state officers. But if the United States

Supreme Court should subsequently decide that the "compelling state interest" is the proper test we think the foregoing discussion is sufficient to satisfy even that test in upholding the validity of durational qualifications of a candidate.

Affirmed.

HARRIS, C.J., concurs in the result.

We agree: HOLT and ROY, JJ.

Floyd D. WILLIAMS *v.* STATE of Arkansas

CR 76-93 541 S.W. 2d 300

Opinion delivered October 4, 1976

*Blevins & Pierce,* by: *James W. Stanley Jr.,* for appellant.

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

ELSIJANE T. ROY, Justice. Appellant was charged with capital felony murder in violation of Ark. Stat. Ann. § 41-4702 (Supp. 1973)[1] for the death of Kenneth Wells who was slain during the course of a robbery. At trial by jury appellant was found guilty as charged, and after rendering its verdict the jury heard evidence of aggravating circumstances as required by Ark. Stat. Ann. § 41-4710 (Supp. 1973).[2] No mitigating circumstances were offered by appellant. In assessing the aggravating circumstances the jury determined that they did not justify imposition of the death penalty and consequently sentenced appellant to life imprisonment without parole. This appeal ensues.

Appellant first claims error in the refusal of the trial court to dismiss the information against him as being violative of his rights under the Fourteenth Amendment to the United States Constitution. He contends the statutes under which his penal-

[1]Now Ark. Stat. Ann. § 41-1501 (effective January 1, 1976).

[2]Now Ark. Stat. Ann. §§ 41-1301 — 41-1302 (effective January 1, 1976).

ty was determined are constitutionally vague, overbroad and vest too much discretion in the jury. This contention involves Ark. Stat. Ann. §§ 41-4710 — 41-4712[3] which require that, upon a determination of guilt, the jury consider specified aggravating and/or mitigating circumstances as a guideline in establishing the sentence to be imposed.

The argument here urged was decided adversely to appellant's contention in *Neal* v. *State,* 259 Ark. 27, 531 S.W. 2d 17 (1976). In *Neal* we held that the statutory language should be so susceptible of " . . . *common understanding and practice* that it cannot be said an ordinary man or juror would have to speculate as to its meaning." We reaffirm our earlier holdings that the questioned language is amenable to such common understanding and practice as to be constitutionally sound. See also *Collins* v. *State,* 259 Ark. 8, 531 S.W. 2d 13 (1975).

Upon a finding of guilt appellant faced a death sentence or life imprisonment without parole. Since the jury imposed life imprisonment without parole appellant is not in a position to question the constitutionality of those provisions of the statute which permit the imposition of the death penalty under certain circumstances.

In *Harris* v. *State,* 259 Ark. 187, 532 S.W. 2d 423 (1976), the appellant received a sentence of life imprisonment without parole. He contended that Act 438 of 1973 (incorporating the statutes here in dispute) was constitutionally improper in that it conferred upon the jury more discretion than is legally permissible in fixing punishment. In *Harris* we stated:

> . . . [T]his appellant received only a sentence to life imprisonment without parole. We find nothing in any of the opinions in *Furman* [408 U.S. 238 (1972)] 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. * * *

In light of the above authorities we find no merit in appellant's first point.

[3]Now Ark. Stat. Ann. §§ 41-1301 — 41-1304 (effective January 1, 1976).

Appellant also urges error in the refusal of the trial court to grant his motion for a directed verdict at the close of the State's case because the circumstantial evidence was not sufficient to warrant a conviction. A directed verdict is proper only when no fact issue exists and upon appeal we review the evidence most favorably to appellee, affirming if there is any substantial evidence. *Burks* v. *State,* 255 Ark. 23, 498 S.W. 2d 336 (1973). The fact that evidence is circumstantial does not render it insubstantial. *Williams* v. *State,* 258 Ark. 207, 523 S.W. 2d 377 (1975). In *Upton* v. *State,* 257 Ark. 424, 516 S.W. 2d 904 (1974), we held that where circumstantial evidence is involved a determination of whether the evidence excludes every other reasonable hypothesis than the guilt of the defendant is basically a question for the jury.

We find the evidence here ample to raise a fact issue. The evidence showed the decedent had been robbed; eyewitness accounts connected appellant with the crime; and appellant's alleged admission to two other men that he murdered the decedent made more than ample proof for the question to go to the jury. Therefore, appellant's motion for a directed verdict was properly refused.

Appellant next questions the cross-examination of Pearlie Mae Givens. During the cross-examination in an attempt to impeach her testimony the State alluded to a tape recording of a conversation the prosecutor had with the witness in his office prior to trial. Appellant immediately objected, and both sides retired to chambers to consider the State's effort to authenticate the recording for purposes of impeaching Witness Givens' testimony. It was agreed that the State would discontinue its efforts to discredit the witness by use of the tape and appellant would withdraw his motion for a mistrial. The court thereafter admonished the jury to disregard the State's previous line of inquiry and the attorney for appellant stated, "This is sufficient, Your Honor."

Appellant's next averment again questions the constitutionality of Ark. Stat. Ann. § 41-4712 (Supp. 1973) on a different theory. He urges that this statute, upon a determination of guilt, compels him to assert mitigating circumstances which in effect destroys his right not to testify. As heretofore set out in this opinion, appellant cannot question the con-

stitutionality of a statutory provision when he has not been penalized by the provision of the statute under attack. Without introducing evidence of mitigating circumstances appellant received life without parole instead of death, so this argument is of no avail.

Appellant's last assignment of error concerns the action of the trial court in sustaining the State's objection to appellant's cross-examination of prosecuting witness George Horton concerning his need for money to support his heroin addiction. This point has no merit because although the court initially sustained an objection to Horton's testimony, thereafter the court allowed full cross-examination of the witness on this point. The court stated: ". . . [Y]ou can go ahead and ask him anything you want to now." Appellant then pursued his cross-examination of the witness to the full extent desired.

In addition to the points discussed, we have considered every objection and assignment of error required by Ark. Stat. Ann. § 43-2725 (Supp. 1975), and, finding no error, the judgment is affirmed.

Affirmed.

We agree. HARRIS, C.J., and BYRD and HOLT, JJ.

## C. W. CURAN *v.* STATE of Arkansas

CR 76-101 541 S.W. 2d 923

Opinion delivered October 4, 1976
[Rehearing denied November 8, 1976.]

*Smith, Stroud, McClerkin, Conroy & Dunn,* by: *Winfred L. Dunn Jr.,* for appellant.

*Jim Guy Tucker,* Atty. Gen., by: *B. J. McCoy,* Asst. Atty. Gen., for appellee.

ELSIJANE T. ROY, Justice. Appellant C. W. Curan was charged in Miller County on January 17, 1974, with the crime of robbery in violation of Ark. Stat. Ann. § 41-3601 (Repl. 1964). He subsequently was tried and convicted of a crime in the State of Texas. On March 1, 1974, an extradition warrant was issued for appellant by the Governor of Texas, and Arkansas requested a hold on July 5, 1974.

On September 5, 1975, while incarcerated in Texas,

appellant filed a pro se motion to dismiss the robbery charge pending against him in Arkansas on the ground that he had been denied a speedy trial. On November 3, 1975, he filed a pro se petition for writ of mandamus in this Court to compel the Miller Circuit Court to act on his motion to dismiss. In an unpublished per curiam order dated March 22, 1976, appellant's petition was denied.

Arkansas authorities requested temporary custody of appellant on December 4, 1975, which request was granted and appellant was returned to Arkansas. On April 9, 1976, another motion to dismiss the charges against appellant was filed, alleging that he had been denied the right to a speedy trial. After a hearing on April 19, 1976, the trial court found that appellant had not been denied his constitutional right to a speedy trial and thus was not entitled to have the charges against him dismissed. From the trial court's ruling comes this appeal.

Appellant relies upon two points for reversal, the first being that the trial court should have sustained his motion to dismiss based upon the denial of the right to a speedy trial as guaranteed by the Sixth Amendment to the United States Constitution.

The United States Supreme Court has held that the right to a speedy trial is so basic and fundamental that it applies in state criminal cases. *Klopfer* v. *North Carolina,* 386 U.S. 213, 87 S. Ct. 988, 18 L. Ed. 2d 1 (1967). The Court also has held that one who is imprisoned in another jurisdiction has a right to a speedy trial, and on demand a state has a duty to make a diligent and good faith effort to secure the presence of the accused from the custodial jurisdiction of another state and afford him a trial. *Dickey* v. *Florida,* 398 U.S. 30, 90 S. Ct. 1564, 26 L. Ed. 2d 26 (1970).

In *Smith* v. *Hooey,* 393 U.S. 374, 89 S. Ct. 575, 21 L. Ed. 2d 607 (1969), the United States Supreme Court held that the Sixth Amendment guarantee of a right to a speedy trial is essential to protect at least three basic demands of criminal justice:

[1] to prevent undue and oppressive incarceration prior

> to trial, [2] to minimize anxiety and concern accompanying public accusation and [3] to limit the possibilities that long delay will impair the ability of an accused to defend himself. (Citation omitted.)

The Court has recognized, however, that the right to a speedy trial is necessarily relative, and that it is consistent with delays and depends upon circumstances. *Beavers* v. *Haubert,* 198 U.S. 77, 25 S. Ct. 573, 49 L. Ed. 950 (1905); *Pollard* v. *United States,* 352 U.S. 354, 77 S. Ct. 481, 1 L. Ed. 2d (1957).

In *Barker* v. *Wingo,* 407 U.S. 514, 92 S. Ct. 2182, 33 L. Ed. 2d 101 (1972), the Court set out four factors to be assessed in determining whether an accused has been deprived of his right to a speedy trial. The four factors identified by the Court are "length of delay, the reason for the delay, the defendant's assertion of his right and prejudice to the defendant."

In the instant case the length of delay is regrettable, but it must be viewed in the light of the reason for the delay. There is no showing of a lack of good faith on the part of the Arkansas officials. Before appellant could be tried in Arkansas, he was incarcerated in another jurisdiction. Almost as soon as Arkansas officials discovered appellant's whereabouts they placed a hold on him, but before appellant could be returned he began his efforts to have the charges against him dismissed. In spite of appellant's efforts to have the charges dismissed there are no indications that he made any effort to demand a trial. In *Barker, supra,* the Court said:

> . . . [F]ailure to assert the right will make it difficult for a defendant to prove that he was denied a speedy trial.

Although the delay in terms of passage of time is obvious, it was caused for the most part by the efforts of appellant to have the charges against him dismissed. Furthermore, appellant has furnished no special evidence of prejudice to him attributable to the delay. In light of all the circumstances we find the trial court properly refused to dismiss the charges against appellant.

Appellant also contends that since he was denied a speedy trial he should have been discharged from custody

pursuant to Ark. Stat. Ann. § 43-1708 (Repl. 1964). This section 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.

In *State* v. *Davidson,* 254 Ark. 172, 492 S.W. 2d 246 (1973), a defendant incarcerated in Colorado filed a motion for dismissal of the charges against him on the ground that the State of Arkansas had not given him a speedy trial pursuant to § 43-1708. The motion was granted by the trial court, and the State appealed. This Court reversed the trial court's ruling, holding that:

> * * * When an accused is incarcerated in a federal institution or another state, he is not incarcerated or held on bond awaiting a determination of whether he is guilty or innocent, but is incarcerated for the commission of another crime for which he has been found guilty. *In such situation there is no good reason why the accused should not be required to place himself on record in the attitude of demanding a trial before he would be entitled to discharge under § 43-1708 or § 43-1709.* (Italics supplied.)

In *Davidson* the Court further held that a motion to dismiss the charges for failure to grant a speedy trial does not constitute a demand for trial for purposes of § 43-1708.

The Interstate Agreement on Detainers, Ark. Stat. Ann. § 43-3201 (Supp. 1975), to which Texas is also a party, outlines the procedure for demand of a speedy trial by an accused incarcerated in one state with charges pending against him in a sister state. There are no indications in the record that appellant ever gave the prosecuting attorney or Miller County officials written notice of his place of imprisonment, demanded final disposition of the charges against him or otherwise provided information required by the Interstate Agreement on Detainers.

Finding no merit in appellant's contentions, the trial court's refusal to grant the motion to dismiss is affirmed.

Affirmed.

We agree. HARRIS, C.J., and BYRD and HOLT, JJ.

Kenneth Ray ALLEN *v.* STATE of Arkansas

CR 76-119 541 S.W. 2d 675

Opinion delivered October 11, 1976

[redacted]

[redacted]

*Tommy H. Russell* and *Bob Dawson,* for appellant.

*Jim Guy Tucker,* Atty. Gen., by: *B. J. McCoy,* Asst. Atty. Gen., for appellee.

JOHN A. FOGLEMAN, Justice. Appellant was found guilty of perjury in the first degree alleged to have been committed during his testimony in a hearing to set bail in the Municipal Court of Walnut Ridge on March 24, 1975. He lists three points for reversal. We find no reversible error on any point and affirm.

Appellant argues that the alleged false statements on which the charge was based were neither material nor relevant, either to the charge of non-support, on which he was brought into the municipal court, or to the amount of appearance bond on the charge. He says that the alleged false statements were: (1) Appellant had not had anything to drink in the past three weeks; (2) he did not make any threats toward his former wife during a telephone conversation; (3) he did not make any threats toward his children during a telephone conversation; (4) he did not make any threats concerning his former wife's house during a telephone conversation. We disagree. To say the very least, his drinking habits and the question of threats of violence were relevant and material to the hearing held by the municipal court on the fixing of a bond for appellant's appearance on the non-support charge when he moved for a continuance on his first appearance before the municipal judge.

The amount of bail is a matter that lies peculiarly within the sound judicial discretion of the court fixing it. *Connley* v. *U.S.,* 41 F. 2d 49 (9 Cir., 1930); *U.S.* v. *Mule,* 40 F. 2d 503 (2 Cir., 1930); *People* v. *McDonnell,* 296 N.Y. 109, 71 N.E. 2d 423 (1947); *Green* v. *Petit,* 222 Ind. 467, 54 N.E. 2d 281 (1944); *People* v. *Searles,* 229 App. Div. 603, 243 N.Y.S. 15 (1930). It should be fixed according to the circumstances surrounding the case and the accused with the rights of the accused and the public good kept in mind. *U.S.* v. *Mulcahy,* 155 F. 2d 1002 (2 Cir., 1946); *In re Scott,* 38 Neb. 502, 56 N.W. 1009 (1893);

*Gregory* v. *State,* 94 Ind. 384, 48 Am. Rep. 162 (1883); *People* v. *Searles,* supra; *Braden* v. *Lady,* 276 S.W. 2d 664 (Ky., 1955); *Green* v. *Petit,* supra. The circumstances of the accused's apprehension may be considered. *State* v. *Mastrian,* 266 Minn. 58, 122 N.W. 2d 621 (1963), cert. den. 375 U.S. 942, 84 S. Ct. 349, 11 L. Ed. 2d 274. It is proper to consider the character and reputation and the criminal activities and tendencies of the person charged as factors bearing upon the security required to insure his appearance.[1] *People* v. *Snow,* 340 Ill. 464, 173 N.E. 8, 72 ALR 798 (1930). It is also appropriate to consider recent actions and threats of the accused because they bear upon his good faith in appearing. *U.S.* v. *Mulcahy,* supra; *Ex parte Thomas,* 91 Tex. Cr. App. 49, 237 S.W. 302 (1922); *Kendrick* v. *State,* 180 Ark. 1160, 24 S.W. 2d 859.

Thus, we find no merit in this point.

The next point for reversal is very difficult to treat, because it is a conglomeration of assorted assertions of error, without considering whether objections were made on the questions now argued or whether they were otherwise raised in the trial court. The point is thus entitled:

THE TRIAL COURT ERRED IN ALLOWING THE PROSECUTING ATTORNEY TO ASK APPELLANT AND OTHERS IRRELEVANT AND IMMATERIAL QUESTIONS SIMPLY TO INFLAME THE JURY.

Although there may be adequate grounds for sustaining the trial court on some of the alleged errors and the reason for the absence of objection may be obvious, we will not discuss any of the questions to which exception is now taken unless an objection was made in the trial court. To do so would require a much more extensive treatment of the record than that given in appellant's brief and a greater elaboration on the merits of these questions than the entire argument of appellant upon the point. We would add that we find no question among those listed on this point which is so inflammatory that proper corrective action could not have been

[1]Under Rule 8.5 (viii) of the Arkansas Rules of Criminal Procedure, effective 1 January 1976, the evidence of these threats would clearly have been pertinent, material and relevant to the pretrial release inquiry.

taken if an objection had been made. We will also forego discussion of any of these questions where an objection was sustained or a question withdrawn and further corrective action, such as an admonition to the jury or the declaration of a mistrial, was not asked, because none of these were of such an inflammatory nature as would have justified any conclusion that the verdict was the result of passion and prejudice or the fundamental fairness of the trial substantially impaired. Furthermore, we will not discuss any asserted error where both the argument and the record consist of transcript references only. This will not permit proper appellate consideration. To adequately treat such questions would place insurmountable burdens upon judicial resources.

Appellant does argue that the court erred in overruling his attorney's objection to a question asked by the prosecuting attorney on cross-examination of Hon. Leonard Lingo, Judge of the Municipal Court of Walnut Ridge, a witness called by appellant. The prosecuting attorney asked, "He [appellant] also denied before you that he wilfully failed to support the children, didn't he?" If there was any error in allowing this cross-examination, it was harmless, because it was already rather obvious from the undisputed evidence that there had been a trial on the charge and testimony heard, which was certainly indicative that appellant had pleaded not guilty. The municipal judge had testified on direct examination that the case involving the charge on which appellant was arrested had come up on March 24, 1975, and had been continued to March 31, at the request of appellant. Prior to this inquiry, appellant's ex-wife and the mother of his child, Donna Wolverton, who had made the charge of non-support against appellant, had testified on cross-examination. Appellant's attorney had asked her if she had not testified at appellant's trial in municipal court and had asked her a question about her testimony at that trial.

The prosecuting attorney also asked appellant on cross-examination whether he had done what Judge Lingo had ordered him to do. Appellant answered that he had paid child support until he was locked up on the preceding Wednesday. Over appellant's objection, the prosecuting attorney asked whether, during the intervening 29 weeks, appellant had paid only $525, as reflected by the records, or

the $675 he should have paid, and whether he would say the records "lie." Appellant answered that the records were wrong and that he had the receipts at home. Wilful non-support of children is a criminal offense. Ark. Stat. Ann. § 41-204 (Repl. 1964). Violation of a proper court order for periodical payments would require the imposition of punishment on the violator. Ark. Stat. Ann. §§ 41-210, 211, 212 (Repl. 1964). Cross-examination about such an offense is permissible. *Moore* v. *State,* 256 Ark. 385, 507 S.W. 2d 711; *Rickett* v. *Hayes,* 251 Ark. 395, 473 S.W. 2d 446. Appellant's answer was a denial and the matter was not pursued. Therefore, it would be difficult to say there was prejudice to appellant, or an abuse of the trial court's discretion in allowing this question. *Alexander* v. *State,* 257 Ark. 343, 516 S.W. 2d 368. Appellant put his character in issue, so cross-examination with reference to alleged non-support was appropriate. *Lewis* v. *State,* 258 Ark. 242, 523 S.W. 2d 923.

Mike Hill, who had been acquainted with appellant for six or seven months, was called as a character witness. On cross-examination the prosecuting attorney asked the witness whether, in deciding that appellant was such a truthful and fine fellow, he had heard that Allen was living in a trailer with a lady to whom he was not married. This cross-examination about particular conduct of appellant was permissible in order to test the value of the knowledge of the witness. *Amos* v. *State,* 209 Ark. 55, 189 S.W. 2d 611. The inquiry was obviously made in good faith, because appellant testified that he had been living with a woman for a longer period of time than Hill had known him.

A third point is:

THE TRIAL COURT ERRED IN PERMITTING THE PROSECUTING ATTORNEY TO CROSS-EXAMINE HIS OWN WITNESS UNDER THE COURT'S RULING OF REDIRECT EXAMINATION.

On cross-examination of Donna Wolverton, appellant's counsel questioned her about the time of the filing of non-support charges and the issuance of a warrant for the arrest of appellant, about the length of time that elapsed between

the time she had last been in contact with appellant prior to a telephone conversation two nights before appellant was arrested, and about the date of her separation from appellant and the filing of a divorce suit by her. She was somewhat confused about the calendar year in which certain of these events happened, but related them to each other. On redirect examination, the prosecuting attorney read the affidavit for a warrant of arrest, showed it to her and asked her whether her signature was affixed. This affidavit showed the date of its execution. Appellant argues that since the prosecuting attorney had asked the witness on direct examination whether she knew when the charges of non-support were filed, this amounted to cross-examination of the state's own witness. This was not the objection made, but there was no abuse of the trial court's discretion in allowing this examination in light of the answers given by the witness on cross-examination.

The basic function of redirect examination is to enable the witness to explain and clarify any relevant matters in his testimony which have been weakened, confused or obscured by cross-examination and to rebut the discrediting effect of any damaging statements or admissions so elicited. *Grievance Committee* v. *Dacey,* 154 Conn. 129, 222 A. 2d 339, 22 ALR 3d 1092 (1966), apl. dism. 386 U.S. 683, 87 S. Ct. 1325, 18 L. Ed. 2d 404 (1967); *Couch* v. *St. L. Public Service Co.,* 173 S.W. 2d 617 (Mo. App. 1943). See also, *People* v. *Tucker,* 142 Cal. App. 2d 549, 298 P. 2d 558 (1956); State v. *Stevens,* 69 Wash. 2d 906, 421 P. 2d 360 (1966); *Nail* v. *State,* 231 Ark. 70, 328 S.W. 2d 836; *Clift* v. *State,* 155 Ark. 37, 243 S.W. 955. The rehabilitation of a witness before the trier of fact is an important and proper purpose. *State* v. *Stevens,* supra. See also, *Hoy* v. *Kansas Turnpike Authority,* 184 Kan. 70, 334 P. 2d 315 (1959); *State* v. *DeZeler,* 230 Minn. 39, 41 N.W. 2d 313, 15 ALR 2d 1137 (1950). The scope and extent of redirect examination lies within the sound judicial discretion of the trial judge. *Couch* v. *St. L. Public Service Co.,* supra. See also, *Nail* v. *State,* supra. In this matter the court's discretion is very liberal. *Grievance Committee* v. *Dacey,* supra. A witness should be allowed full opportunity to explain matters brought out on cross-examination or to rebut any discrediting effect they may have had or to correct any wrong impression that may have been created. *Johnson* v. *Minihan,* 355 Mo. 1208, 200

S.W. 2d 334 (1947). Courts go very far in permitting redirect examination for these purposes, even though the admission of evidence thus brought out may not have been proper on direct examination. *Johnson* v. *Minihan,* supra. See also, *Clift* v. *State,* supra. It is not an improper exercise of that discretion to permit the examiner to refresh the memory of the witness by a statement he had signed. *State* v. *Stevens,* supra.

We cannot say that the trial judge abused his discretion in this instance.

The judgment is affirmed.

We agree: HARRIS, C.J., and GEORGE ROSE SMITH and JONES, JJ.

William Lawrence FRENCH *v.* STATE of Arkansas

CR 76-120 541 S.W. 2d 680

Opinion delivered October 11, 1976

*William M. Ravkind,* Dallas, Tex.; *Jerry D. Patchen,* Houston, Tex., and *W. B. Putman,* Fayetteville, for appellant.

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

CONLEY BYRD, Justice. For reversal of a marijuana conviction in violation of the Controlled Substance Act, Ark. Stat. Ann. § 82-2617 (Supp. 1975), appellant William Lawrence French raises the three points hereinafter discussed.

POINT 1. The record admittedly contains evidence, if believed, that would establish the defense of entrapment. The trial court recognized the sufficiency of the evidence, but over objections of appellant to the word "unconscious" instructed the jury ". . . Entrapment exists where the criminal design or act originated, not with the accused, but with an officer of the law or his agent who lures the defendant into the *unconscious* commission of an unlawful act by persuasion, deceptive representation or inducement. . . ." We hold that the trial court erred in using the word "unconscious," because it is not an element in the defense of entrapment. See *Sorrells* v. *United States,* 287 U.S. 435, 53 S. Ct. 210, 77 L. Ed. 413 (1932), where Chief Justice Hughes pointed out that it was the duty of officers of the law to prevent, not to punish crime and that it was a gross abuse of authority for the officers to cause or create a crime in order to punish it. See also Ark. Stat. Ann. § 41-209 (Supp. 1975).

POINT 2. Appellant's contention that the trial court erred in failing to advise the jury that it was his burden to establish the defense of entrapment by a preponderance of the evidence, seems to have been raised for the first time on appeal. Therefore we do not reach that issue.

POINT 3. In addition to the evidence from which the jury could have found that a Government agent by the name of Haas had planned the acquisition of the marijuana and persuaded appellant to assist in its acquisition for the purpose of prosecuting and convicting appellant and others, the trial court ruled inadmissible evidence showing that Haas was paid by the Drug Enforcement Administration of the United States Government upon a contingent arrangement depending upon whether he makes a case and how many arrests result. To support the trial court's ruling, the State

mentions that Haas did not testify and concludes that such testimony was inadmissible because it involved collateral issues. The same contention, now made by the State, was argued by the Government in *Sorrells* v. *United States, supra.* In answer to the argument there that the defense of entrapment would lead to "the introduction of issues of a collateral character relating to the activities of the officials of the Government. . . ", the court there stated: "The Government in such a case is in no position to object to evidence of the activities of its representatives in relation to the accused. . . ."

As pointed out by the concurring opinion of Mr. Justice Roberts in *Sorrells* v. *United States, supra,* "Entrapment is the conception and planning of an offense by an officer, and his procurement of its commission by one who would not have perpetrated it except for the trickery, persuasion, or fraud of the officer." If such be the facts in a case, we can see no reason for preventing the defendant from proving them. The remuneration of an officer contingent upon the conviction of an accused has always been viewed as suspect, see *Doty* v. *Goodwin,* 246 Ark. 149, 437 S.W. 2d 233 (1969). Consequently, we must hold that the trial court erred in excluding the testimony showing the contingency of Haas' remuneration.

Reversed and remanded.

We agree: HARRIS, C.J., and HOLT and ROY, JJ.

# O. W. FLETCHER *v.* CITY OF NEWPORT

CR 76-108 541 S.W. 2d 681

Opinion delivered October 11, 1976

[Rehearing denied November 8, 1976.]

*Pickens, Boyce, McLarty & Watson,* by: *James A. McLarty,* for appellant.

*Harold S. Erwin,* City Attorney, for appellee.

ELSIJANE T. ROY, Justice. On August 27, 1975, appellant O. W. Fletcher was arrested for the offense of driving while under the influence of intoxicants and refusing to take an intoximeter test. During the course of the arrest, Officer Mike Wilson informed appellant of his rights pursuant to Ark. Stat. Ann. § 75-1045 (c)(3) (Supp. 1975), but appellant was not informed that law enforcement officers would assist him in obtaining an additional test if he so desired. Appellant refused the test. He did not contest the trial in Municipal Court but appealed for a trial de novo in Circuit Court.

In the interim between the municipal court and circuit court trials appellant was again convicted in municipal court for driving while under the influence of intoxicants. On trial de novo on the first charge in the circuit court appellant was found guilty and the jury assessed his penalty on the driving while intoxicated charge as 24 hours in jail, a $100.00 fine

and suspension of drivers license for 30 days. Conviction of refusal to take the intoximeter test brought a suspension of driving privileges for 30 days to run concurrently with the other suspension.

Appellant first contends "the court erred in allowing the introduction of the results of the intoximeter test," relying upon the case of *Small* v. *City of Little Rock,* 253 Ark. 7, 484 S.W. 2d 81 (1972). In *Small* the Court excluded the results of the "breatholator test" when the subject was not advised of his rights, but stated that the case would not be dismissed if there were other evidence of intoxication which made, of itself, a fact question. Here appellant insists that because he was not advised the arresting officer would assist him in securing an independent medical opinion the results of the test are inadmissible.

The rights to which one is entitled, when requested to submit to a test for intoxication, are contained in Ark. Stat. Ann. § 75-1045 (c)(3), which reads as follows:

> (3) The person tested may have a physician, or a qualified technician, registered nurse, or other qualified person of his own choice administer a complete [chemical] test or tests in addition to any administered at the direction of a police officer. The law enforcement officer shall advise such person of this right. The refusal or failure of a law enforcement officer to advise such person of this right and to permit and assist the person to obtain such test or tests shall preclude the admission of evidence relating to the test or tests [taken] at the direction of a law enforcement officer.

In the instant case appellant never took the test, and, therefore, there were no results to exclude. He refused to submit to the test because, according to his own testimony, he thought he would be declared guilty no matter what the outcome revealed. It naturally follows that appellant, in not having any test results introduced into evidence against him, was not deprived of the right the statute cited is intended to insure. Thus this contention is wholly without foundation.

Appellant's second argument is that the court erred in

permitting the City to inquire regarding a subsequent conviction of driving while intoxicated - second offense.

The date of the offense for which appellant was standing trial was August 27, 1975. The date of the trial de novo before the circuit court was February 17, 1976. Appellant took the stand and offered testimony in his own behalf.

The issue of appellant's credibility arose when on direct examination he testified as follows:

> Q. Okay, you have worked out there for twelve years?
>
> A. Yes, sir.
>
> Q. Before this event in August of '75 that we are talking about here when you were stopped by Officer Wilson, had you ever been arrested for anything before?
>
> A. No, sir, not since I have been in Newport *I have never been arrested.*
>
> Q. Have you ever been convicted of anything?
>
> A. *No.*
>
> Q. During the entire twelve years?
>
> A. *That is right.* (Italics supplied.)

On cross-examination, testing the credibility of the witness, it was revealed by appellant's own testimony that he had been convicted of five misdemeanor charges since 1975. These included the driving while intoxicated - second offense on February 6, 1976, which he testified was on appeal, but whether an appeal was pending was disputed by the City. At this point the court overruled the appellant's objection. Since the record reflects that appellant by his own testimony invited the questions concerning his previous arrests we find no reversible error in this attack on his credibility. See *Montaque* v. *State,* 219 Ark. 385, 242 S.W. 2d 697 (1951).

Affirmed.

We agree. HARRIS, C.J., and BYRD and HOLT, JJ.

Roger CLARK *v.* STATE of Arkansas

CR 76-132 541 S.W. 2d 683

Opinion delivered October 11, 1976

*Dale E. McCoy,* for appellant.

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

ELSIJANE T. ROY, Justice. Appellant Roger Clark was convicted on two counts of selling a controlled substance. The jury fixed his punishment at ten years in the State penitentiary and a fine of $5,000 on each count. It is from this conviction and sentence that appellant appeals.

On appeal, appellant first contends the court abused its discretion in denying his motion for a continuance. At arraignment on September 15, 1975, the case was set for trial on December 8, 1975. On October 17, 1975, appellant requested a continuance, stating:

> * * * Said defendant has submitted himself to the Human Services Center of Russellville, Arkansas, for a program of psychological counseling and treatment pursuant to an order of this Court dated October 8, 1975; and that defendant and his attorney desire a period of time beyond the present trial date to utilize this counseling program in preparation of defendant's case for trial.

Trial was then set for January 12, 1976. On December 30, 1975, counsel requested another continuance, citing his trial schedule as the basis for his motion. This motion was denied by letter from the court dated January 5, 1976, and received by counsel for appellant on January 7, 1976.

It is well settled that the granting or denying of a continuance is within the sound discretion of the trial court and that, on appeal, this Court will not disturb that decision unless abuse of discretion is shown. See *Cox* v. *State,* 257 Ark. 35, 513 S.W. 2d 798 (1974), and cases cited therein. Appellant here was represented by the same attorney at all stages of the proceedings, and four months was certainly adequate time to prepare this case for trial. Therefore we find no abuse of the trial court's discretion in denying appellant's motion for a continuance.

The second contention raised is that the court deprived appellant of due process of law by failing to immediately suspend all proceedings in the prosecution when appellant filed

notice of his intent to rely upon the defense of mental disease or defect; and further failed to direct appellant to undergo examination and observation by a court-appointed psychiatrist or psychiatric hospital, as required by the new Criminal Code.[1]

On January 8, 1976, only four days before trial, appellant filed a motion for application of the provisions of the new Criminal Code in his trial and a notice of intent to raise mental disease or defect as a defense pursuant to Ark. Stat. Ann. § 41-102 (4) (Crim. Code 1975). Although counsel for appellant had received a psychological evaluation of appellant from the Human Services Center of Russellville, Arkansas, in December of 1975 appellant did not comply with § 41-102(4), which provides that:

> (4) A defendant in a criminal prosecution for an offense committed prior to the effective date of this Code may elect to have the construction and application of any defense to such prosecution governed by the provisions of this Code. Such election shall be made by motion to the court which is to conduct the trial. *The motion shall be timely filed but not later than ten (10) days before the date set for the trial of the case, except that the court for a good cause shown may entertain such motion at a later time.* (Italics supplied.)

Counsel for appellant knew as early as December that the above-mentioned psychological evaluation indicated that appellant suffered from schizophrenia, but he failed to so "notify the prosecutor and the court at the earliest practicable time." Ark. Stat. Ann. § 41-604(1) (Crim. Code 1975).

Since timely request was not made as required by statute and no good cause was shown as to why the motion should be entertained at a later time the court was not required to proceed under the provision of the new Criminal Code. Consequently appellant's case was controlled by the provisions of Ark. Stat. Ann. § 43-1301 et seq. (Supp. 1975). We find that the court has complied with the requirements of § 43-1301 in that appellant had been psychologically

[1]The informations charge the offenses were committed on July 3, 1975, and the new Criminal Code became effective January 1, 1976.

evaluated. The psychologist, Alan Tuft, who made the evaluation testified in appellant's behalf at his trial. Furthermore, a written report from a qualified psychiatrist, Dr. W. R. Oglesby, was introduced without objection. Said report was made at the request of Mr. Tuft and considered in Tuft's evaluation of appellant. The report in part read as follows:

> It is my impression that this young man has average or above average intelligence. He knows right from wrong and is able to refrain from that which is wrong if he chooses to do so. I have found no past or present evidence of any psychosis or impairment of judgment which would affect his behavior. Therefore, it is my opinion that he is responsible for his behavior and should be held accountable for it. The best treatment in this situation would be for him to have to answer any consequences of his behavior. I do not feel that he would respond to any type of psychotherapy or medication.

It was certainly within discretion of the court to determine whether appellant was entitled to any further examination, and we find no abuse of discretion on this issue.

It is not necessary to discuss appellant's last contention concerning denial of certain rights under the new Criminal Code (Ark. Stat. Ann. § 41-612) since, as heretofore pointed out in this opinion, he was not entitled to proceed under the new code because the request was not timely filed.

Finding no reversible error, the judgment of conviction is affirmed.

We agree. HARRIS, C.J., and BYRD and HOLT, JJ.

SPRINGDALE FARMS et al *v.*
Barbara Ann McGARRAH

76-105 541 S.W. 2d 928

Opinion delivered October 18, 1976

*Crouch, Blair, Cypert & Waters,* by: *Jay N. Tolley,* for appellants.

*Putman, Davis & Bassett,* for appellee.

GEORGE ROSE SMITH, Justice. This workmen's compensation claim arises from a wrist injury sustained by the claimant, Mrs. McGarrah, in the course of her employment in a chicken processing plant. A surgical operation did not completely restore the claimant's use of her wrist. Dr. Moore fixed the functional loss of use of the arm below the elbow at 10%. Dr. Martin's testimony was similar to that of Dr. Moore, except that Dr. Martin made no estimate of the ex-

tent of disability. The employer and insurance carrier now contend that there is no substantial evidence to support the Commission's finding, affirmed by the circuit court, that the permanent partial loss of use amounts to 35%.

We consider the case to be controlled by our decisions in *Ray* v. *Shelnutt Nursing Home,* 246 Ark. 575, 439 S.W. 2d 41 (1969), and *Anchor Construction Co.* v. *Rice,* 252 Ark. 460, 479 S.W. 2d 573 (1972). In the *Ray* case we recognized that the Commission is not limited to the medical testimony in determining the extent of functional disability, but we also pointed out that the Commission's knowledge and experiences are not evidence and can only be used in weighing the competent proof. The *Anchor* case, like the case at bar, involved a scheduled injury. Ark. Stat. Ann. § 81-1313 (c) (22) (Repl. 1960). There we held that a scheduled injury cannot be apportioned to the body as a whole in determining partial disability and that the Commission, in fixing the partial loss of the use of a limb, cannot consider a wage earning loss in addition to the functional loss.

In the present case the Commission followed *Anchor* to the extent of not taking into account any wage earning loss suffered by the claimant. Nevertheless, the Commission increased the partial loss of use from 10%, as found by the medical testimony, to 35%. The Commission based its action upon the claimant's testimony that as a result of her injury she has difficulty in gripping mops and brooms in her housework, that she cannot open fruit jars, that her daughter must do most of the ironing, and that in other respects she is handicapped in the practical performance of her daily domestic activities.

The trouble is, all these difiiculties stem from the weakness in the claimant's right hand. That weakness was studied and evaluated by the doctors, with Dr. Moore fixing the functional loss at 10%. The claimant's testimony added nothing to the medical evidence; so, as in the *Ray* case, *supra,* her testimony cannot be used as a basis for increasing the percentage of functional loss.

The explanation for what is seemingly a harsh result was given in *Anchor,* where we quoted the following paragraphs

from Larson's Workmen's Compensation Law, § 58.10:

> The typical schedule provides that, after the injury has become stabilized and its permanent effects can be appraised, benefits described in terms of regular weekly benefits for specified numbers of weeks shall be paid, ranging, for example, from 312 weeks for an arm, 288 for a leg, and 160 for an eye to 38 for a great toe and 7 ½ for one phalange of the little finger. These payments are not dependent on actual wage loss. Evidence that claimant has had actual earnings, or has even been regularly employed at greater earnings than before, is completely immaterial.
>
> This is not, however, to be interpreted as an erratic deviation from the underlying principle of compensation law — that benefits relate to loss of earning capacity and not to physical injury as such. The basic theory remains the same; the only difference is that the effect on earning capacity is a conclusively presumed one, instead of a specifically proved one based on the individual's actual wage-loss experience. The effect must necessarily be a presumed one, since it would be obviously unfair to appraise the impact of a permanent injury on earning capacity by looking at claimant's earning record for some relatively short temporary period preceding the hearing. The alternative is to hold every compensation case involving any degree of permanent impairment open for a lifetime, making specific calculations of the effects of the impairment on claimant's earnings each time claimant contends that his earnings are being adversely affected. To avoid this protracted administrative task, the apparently cold-blooded system of putting average-price tags on arms, legs, eyes, and fingers has been devised.

The reasoning that applies to loss of earning capacity must also apply to loss of housework capacity. Otherwise workmen's compensation insurance becomes general accident insurance.

We conclude that the Commission's action in increasing the claimant's loss from 10% to 35% must be set aside.

Inasmuch as the compensability of the claim was controverted at the outset, the Commission was not in error in allowing the maximum attorney's fee upon the award — now 10%.

Reversed.

We agree. HARRIS, C.J., and FOGLEMAN and JONES, JJ.

Henry Morris SANDY *v.* Lloyd SALTER

76-132 541 S.W. 2d 929

Opinion delivered October 18, 1976

*Pickens, Boyce, McLarty & Watson,* by: *James A. McLarty,* for appellant.

*Harkey, Walmsley & Belew,* by: *James M. Belew,* for appellee.

GEORGE ROSE SMITH, Justice. This is a workmen's compensation case. The claimant, Henry Sandy, suffered a back injury while he was working as a carpenter in the remodeling of a house owned by the appellee, Lloyd Salter, and his wife. The key question is whether the claimant was or was not an employee of the Salters. This appeal is from a circuit court judgment sustaining the Commission's finding that Henry Sandy was not such an employee.

The facts are singularly free from dispute. Salter is engaged in the trucking business. He and his wife decided to add a room to each end of their home. They had no plans or specifications except a photograph, clipped from a magazine, of a house which they wanted their home to resemble. Salter provided the money for the project but left the details pretty much to his wife. During the remodeling, which extended over a period of several months and cost from $20,000 to $25,000, the Salters lived elsewhere "up on the highway," but one or the other went down to the project two or three times a day, because they were raising chickens there.

For some ten years the claimant had worked for (or with) his older brother, Dewayne Sandy, in the building trade. The Salters had confidence in Dewayne and turned the remodeling over to him. There was no discussion about how long it would take or what it would cost. Dewayne simply agreed to do the work and to make the house look as much as possible like the magazine picture.

When Dewayne was free to begin the job, he brought with him his brother (the claimant) and another carpenter, both of whom had been working under his supervision. Dewayne hired the two men and supervised them. He was responsible for the progress and completion of the project. He kept a record of each man's working hours. He selected and ordered all the materials that were used.

The Salters, who had no knowledge of building or carpentry, exercised no direct supervision over the work. The three workmen were paid by the hour, with Dewayne, as the foreman, receiving the highest wages. Mrs. Salter wrote the checks for labor and materials, relying upon Dewayne's time records and choice of materials. The Salters believed, and the proof indicates, that they could have terminated the project if they had run out of money and that they could have discharged any or all of the workmen if their work had been unsatisfactory. The relationships that we have described were in existence when the claimant was hurt on the job.

In determining whether a workmen's compensation claimant was an employee we have substantially followed the common-law rule that the governing test is whether the asserted employer had the right to control the claimant in his work. *Clarksville Meat Co.* v. *Brooks,* 237 Ark. 717, 375 S.W. 2d 671 (1964). That test was recognized by the Commission in the case at bar. In reaching its conclusion that the Sandy brothers were not subject to Salter's control the Commission pointed out that (1) Salter did not direct how the end result was to be accomplished, (2) Dewayne hired the other two workmen, (3) Dewayne purchased the materials without Salter's approval, and (4) the other workers took their directions from Dewayne.

On the other hand, as the Commission noted, (1) the Salters paid the workmen's wages, (2) the Salters apparently could have discharged Dewayne without liability, and (3) the risk of an increase in the cost of materials was borne by the Salters, not by Dewayne. In seeking a reversal the appellant stresses our recognition that the employer's power to terminate the employment at will is a strong circumstance tending to show the subserviency of the workman. *Hollingsworth & Frazier* v. *Barnett,* 226 Ark. 54, 287 S.W. 2d 888 (1956).

Upon the basic issue of "control," as that conception was developed at common law in master and servant cases, the proof presents a close and difficult question; but we cannot say that there is no substantial evidence to support the Commission's decision. Our anxiety, however, is greatly lessened by a fresh point of view that has won some acceptance after it was first suggested, apparently, by Professor Larson, who of course is a recognized authority upon workmen's compensation's law. We have not had occasion to consider this theory before, because this is apparently the first case to reach us in which the claimant's injury had no connection with the employer's regular business — here Salter's trucking business. Such injuries are not ordinarily compensable, because the statutory definition of an employee excludes one whose employment is casual and not in the course of the employer's regular business. Ark. Stat. Ann. § 81-1302 (b) (Repl. 1960). Here the claimant's employment, extending over a period of months, can hardly be said to have been "casual."

Larson makes the point that the recognition of control as the governing test of the employment relationship arose in common-law tort cases, where the question was whether the master was vicariously liable for his servant's negligence. In that setting the master's right to control his servant's detailed activities was highly relevant to the question whether the master ought to be liable. The issue, however, was the master's liability for injuries inflicted by the servant *upon third persons*. By contrast, the issue in compensation cases is the master's liability for injuries *sustained by the employee*. Larson, Workmen's Compensation Law, § 43.42 (1973).

Larson reasons that in a case such as the one at bar, the law should consider, in determining whether an employer-employee status exists, not only the matter of control but also the relationship between the claimant's own occupation and the regular business of the asserted employer. Larson, §§ 43.50 and 43.51. With regard to the latter aspect of the problem, two considerations have weight: First, how much of a separate calling or profession is the claimant's occupation? How skilled is it? To what extent may it be expected to carry its own share of the workmen's compensation responsibility? Second, what relationship does the claimant's work bear to

the regular business of the asserted employer? Is there a continuous connection or only an intermittent one, or is there no connection at all? See Larson, § 43.52.

The case at hand confirms the soundness of Larson's approach to the problem. If the power to control is alone to be taken into account, the Salters might be found to have had that power, owing to their authority to dismiss the workmen at will. Yet there was certainly no actual power to control the men in the details of their work, for the Salters knew nothing about how to go about remodeling a home.

By contrast, Dewayne Sandy was a skilled specialist in the building trade. He employed his own crew, with whom he had worked in the past, fixed their wages, kept track of their working time, and directed their activities on the job. Dewayne alone had the expertise to maintain the progress of the work by selecting and arranging for the delivery of all necessary materials. In the circumstances it seems plain that the duty to obtain workmen's compensation insurance, and the responsibility for failing to obtain it, ought to rest upon Dewayne rather than upon the Salters. It is altogether unlikely that the average homeowner, in arranging for his house to be remodeled, would have the remotest idea that he should obtain workmen's compensation insurance if he pays his "contractor" by the hour instead of by the job. Thus the facts in this case demonstrate the soundness of Professor Larson's suggested two-way approach to the peculiar situation presented here.

Affirmed.

We agree. HARRIS, C.J., and FOGLEMAN and JONES, JJ.

Carl DUNCAN *v.* STATE of Arkansas

CR 76-114 541 S.W. 2d 926

Opinion delivered October 18, 1976

*Frierson, Walker, Snellgrove & Laser,* by: *Mark Ledbetter* and *David N. Laser,* for appellant.

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

GEORGE ROSE SMITH, Justice. Upon trial by jury the appellant was found guilty of first-degree rape and was sentenced to a 40-year prison term. Two points for reversal are argued.

First, Duncan testified in his own defense. On cross-examination the prosecutor inquired about Duncan's guilt in a number of earlier instances, this being a typical question: "In March, the 7th of 1954, in Sacramento, California, were you guilty of burglary?" Duncan denied his guilt with respect to all the offenses except a battery committed in California on July 8, 1953. Upon objection the prosecutor admitted, in chambers, that his questions were taken partly from an F.B.I. "rap sheet", but that document was not displayed to the jury.

It does not appear from the record before us that the questions were improper. An accused may be asked in good faith, on cross-examination, if he is guilty of having committed a named criminal offense, though he cannot be asked if he was indicted or accused of a crime. *Moore* v. *State,* 256 Ark. 385, 507 S.W. 2d 711 (1974); see also the American Bar Association's Standards Relating to the Prosecution Function and the Defense Function, § 5.7d (Approved Draft, 1971). Here there was no request that the F.B.I. rap sheet be made a part of the appellate record. Consequently, we have no way of determining whether it contained enough information about the various asserted offenses to justify a good faith inquiry about Duncan's guilt. We do not imply that a mere showing that Duncan had been arrested 20 years earlier in another state upon a certain charge would be adequate information to form the basis for such a question.

It is also argued that the supposed offenses were too remote in time to have any bearing upon Duncan's credibility. Our cases have not been completely harmonious upon this issue of remoteness. We do not explore the matter, however, because the judgment must be reversed upon another ground. At the retrial the newly adopted Uniform Rules of Evidence will be in force, because new procedural statutes ordinarily apply to pending cases. *DeLong* v. *Green,* 229 Ark. 100, 313 S.W. 2d 370 (1958). Rules 608 and 609 make changes in the law with regard to proof of specific instances of prior conduct on the part of the witness and with regard to

prior convictions. Ark. Stat. Ann. § 28-1001, Rules 608 and 609, effective July 1, 1976. With the limited information supplied by this record about Duncan's earlier conduct or convictions, we are not in a position to pass upon the effect of the new rules in this case.

Secondly, a reversal is sought on the basis of a juror's having read a newspaper account that was published on the morning of the second day of the trial. The story, which appeared in a Jonesboro newspaper (where the case was being tried), contained this statement: "During a lengthy cross examination, Burnett read from a three page Federal Bureau of Investigation rap sheet listing Duncan's arrests dating back to 1953." When the issue was raised upon a resumption of the trial, one juror admitted that he had read the article (although the jurors had been instructed not to read newspaper reports of the trial). In response to questions by the court — questions that were understandably very leading — the juror said that he could put the newspaper account entirely out of his mind and not be influenced by it in any manner. The defense motion for a mistrial was overruled.

The motion should have been granted, especially in view of the earlier protracted cross-examination based upon the rap sheet. The State, in arguing that the court's ruling was right, relies upon our holding in *Howell* v. *State,* 220 Ark. 278, 247 S.W. 2d 952 (1952). It does not clearly appear from that opinion that the newspaper accounts contained any information not already disclosed by the testimony in the case. Here, to the contrary, the press report described a three-page F.B.I. rap sheet, the existence of which had not been made known to the jury. In *Shroeder* v. *Johnson,* 234 Ark. 443, 352 S.W. 2d 570 (1962), such a rap sheet was mentioned and displayed during the testimony of a witness, though it was not examined by the jury. The trial judge pointedly and positively instructed the jury to disregard the rap sheet. We nevertheless granted a new trial, because we could not say with certainty that the possibility of prejudice had been removed. Here the necessity for a new trial is even more clear. Hardly any juror, after having admittedly disobeyed the judge's instructions not to read press accounts of the trial, would confess even a possibility of being influenced by the consequences of his own misconduct. He might very well think that such an admission on his part

would result in his being charged with contempt of court. In the circumstances we cannot say with assurance that the appellant was not prejudiced by the incident.

Reversed.

We agree. HARRIS, C.J., and FOGLEMAN and JONES, JJ.

DUTTON-LAINSON COMPANY *v.*
Lynn Williams McGEE and NATIONAL
BANK OF COMMERCE, Executors

76-80 542 S.W. 2d 739

Opinion delivered October 25, 1976
[Rehearing denied November 29, 1976.]

*Rubens, Rubens & Rainey,* by: *Kent J. Rubens; Winslow Drummond* and *Robert M. Fargarson,* for appellant.

*Hale, Fogleman & Rogers* and *Holcomb, Dunbar, Connell, Mekel, Tollison & Khayat,* Clarksdale, Miss., for appellees.

GEORGE ROSE SMITH, Justice. This is a products-liability

action for wrongful death, in which service upon the appellant Dutton-Lainson Company (one of two defendants) was obtained in Nebraska under the long-arm statute. Ark. Stat. Ann., Title 27, Ch. 25 (Supp. 1975). This appeal is from an order finding Dutton-Lainson to be in default because (*a*) its first pleading, a motion for an additional 15 days in which to plead further, was not signed by a resident Arkansas attorney and (*b*) its next pleading, an answer, was filed too late.

We cannot agree with the trial court's conclusion that the harsh sanction of a judgment by default is called for in this case. Dutton-Lainson engaged a Memphis, Tennessee, attorney, Robert M. Fargarson, to defend the case. Within the time allowed by statute, Ark. Stat. Ann. § 27-1135 (Repl. 1962), Fargarson filed a motion for an additional 15 days in which to plead, alleging that the complaint asserted questions of jurisdiction and venue and other serious questions of law and fact. The motion was signed only by Fargarson, whose Memphis address appeared below his signature. The local rule, requiring that pleadings by a nonresident lawyer be also signed by an Arkansas attorney, closes with this warning: "The Clerk of this Court shall not receive for filing any pleading except in conformity with this rule." The clerk nevertheless accepted and filed Fargarson's motion for additional time. It is basic that a litigant should not be prejudiced by an act of the court, a principle that has been applied to an error of the clerk. *Bartlett* v. *Standard Life & Acc. Ins. Co.,* 223 Ark. 37, 264 S.W. 2d 46 (1954). Here, had the clerk obeyed the local rule by rejecting the proffered motion, Fargarson, who had driven to Marion, Arkansas, to file it, could quickly have associated local counsel in the case, as he had done in the past. (We also call attention to Ark. Stat. Ann. § 27-1136, although its applicability has not been argued by counsel in this case.)

Furthermore, our Uniform Rules for Circuit and Chancery Courts provide that if a respondent opposes a pleading he shall file his response to it within 10 days after service. Rule 2 c, Ark. Stat. Ann., Vol. 3A, p. 136 (Supp. 1975). Here the motion for additional time to plead was served by mail upon plaintiffs' counsel, but they interposed no objection within the 10 days allowed by the rule. Thus the request for time was apparently conceded, by default. In sim-

ple fairness we cannot hold that the parties appellee, who were in themselves in default, can nevertheless take advantage of a similar default on the part of their adversaries.

We need not discuss the jurisdictional question under the long-arm statute, because the order refusing to quash the service of process is not a final appealable ruling.

Reversed.

We agree. HARRIS, C.J., and JONES and BYRD, JJ.

Mary Nell BOWMAN et al *v.* W. D. PHILLIPS Jr., et al

76-101 542 S.W. 2d 740

Opinion delivered October 25, 1976

[Rehearing denied November 29, 1976.]

*Benny E. Swindell,* for appellants.

*Williams & Gardner,* for appellees.

GEORGE ROSE SMITH, Justice. The question here is

whether a life tenant, the appellee W. D. Phillips, Jr., who is entitled to the exclusive possession of the property, can maintain a partition suit against the vested remaindermen. We disagree with the chancellor's conclusion that the suit is maintainable and therefore reverse.

In 1944 W.D. Phillips, Sr., conveyed the 43.75 acres in question to his son, the principal appellee. The deed *(a)* reserved a life estate in the grantor, *(b)* granted a life estate to the son after the grantor's death, and *(c)* provided that upon the son's death the property would go to the grantor's heirs, except that the son's wife, the appellee Wanda Phillips, would also take an equal share. The elder Phillips died in 1951. The proof, which is limited to the situation at the time of the trial, shows that his heirs now comprise three surviving children and the descendants of five deceased children. This suit for partition was brought by W. D. Phillips, Jr., as the sole life tenant, by his wife Wanda as the owner of a one-ninth interest in the remainder, and by the couple's son, Paul Douglas Phillips, who was erroneously alleged to be the owner of another one-ninth interest in the remainder. Of course the remainder actually vested at the death of W.D. Phillips, Sr., so that W.D. Phillips, Jr., is the owner of the one-ninth remainder interest which the complaint attributes to his son. Restatement of Property, § 157, Comment j (1936); see also *Steele* v. *Robinson,* 221 Ark. 58, 251 S.W. 2d 1001 (1952).

The chancellor correctly found that W. D. Phillips, Jr., owns a life estate in the land and that the remainder interest is vested in equal one-ninth parts in Wanda and in the eight lines of descent, per stirpes. The decree ordered that the land be sold and that the proceeds be divided among the parties according to their interests, which would give W. D. Phillips, Jr., the present value of his life estate in addition to his one-ninth interest as a remainderman.

A life tenant's right to seek partition must be found in the statute, which allows a partition suit to be brought by "[a]ny persons having any interest in and desiring a division of land held in joint tenancy, in common, . . . or in coparceny, absolutely or subject to the life estate of another, or otherwise . . ." Ark. Stat. Ann. § 34-1801 (Supp. 1975). In *Monroe* v.

*Monroe,* 226 Ark. 805, 294 S.W. 2d 338 (1956), we held that the language of the statute allows the partition of property by *remaindermen,* subject to the life estate of another. We went on to say, perhaps as dictum but with supporting authority, that a single life tenant who is entitled to exclusive possession cannot maintain a partition suit against the remainderman, because the necessary element of a cotenancy is absent.

That case controls this one. In many situations there may be solid reasons of public policy for denying to the life tenant the right to a partition by public sale. He might, for example, be suffering from an illness reducing his life expectancy below that shown by the statutory tables. Or the land might be vacant or otherwise unimproved, so that a successful partition suit and sale would provide the life tenant with a cash return that he would not otherwise receive. For these reasons we think it is for the legislative branch to determine whether a life tenant should have the right to obtain a partition, as against the remainder interest. We cannot find in our present statute any indication that such a right has yet been conferred.

It seems to go without saying, and other courts have held, that a life tenant, when he is, as here, also a remainderman, can obtain a partition by giving up any claim to the value of his life estate. *Phelps* v. *Domville,* 303 S.W. 2d 601, 606 (Mo. 1957); *Brown* v. *Brown,* 67 W. Va. 251, 67 S.E. 596, 21 Ann. Cas. 263, 28 L.R.A. (n.s.) 125 (1910). That option is open to W. D. Phillips, Jr., and as we have seen, he and his wife may also seek a partition of the remainder, subject to the life estate. We therefore remand the case for further proceedings.

Reversed and remanded.

We agree: HARRIS, C.J., and FOGLEMAN and JONES, JJ.

James GRIGSBY *v.* STATE of Arkansas

CR 76-60 542 S.W. 2d 275

Opinion delivered October 25, 1976

*Thomas E. Robertson Jr.* and *Hubert Graves,* for appellant.

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

JOHN A. FOGLEMAN, Justice. Appellant Grigsby was sentenced to life imprisonment without parole for the capital felony murder of John Henry Childers while in the perpetration of a robbery. We find no reversible error and affirm.

Among his stated points for reversal are the following:

THE COURT ERRED IN OVERRULING DEFENDANT'S MOTION IN LIMINE THAT JURORS WHO WOULD NOT CONSIDER THE DEATH PENALTY NOT BE EXCUSED FOR CAUSE IN THAT PART OF THE TRIAL AT WHICH DEFENDANT'S GUILT OR INNOCENCE WOULD BE DECIDED.

THE COURT ERRED IN OVERRULING DEFENDANT'S MOTION FOR PAYMENT OF TRAVEL EXPENSES AND WITNESS FEES TO EXPERT WITNESSES WHO WOULD TESTIFY THAT A JURY COMPOSED ONLY OF PERSONS WHO WOULD BE WILLING TO CONSIDER THE DEATH PENALTY IS MORE LIKELY TO CONVICT THAN IS A JURY COMPOSED OF A CROSS SECTION.

THE COURT ERRED IN OVERRULING DEFENDANT'S MOTION FOR A ONE WEEK CONTINUANCE IN ORDER TO PRESENT EVIDENCE THAT A JURY COMPOSED ONLY OF PERSONS WHO WOULD CONSIDER THE DEATH PENALTY IS MORE LIKELY TO CONVICT THAN IS A JURY COMPOSED OF A CROSS SECTION.

THE COURT ERRED IN OVERRULING DEFENDANT'S MOTION FOR A DIRECTED VERDICT AS TO CAPITAL FELONY MURDER AND FIRST DEGREE MURDER AND IN SUBMITTING AN OFFENSE HIGHER THAN SECOND DEGREE MURDER TO THE JURY.

THE TRIAL COURT ERRED IN REFUSING TO INSTRUCT THE JURY THAT THE STATE

MUST PROVE THE ELEMENTS OF A MURDER IN ORDER FOR THE DEFENDANT TO BE CONVICTED OF A CAPITAL FELONY.

We see no point in discussing these points because the record and arguments supporting them are virtually identical to those in *Venable* v. *State,* 260 Ark. 201, 538 S.W. 2d 286 (1976). Our rejection of these arguments there is controlling here.

Appellant argues that the court erred in excusing prospective juror Blan, who was acquainted with the appellant and his family and who had found it difficult to say that he could try the case fairly and impartially without being influenced by this acquaintance. Even though he finally responded in the affirmative to appellant's attorney's question whether he could render a verdict based on the evidence presented in court and applied to the instructions of law given by the court, the circuit judge pursued the matter further, obviously because the state's attorney had challenged Blan for cause on the basis of earlier answers. When the judge asked Blan if he felt that he could be totally fair and impartial to both the state and the defendant if he was taken on the jury, Blan answered, "I don't believe I could be totally fair, no." The trial judge did not abuse his discretion by honoring the challenge for actual bias. Ark. Stat. Ann. § 43-1919 (Repl. 1964). See *Henslee* v. *State,* 251 Ark. 125, 471 S.W. 2d 352.

Appellant argues the following points for reversal:

THE COURT ERRED IN ALLOWING A DEFENSE WITNESS TO TESTIFY ABOUT CARTRIDGE CASES FOUND TWO DAYS AFTER THE OFFENSE WAS ALLEGED TO HAVE BEEN COMMITTED WHEN THE WITNESS WAS UNABLE TO SAY THAT THE SCENE WAS IN THE SAME CONDITION THAT IT WAS IN ON THE DAY OF THE ALLEGED OFFENSE.

THE COURT ERRED IN OVERRULING DEFENDANT'S OBJECTION TO FURTHER DESCRIPTION OF THE SCENE WHERE THE BODY WAS FOUND WHEN THE WITNESS WHO

DISCOVERED THE BODY LEFT THE SCENE FOR APPROXIMATELY TWO HOURS AND RETURNED WITH A DEPUTY SHERIFF.

The two points are considered together because they are argued jointly by appellant, who relies upon *Oliver* v. *Miller,* 239 Ark. 1043, 396 S.W. 2d 288. The gist of appellant's argument is that the evidence admitted was too remote to be relevant and that the evidence was prejudicial, particularly since the evidence of murder was circumstantial and important inferences could be drawn from this testimony.

In evaluating this argument, we take into consideration a statement made by Grigsby to a police officer which was subsequently admitted into evidence without objection by appellant. That statement had exculpatory features, but appellant did admit therein that on the evening of the date in question he and Childers had been riding around drinking; the two were alone on a side road off Highway 309, when Grigsby showed Childers a .25 caliber automatic pistol, which Childers examined and started firing. Grigsby was quoted as saying that he grabbed Childers' arm and the gun went off, after which Childers' eyes started looking funny and he walked back to the car, sat down on the seat and fell over on it; Grigsby pulled him out, put him in the "edge of the bushes," took a $20 bill and a $5 bill from Childers' overalls, threw his billfold over by a tree, and took the car, leaving the man and a little white dog at the scene; he met Billy Belt and Mrs. Velma Smith along the road and told them what he had done. Grigsby stated that he, Mrs. Smith and Belt stopped along the Carbon City Road and fired at a beer can with his .25 caliber pistol, and that he later offered to sell the weapon to a man named Highfield.

Velma Smith had testified substantially as follows:

> Appellant came to her house on July 18, 1975. Someone she did not know was in a brown and white Chevrolet that Grigsby was driving on this occasion. Mrs. Smith left with Billy Belt. Later they met Grigsby "coming back to town," driving the same automobile. Still later they met him "over by Hillard's farm" coming toward Ozark on Highway 309, still driving the same

car. She and Belt proceeded to O'Kane Island and Grigsby followed them there, where they all were drinking beer and talking and Grigsby told them he had killed a guy in Fort Smith, or thought he had. Mrs. Smith and Belt started back to the "Rock," a tavern in Paris, but stopped on a dirt road, where they were soon joined by Grigsby still driving the same car, when Belt and Grigsby fired several shells at a beer can from a "gun" Grigsby had.

There was evidence tending to show that John Henry Childers was the person Mrs. Smith had seen at her house in the brown and white Chevrolet and that the vehicle belonged to Childers. There was testimony that Grigsby had also told Warren George Highfield on July 18, 1975, that he had shot a man and that Grigsby had tried to sell a .25 automatic pistol to Highfield.

On Sunday, July 20, Billy Joe Davis was "riding around" in his pickup truck on Highway 309 and turned off on an old lane. After driving about a half mile, he turned around and started to get out of his truck, when he heard a dog barking. Since he was unable to see the dog, he called it. The dog came running out of a roll of wire. Behind the wire, Davis then saw the feet of a human. He immediately came to town and reported to Deputy Sheriff Kenneth Ross that he had found a dead man. This occurred about 10:45 a.m. Davis directed Ross to the place where the body lay. Ross remained there until Sheriff Pritchard and Arkansas State Police Criminal Investigator Stevens arrived at about 12:15 p.m. Ross examined the body. He described the location as a junk yard. He said the body was not easily seen from the road. Albert Helmert, radio dispatcher for the sheriff's office, testified that he accompanied the sheriff to the scene, where he found four empty cartridges for a small caliber pistol and a billfold. He also testified that he went with Ross, Mrs. Smith and others to a place along Carbon City Road, where six empty "hulls" and one bullet were found.

It is difficult to see how the introduction of the cartridges found at the place Belt and Grigsby fired at a can could have prejudiced appellant. The finding of six bullets and some cartridge cases along the Carbon City Road was relevant only to

the identity of the weapon from which the fatal bullets were fired, but there really does not seem to have been any issue on this point.

The medical examiner testified that the death of Childers was caused by multiple .25 caliber gunshot wounds, at least one of which could not likely have been self-inflicted. It was a question for the jury to say, after considering the circumstances, whether the fatal wounds were inflicted by Grigsby or they were accidentally inflicted, or whether someone else had subsequently come to the scene and fired .25 caliber bullets into the wounded body of Childers. The four cartridges found at the scene where the body was found and the four .25 caliber bullets taken from the body were shown by expert testimony to have been fired from the same weapon. This evidence had some bearing on the question whether there was a remote possibility that someone else wounded Childers after Grigsby left. The lapse of two days was not sufficient to make this evidence irrelevant. The description of the scene and the location of the body could also have had some bearing on the real issue, i.e., whether Childers was murdered or whether he was accidentally wounded in the manner described in Grigsby's statement. Stevens testified that Childers' body was in a brush area behind a pile of wire approximately 30 feet north of the roadway. This testimony along with that of Ross constituted the only significant description of the scene, except for that given by Davis.

The question of admissibility of this evidence is one of relevance to the issue. In *Everett* v. *State,* 231 Ark. 880, 333 S.W. 2d 233, we stated that the test of admissibility of evidence over an objection for irrelevancy is whether the fact offered in proof affords a basis for rational inference of the fact to be proved. It is sufficient if the fact may become relevant in connection with other facts or if it forms a link in the chain of evidence necessary to support a party's contention. *Glover* v. *State,* 194 Ark. 66, 105 S.W. 2d 82. See also, *Horne* v. *State,* 253 Ark. 1096, 490 S.W. 2d 806; *Williams* v. *State,* 257 Ark. 8, 513 S.W. 2d 793. The state's evidence on the question whether Childers was accidentally or deliberately wounded was largely circumstantial, and the fact that the body was not readily seen is a circumstance which might be taken to show

that Childers had been taken to this scene deliberately and his body left where it would not be readily found.

Too precise admeasurements of logical relevancy should not be used to withhold from a jury circumstances which may shed some helpful light on the issues. *State* v. *Micci,* 46 N.J. Super. 454, 134 A. 2d 805 (1957); *State* v. *Smith,* 5 Wash. App. 237, 487 P. 2d 227 (1971); *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; *Karnes* v. *Commonwealth,* 125 Va. 758, 99 S.E. 562, 4 ALR 1509 (1919). See also, *State* v. *Stokes,* 250 La. 277, 195 So. 2d 267 (1967); *State* v. *Shiren,* 15 N.J. Super. 440, 83 A. 2d 620 (1951), aff'd. 9 N.J. 445, 88 A. 2d 601 (1952); *Haley* v. *State,* 84 Tex. Cr. Rep. 629, 209 S.W. 675, 3 ALR 675 (1919). It is enough that the evidence may tend even slightly to elucidate the inquiry or to assist, however remotely, in a determination probably founded on truth. *New* v. *State,* 211 S. 2d 35 (Fla. App. 1968); *Holmes* v. *Goldsmith,* 147 U.S. 150, 13 S. Ct. 288, 37 L. Ed. 118 (1893). See also, *State* v. *Stokes,* supra. When evidence on an issue is circumstantial, it is never irrelevant to put in evidence any circumstance which may make the proposition at issue more or less probable. *Johnson* v. *Commonwealth,* 115 Pa. 369, 9 A. 78 (1887). Relevance is determined, not by resemblance to, but by connection with, other facts. *Oseman* v. *State,* 32 Wis. 2d 523, 145 N.W. 2d 766 (1966). See also, *Karnes* v. *Commonwealth,* supra. Objections to circumstantial evidence upon the grounds of irrelevancy are not favored because the force and effect of circumstantial facts usually, and almost necessarily, depend upon their connection with each other. *Bowline* v. *Cox,* 248 Ala. 55, 26 S. 2d 574 (1946).

The latitude of the trial judge's discretion in admitting circumstantial evidence is great. *Holmes* v. *Goldsmith,* supra; *Oseman* v. *State,* supra; *State* v. *Alexander,* 78 Wyo. 324, 324 P. 2d 831 (1958), cert. den. 363 U.S. 850, 80 S. Ct. 1630, 4 L. Ed. 2d 1733; *Bond* v. *State,* 105 Ga. App. 627, 122 S.E. 2d 310 (1961); *New* v. *State,* supra; *Bowline* v. *Cox,* supra. See also, *Karnes* v. *Commonwealth,* supra. Evidence of any fact which aids in establishing the defendant's guilt or innocence is usually held relevant, even though only a slight inference may be drawn from the fragmentary fact and it is only a link in the chain of facts which must be proved to make the proposition

at issue more or less probable. *Oseman* v. *State,* supra; *State* v. *Smith,* supra; *State* v. *Stokes,* supra; *Johnson* v. *Commonwealth,* supra. See also, *Jenkins* v. *Commonwealth,* 167 Ky. 544, 180 S.W. 961, 3 ALR 1522 (1915); *Haley* v. *State,* supra. The trial judge's determination on the question of admissibility of such evidence is to be reversed only if he has abused his wide discretion. *U.S.* v. *Campbell,* 466 F. 2d 529 (9 Cir., 1972), cert. den. 409 U.S. 1062, 93 S. Ct. 571, 34 L. Ed. 2d 516. See also, *Holmes* v. *Goldsmith,* supra. It has been said that such an abuse of discretion should not be found by an appellate court unless it manifestly appears that the evidence questioned has no legitimate bearing upon the question at issue and is calculated to prejudice the accused in the minds of the jurors. *Moore* v. *U.S.*, 150 U.S. 57, 14 S. Ct. 26, 37 L. Ed. 996 (1893).

We find no abuse of the trial court's discretion and the inability or failure of the state to show that conditions of the scene remained unchanged during Davis' two hour absence was a matter for the jury's consideration in weighing the evidence, but did not take the question of admissibility of the evidence outside the scope of the judge's discretion.

Appellant argues that his motion for directed verdict and reduction of his charge to one of first degree murder should have been granted. This argument is based upon his contention that the only evidence about what happened at the time of the killing showed that he took Childers' property after the killing, and that there is no evidence that this taking was anything other than an afterthought. For us to rule as a matter of law that the robbery was an afterthought would require that portions of Grigsby's statement, which was mostly exculpatory, be taken at face value. If indeed Grigsby murdered Childers, and the killing was not accidental, it would be difficult to believe that anything other than robbery motivated the killing. Suffice it to say that the circumstantial evidence here furnishes adequate support for the jury's finding that Childers was killed in the perpetration of a robbery. See *Upton* v. *State,* 257 Ark. 424, 516 S.W. 2d 904.

In his statement, Grigsby said that he was hitchhiking on Highway 10 when Childers picked him up and took him to Childers' house trailer where they started drinking wine and beer. The appellant, approximately thirty years old, and the

deceased, described as an elderly man, spent the afternoon visiting bars and drinking. Grigsby was unemployed and later in the day had to borrow money from Childers to pay for a bottle of whiskey. In his statement, Grigsby said that he had stolen the death weapon from a woman in Fort Smith, from whence he had started his hitchhiking journey. He stated that he had thrown the pistol away.

For the purpose of considering appellant's argument (which was approached but not actually reached in *Upton* v. *State,* supra and *Upton* v. *State,* 254 Ark. 664, 497 S.W. 2d 696) there is no substantial difference in the capital felony murder statute under which he was prosecuted, Act 438 of 1973 [Ark. Stat. Ann. § 41-4702 (Supp. 1973)] and its predecessor, Ark. Stat. Ann. § 41-2205 (Repl. 1964), i.e., the definitions were substantially the same. In the earlier statute, murder committed in the perpetration, or attempt to perpetrate, robbery was made murder in the first degree. In the 1973 act the unlawful killing of a human being when committed by a person engaged in the perpetration of or in the attempt to perpetrate robbery was made a capital felony.

We find no room for quarrel with appellant's assertion that larceny from the body of one killed, as an afterthought, would not constitute a capital felony. We do not agree, however, that the jury was bound to accept his exculpatory statement to the officer or that there was no evidence from which the jury could reasonably infer that the taking of the deceased's automobile and money was a part of the same acts and transactions in which Childers was killed, and that robbery was the motivating purpose of the incidents taking place at the death scene.

The underlying rationale of the felony-murder rule, both statutory and common law, is that the killing constitutes a part of the res gestae of the accompanying felony and both are parts of one continuous transaction. *People* v. *Mason,* 54 Cal. 2d 164, 4 Cal. Rptr. 841, 351 P. 2d 1025 (1960); *Bizup* v. *People,* 150 Col. 214, 371 P. 2d 786, cert. den. 371 U.S. 873, 83 S. Ct. 144, 9 L. Ed. 2d 112; *Conrad* v. *State,* 75 Ohio St. 52, 78 N.E. 957 (1906); *State* v. *Anderson,* 10 Wash. 2d 167, 116 P. 2d 346 (1941). Where the robbery and the killing are so closely connected in point of time, place and continuity of action as

to constitute one continuous transaction it is proper to consider both as a single transaction and the homicide as a part of the res gestae of the robbery. *Bizup* v. *People,* supra; *People* v. *Mason,* supra. The sequence of events is unimportant and the killing may precede, coincide with or follow the robbery and still be committed in its perpetration. *Conrad* v. *State,* 75 Ohio St. 52, 78 N.E. 957 (1906); *State* v. *Anderson,* 10 Wash. 2d 167, 116 P. 2d 346 (1941).

Where the killing and the felony cannot rationally be disassociated, an inference that the killing was part of the res gestae is justifiable, particularly as against retrospective subjective disavowal. *State* v. *Anderson,* supra. Where the circumstances permit an inference that the killing and the robbery were all part of one transaction, the state is not required to prove intent to commit the felony by direct evidence. *People* v. *Mason,* supra. It has been aptly said that from the very nature of things it is often impossible for the state to know at just what instant a killing was committed — whether in the commission of a felony or while withdrawing from the scene of a felony. *State* v. *Anderson,* 10 Wash. 2d 167, 116 P. 2d 346 (1941); *State* v. *Whitfield,* 129 Wash. 134, 224 P. 559 (1924). The Supreme Court of California has said that it has never required proof of strict causal relationship between the felony and the homicide. We agree with that court that the statute was adopted for the protection of the community, not the lawbreaker, and to make punishment of this class of crime more certain and not to relieve the wrongdoer from any probable consequences of his act by placing an unreasonable or unnatural limitation upon the res gestae. *People* v. *Mason,* supra.

Intent in such a case as this may be gathered from what was done. *State* v. *Hauptmann,* 115 N.J. Law 412, 180 A. 809 (1935). Certainly, the intent may be found from the facts and circumstances in a particular case. *Commonwealth* v. *Hart,* 403 Pa. 652, 170 A. 2d 850, cert. den. 368 U.S. 881, 82 S. Ct. 130, 7 L. Ed. 2d 81. In a case in which an accused testified that he struck a fatal blow in self-defense and in a confession had said that he had decided to take his victim's money as the latter lay on the ground after having been struck, the Pennsylvania Supreme Court held that the argument that the intention to rob originated after the assault on the deceased did not merit

serious consideration in view of the jury's verdict finding the accused guilty of murder in the perpetration of a robbery. The court said that it was immaterial when the design to rob was conceived, if the homicide occurred while the accused was perpetrating or attempting to perpetrate a robbery, pointing out that the circumstances leading up to the attack were indicative of an assault with intent to rob. *Commonwealth* v. *Stelma,* 327 Pa. 317, 192 A. 906 (1937). In considering a similar contention, the Pennsylvania court later had this to say in *Commonwealth* v. *Hart,* supra:

> Defendant's highly technical argument amounts to this: Unless the Commonwealth proves that the intention to commit a robbery was formed before the beginning of the fatal assault, the evidence cannot amount to a murder which was committed in the perpetration of a robbery. In other words, defendant would require a televised stop-watch in every robbery or felony-killing to prove that the felonious intent existed before the attack. It is rare, we repeat, that a criminal telephones or telegraphs his criminal intent and consequently such intent can be properly found by the jury from the facts and circumstances in a particular case. *****
>
> *****
>
> The law which has been in existence for many centuries in England and for ages in our Country, was enacted for the safety and protection of peaceable citizens of each community and we will not permit it to be thwarted or evaded by such a far-fetched and realistically-absurd construction of the Penal Code.

We agree with the sentiments of the Pennsylvania Supreme Court. We find the circumstantial evidence of intent sufficient to support a finding that appellant was guilty of capital felony.

We have, as we do in cases where the penalty imposed is death or life imprisonment, reviewed the record for other objections made by the defendant during the proceedings in the trial court and find none worthy of consideration.

The judgment is affirmed.

We agree: HARRIS, C.J., GEORGE ROSE SMITH and JONES, JJ.

STATE of Arkansas *v.* Jack BLAND

CR 76-88 542 S.W. 2d 497

Opinion delivered October 25, 1976
(In Banc)
[Rehearing denied November 22, 1976.]

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

*Gordon, Gordon & Eddy,* by: *Allen Gordon,* for appellee.

CONLEY BYRD, Justice. The State seeks to take an appeal from an interlocutory order entered on February 19, 1976, following an Omnibus Hearing held pursuant to Ark. Rules of Criminal Procedure, Rule 20.3. The notice of appeal was filed the same date. After obtaining two extensions in the trial court for obtaining a transcript, the attorney general filed the record in this Court on May 20, 1976, Rule 36.10(c), of the Ark. Rules of Criminal Procedure, requires appeals by the state to be filed in this Court within 60 days after the filing of the notice. Since the present appeal was not filed within the 60 day period, the appeal is dismissed.

Appeal dismissed.

William H. THOMAS *v.* STATE of Arkansas

CR 76-111 542 S.W. 2d 284

Opinion delivered October 25, 1976
(In Banc)

*Richard L. Mays,* of *Walker, Kaplan & Mays, P.A.,* for appellant.

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

CONLEY BYRD, Justice. Involved in this case is the bail bond procedure conducted in the Little Rock Municipal

Court. The record shows that petitioner William H. Thomas was arrested on Saturday May 8, 1976, at approximately 11:45 p.m. for allegedly possessing marijuana for sale. Bail at that time by prearrangement of the municipal court for all such offenses was set at $20,000. On Monday May 10, 1976, at petitioner's first appearance before the municipal court, and when it was determined that he was a resident of the State, the bail was reduced to $5,000 to be made only by a professional bail bondsman. It appears that no hearing was had at that time and on motion of the State the matter of petitioner's detention was passed to May 26, 1976. On May 11, 1976, petitioner through his present counsel filed a motion to reduce the $5,000 bail bond. In refusing to hold a pretrial release inquiry pursuant to Ark. Rules of Crim. Pro., Rule 8.5 the municipal judge stated:

> "It's going to be my position today and tomorrow that everybody that's charged with the possession of marijuana with intent to sell or some other hard drugs, it will be Twenty Thousand Dollars to start and reduced then after the Court hears more about the facts to a minimum of Five Thousand unless the Prosecuting Attorney comes in with additional information and recommends a lower bond. That has been my policy. It's going to be my policy and there's no use anybody taking this Court's time trying to change my mind. . . ."

Following a hearing in municipal court, petitioner went to the circuit court upon a "Petition for Supervisory Writ of Mandamus and Certiorari and for Writ of Habeas Corpus." The circuit court held two hearings — one on May 14, 1976, and the other on May 17, 1976. The first hearing was conducted pursuant to Ark. Rules of Crim. Pro., Rule 8.3(c), wherein it was determined that petitioner, while driving an automobile occupied by two or three other men, had been stopped by the police and that a search of the car by the police turned up two pounds of marijuana. The court at that time fixed bail at $5,000 to "be bail by a surety, money bail by a surety or property bond" pending the May 17th hearing. In dismissing the mandamus petition, on May 17th, the circuit court stated:

> "THE COURT:

Well, I would want the precedent to set out what I have set out here, and that is that Rule 8.3 is mandatory, that a probable cause hearing must be held, that a pretrial release inquiry must be held.

MR. MAYS:
But that one has been held, in this case?

THE COURT:
One has been held in this case and, if there was any deficiency, it was cured by the one that I held. And I assume that this will take care of any problems we have under this bond and, also, you can put in there that I think that twenty thousand dollars, that I hold that a twenty thousand dollar first—

MR. MAYS:
(Interposing) Pre-set.

THE COURT:
Pre-set bond before the judge has an opportunity to hear and have this pretrail release hearing, which he always has the very next morning, is reasonable. I don't see anything else we need to cover in there. Court's adjourned.

MR. MAYS:
Thank you, your Honor.

(THEREUPON, the hearing was concluded.)"

Following the ruling of the trial court, a temporary writ of certiorari was granted by this court releasing petitioner upon "$5,000 bail with surety or by depositing 10% of that bail with the clerk of the Municipal Court."

Petitioner's contentions in this court are as follows:

"1. The Circuit Court erred in refusing to direct the Municipal Court to conduct a pretrial release inquiry before setting money bail;

2. The Circuit Court erred in refusing to require the

Municipal Court to determine that no other condition would ensure the appearance of the appellant in court before setting money bail; and

3. The Circuit Court erred in refusing to require the Municipal Court to select the least restrictive type of money bail arrangement."

The Constitution of the State of Arkansas in so far as here pertinent provides:

Art. 2 § 8 ". . . All persons shall, before conviction, be bailable by sufficient sureties, except for capital offenses, when the proof is evident or the presumption great."

Art. 2 § 9. "Excessive bail shall not be required. . . . "

The Arkansas Rules of Criminal Procedure, promulgated by this Court on January 6, 1976, in so far as here applicable provide:

RULE 8. RELEASE BY JUDICIAL OFFICER AT FIRST APPEARANCE

"RULE 8.1 *Prompt First Appearance*

An arrested person who is not released by citation or by other lawful manner shall be taken before a judicial officer without unnecessary delay.

. . .

RULE 8.3 *Nature of First Appearance*

(a) Upon the first appearance of the defendant the judicial officer shall inform him of the charge. The judicial officer shall also inform the defendant that:

(i) he is not required to say anything, and that anything he says can be used against him;

(ii) he has a right to counsel; and

(iii) he has a right to communicate with his counsel, his family, or his friends, and that reasonable means will be provided for him to do so.

(b) No further steps in the proceedings other than pretrial release inquiry may be taken until the defendant

and his counsel have had an adequate opportunity to confer, unless the defendant has intelligently waived his right to counsel or has refused the assistance of counsel.

(c) The judicial officer, if unable to dispose of the case at the first appearance, shall proceed to decide the question of the pretrial release of the defendant. 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.

RULE 8.4 *Pretrial Release Inquiry: In What Circumstances Conducted.*

(a) An inquiry by the judicial officer into the relevant facts which might affect the pretrial release decision shall be made:

(i) in all cases where the maximum penalty for the offense charged exceeds one (1) year and the prosecuting attorney does not stipulate that the defendant may be released on his own recognizance;

(ii) in those cases where the maximum penalty for the offense charged is less than one (1) year and in which a law enforcement officer gives notice to the judicial officer that he intends to oppose release of the defendant on his own recognizance.

(b) In all other cases, the judicial officer may release the defendant on his own recognizance or on order to appear without conducting a pretrial release inquiry.

RULE 8.5 *Pretrial Release Inquiry: When Conducted: Nature of.*

(a) A pretrial release inquiry shall be conducted by the judicial officer prior to or at the first appearance of the defendant.

(b) The inquiry should take the form of an assessment of factors relevant to the pretrial release decision, such as:

(i) the defendant's employment status, history and financial condition;

(ii) the nature and extent of his family relationships;

(iii) his past and present residence;

(iv) his character and reputation;

(v) persons who agree to assist him in attending court at the proper times;

(vi) the nature of the current charge and any mitigating or aggravating factors that may bear on the likelihood of conviction and the possible penalty;

(vii) the defendant's prior criminal record, if any, and, if he previously has been released pending trial, whether he appeared as required;

(viii) any facts indicating the possibility of violations of law if the defendant is released without restrictions; and

(ix) any other facts tending to indicate that the defendant has strong ties to the community and is not likely to flee the jurisdiction.

(c) The prosecuting attorney should make recommendations to the judicial officer concerning:

(i) the advisability and appropriateness of pretrial release;

(ii) the amount and type of bail bond;

(iii) the conditions, if any, which should be imposed on the defendant's release.

## RULE 9. THE RELEASE DECISION

RULE 9.1 *Release on Order to Appear or on Defendant's Own Recognizance.*

(a) At the first appearance the judicial officer may release the defendant on his personal recognizance or upon an order to appear.

(b) Where conditions of release are found necessary, the judicial officer should impose one (1) or more of the following conditions:

(i) place the defendant under the care of a qualified person or organization agreeing to supervise the defendant and assist him in appearing in court;

(ii) place the defendant under the supervision of a probation officer or other appropriate public official;

(iii) impose reasonable restrictions on the ac-

tivities, movements, associations and residences of the defendant;

(iv) release the defendant during working hours but require him to return to custody at specified times; or

(v) impose any other reasonable restriction to insure the appearance of the defendant.

RULE 9.2 *Release on Money Bail.*

(a) The judicial officer shall set money bail only after he determines that no other conditions will reasonably ensure the appearance of the defendant in court.

(b) If it is determined that money bail should be set, the judicial officer shall require one (1) of the following:

(i) the execution of an unsecured bond in an amount specified by the judicial officer, either signed by other persons or not;

(ii) the execution of an unsecured bond in an amount specified by the judicial officer, accompanied by a deposit of cash or securities equal to ten per cent (10%) of the face amount of the bond. Ninety per cent (90%) of the deposit shall be returned at the conclusion of the proceedings, provided the defendant has not defaulted in the performance of the conditions of the bond; or

(iii) the execution of a bond secured by the deposit of the full amount in cash, or by other property, or by obligation of qualified sureties.

(c) In setting the amount of bail the judicial officer should take into account all facts relevant to the risk of wilful nonappearance including:

(i) the length and character of the defendant's residence in the community;

(ii) his employment status, history and financial condition;

(iii) his family ties and relationship;

(iv) his reputation, character and mental condition;

(v) his past history of response to legal process;

(vi) his prior criminal record;

(vii) the identity of responsible members of the

community who vouch for the defendant's reliability;

(viii) the nature of the current charge, the apparent probability of conviction and the likely sentence, in so far as these factors are relevant to the risk of nonappearance; and

(ix) any other factors indicating the defendant's roots in the community."

The drafting committee's comment to Rule 9.2 states: "Money bail in any form ought to be a last resort and should be used only to assure the defendant's appearance."

In *Stack* v. *Boyle,* 342 U.S. 1, 72 S. Ct. 1, 96 L. Ed. 3 (1951), the twelve petitioners had been indicted in the District Court upon a charge of conspiring to violate the Smith Act. The trial court set bail at $50,000 for each petitioner. The only evidence offered by the Government on a motion for reduction of bond was a certified record showing that four persons previously convicted under the Smith Act had forfeited bail. In holding that the District Court in leaving the bail at $50,000 had violated both statutory and constitutional standards for admission to bail, a majority of the court, in speaking through Chief Justice Vinson, stated:

"*First.* From the passage of the Judiciary Act of 1789, 1 Stat. 73, 91, to the present Federal Rules of Criminal Procedure, Rule 46(a)(1), federal law has unequivocally provided that a person arrested for a noncapital offense *shall* be admitted to bail. This traditional right to freedom before conviction permits the unhampered preparation of a defense, and serves to prevent the infliction of punishment prior to conviction. See *Hudson* v. *Parker,* 156 U.S. 277, 285 (1895). Unless this right to bail before trial is preserved, the presumption of innocence, secured only after centuries of struggle, would lose its meaning.

The right to release before trial is conditioned upon the accused's giving adequate assurance that he will stand trial and submit to sentence if found guilty. *Ex parte Milburn,* 9 Pet. 704, 710 (1835). Like the ancient practice of securing the oaths of responsible persons to stand as sureties for the accused, the modern practice of requiring a bail bond or the deposit of a sum of money

subject to forfeiture serves as additional assurance of the presence of an accused. Bail set at a figure higher than an amount reasonably calculated to fulfill this purpose is 'excessive' under the Eighth Amendment. See *United States* v. *Motlow,* 10 F. 2d 657 (1926, opinion by Mr. Justice Butler as Circuit Justice of the Seventh Circuit).

Since the function of bail is limited, the fixing of bail for any individual defendant must be based upon standards relevant to the purpose of assuring the presence of that defendant. The traditional standards as expressed in the Federal Rules of Criminal Procedure are to be applied in each case to each defendant. In this case petitioners are charged with offenses under the Smith Act and, if found guilty, their convictions are subject to review with the scrupulous care demanded by our Constitution. *Dennis* v. *United States,* 341 U.S. 494, 516 (1951). Upon final judgment of conviction, petitioners face imprisonment of not more than five years and a fine of not more than $10,000. It is not denied that bail for each petitioner has been fixed in a sum much higher than that usually imposed for offenses with like penalties and yet there has been no factual showing to justify such action in this case. The Government asks the courts to depart from the norm by assuming, without the introduction of evidence, that each petitioner is a pawn in a conspiracy and will, in obedience to a superior, flee the jurisdiction. To infer from the fact of indictment alone a need for bail in an unusually high amount is an arbitrary act. Such conduct would inject into our own system of government the very principles of totalitarianism which Congress was seeking to guard against in passing the statute under which petitioners have been indicted."

In a separate opinion Justice Jackson elaborated:

"It is complained that the District Court fixed a uniform blanket bail chiefly by consideration of the nature of the accusation and did not take into account the difference in circumstances between different defendants. If this occurred, it is a clear violation of Rule 46(c). Each defendant stands before the bar of justice as an individual. Even on a conspiracy charge defendants

do not lose their separateness or identity. While it might be possible that these defendants are identical in financial ability, character and relation to the charge — elements Congress has directed to be regarded in fixing bail — I think it violates the law of probabilities. Each accused is entitled to any benefits due to his good record, and misdeeds or a bad record should prejudice only those who are guilty of them. The question when application for bail is made relates to each one's trustworthiness to appear for trial and what security will supply reasonable assurance of his appearance."

. . .

"But the protest charges, and the defect in the proceedings below appears to be, that, provoked by the flight of certain Communists after conviction, the Government demands and public opinion supports a use of the bail power to keep Communist defendants in jail before conviction. Thus, the amount is said to have been fixed not as a reasonable assurance of their presence at the trial, but also as an assurance they would remain in jail. There seems reason to believe that this may have been the spirit to which the courts below have yielded, and it is contrary to the whole policy and philosophy of bail. This is not to say that every defendant is entitled to such bail as he can provide, but he is entitled to an opportunity to make it in a reasonable amount. I think the whole matter should be reconsidered by the appropriate judges in the traditional spirit of bail procedure."

Obviously Rule 8.5, *supra,* mandates that the judicial officer hold a pretrial release inquiry upon the first appearance of an arrested person. Likewise, Rule 9.2 mandates a determination that no other condition would ensure the appearance of the arrested person before setting a money bail.

When we consider the record before us with reference to the applicable law and the purpose of pretrial bail, we must agree with petitioner that the circuit court erred in refusing to direct the municipal court to conduct a pretrial release in-

quiry before setting money bail. The municipal court's adamantive bail requirements in drug arrests of $20,000 money bail at time of arrest with a reduction to $5,000 money bail for state residents can hardly be classified as a pretrial release inquiry. It would be putting form above substance to classify an inquiry limited to an arbitrary determination of whether the bail would be $20,000 or $5,000 money bail as a pretrial release inquiry within the meaning of Rule 8.5, *supra.* Consequently, we need not determine the nature and extent of a hearing necessary to satisfy the requirements of a pretrial release inquiry. In this connection we must note that The Honorable Municipal Judge was fearful that such inquiries would seriously impede the business of the municipal court. However, we must point out that the Constitution of this State and the foregoing Rules place much stress on the individual rights of persons and were drafted with the view that the authorities would discharge their responsibilities by providing sufficient courts and courtroom facilities for the protection of those individual rights.

Since the Ark. Rules of Criminal Procedure were drawn from the standpoint that money bail in any form should be used only as a last resort to ensure the appearance of an accused in court, we must agree with petitioner that the circuit court erred in refusing to require the municipal court to make determination that no other condition would ensure petitioner's appearance in court before setting money bail only.

Finally, we must agree with petitioner that Rule 9.2 contemplates that in fixing money bail, the judicial officer will use the least restrictive type of money bail arrangement set out in Rule 9.2(b) for securing the appearance of an arrested person.

The State to sustain the action of the circuit court contends that if there were any deficiencies in the municipal court then they were cured by the proceedings in the circuit court. This contention is not sustained by the record which shows bail fixed by the circuit court solely upon the offense charged and without regard to the individual responsibility of appellant. The tenor of the record before us is that a person arrested on a drug charge must either remain in jail or forfeit

a considerable sum[1] to a professional bail bondsman. Thus in either case the arrested person is substantially penalized before trial. The spirit of the fixing of bail by the trial court contravened the drafting committee's view that "money bail in any form ought to be a last resort and should be used only to assure the defendant's appearance."

The State also suggests that certiorari is not the proper remedy to review the proceedings in the circuit court. However, we pointed out in *State* v. *Nelson, Berry Petroleum Co.,* 246 Ark. 210, 438 S.W. 2d 33 (1969), that certiorari is available in the exercise of this court's superintending control over a tribunal which is proceeding illegally and where there is no other adequate mode of review.

Writ granted.

HOLT, J., not participating.

FOGLEMAN, J., concurs.

JOHN A. FOGLEMAN, Justice, concurring. In concurring, I disagree with only one particular of the majority opinion. I cannot agree that the circuit court did not conduct an adequate pretrial release inquiry. The circuit judge specifically found, and held, that only money bail would insure appellant's appearance, set the bail at $5,000 and declined to allow the payment of ten percent of the face amount of the bail into court, prescribing that bail be in the form of either a surety or property bond. The trial judge specifically stated that he did not feel that this was the proper case for a cash deposit of ten percent of the bail. It appears that the circuit judge did take into consideration relevant factors and made certain findings in that regard. He also found, as a basis for requiring money bail, that there was a probability of conviction and a substantial sentence of imprisonment, remarking that juries deal harshly with the offense with which appellant was charged. I do not believe that this requirement made by the circuit court mandated jail or forfeiture of a bail bondsman's fee. One as reliable as appellant is represented to

[1]The charge of a professional bail bondsman is regulated by the trial court, Ark. Stat. Ann. § 43-732 (Repl. 1964), and ordinarily amounts to 10% of the face amount of the bond.

be would likely be able to make a "property bond" without risking the fee.

ARKANSAS STATE HIGHWAY COMMISSION
*v.* Joe TAYLOR Jr. et al

76-91 542 S.W. 2d 498

Opinion delivered October 25, 1976
[Rehearing denied November 22, 1976.]

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

*Lightle, Tedder, Hannah & Beebe,* for appellees.

ELSIJANE T. ROY, Justice. This action involves the second appeal of this condemnation case. See *Arkansas State Highway Commission* v. *Taylor,* 256 Ark. 681, 509 S.W. 2d 817 (1974).

Upon the second trial in July, 1975, the jury returned a verdict in the amount of $56,550. Appellees filed a motion to set aside the verdict, and on September 5, 1975, the trial court, in response to the motion, granted a new trial to

appellees. From said order this appeal is brought.

Ark. Stat. Ann. § 27-1901 (Repl. 1962) governing the granting of a new trial reads in material part as follows:

> "New trial" defined — Grounds — A new trial is a re-examination in the same court of an issue of fact after a verdict by a jury or a decision by the court. The former verdict or decision may be vacated and a new trial granted, on the application of the party aggrieved, for any of the following causes, affecting materially the substantial rights of such party:
>
> First. Irregularity in the proceedings of the court, jury or prevailing party, or any order of court or abuse of discretion, by which the party was prevented from having a fair trial.

Effective January 1, 1975, this Court adopted Rule 16 of the Uniform Rules of Procedure for Circuit, Chancery and Probate Courts which required the lower court to set out with particularity the specific ground or grounds for its decision in the order granting a new trial. The trial court complied with Rule 16, and the order setting aside the verdict and granting the new trial enumerated four grounds.

The first ground was the error of the clerk in preparing the list of jurors submitted to the parties for the purpose of making their strikes. The order states:

> (a) Because of the irregularity in the proceedings of the Court, in that the name of one of the jurors was omitted from the list of jurors prepared by the Clerk and submitted to the parties for the purpose of making their strikes; that said list did not contain 18 names, but only had thereon 17; that after the parties made their strikes the Court then added the name of the 18th juror, to wit, one Dee Barnes.

The list of persons drawn and called, which was prepared by the clerk of the court, omitted the name of Dee Barnes. This was clearly an irregularity in the proceedings of the court. This error became more important when Mr.

Barnes became the foreman of the jury.

We have held many times that a trial judge's order granting a new trial upon a statutory ground should not be reversed in the absence of manifest abuse of his discretion. *Law* v. *Collins,* 242 Ark. 83, 411 S.W. 2d 877 (1967); *Blackwood* v. *Eads,* 98 Ark. 304, 135 S.W. 922 (1911). The showing that this discretion was abused must be much stronger when a new trial has been granted than when it is denied. *Worth James Construction Co.* v. *Herring,* 242 Ark. 156, 412 S.W. 2d 838 (1967); *Heil* v. *Roe,* 253 Ark. 139, 484 S.W. 2d 889 (1972). We find no abuse of discretion by the trial court in this case.

Since the first reason given by the trial court for granting a new trial constitutes sufficient justification for this action, we need not discuss those additional grounds enumerated in the order.

Affirmed.

We agree. HARRIS, C.J., and BYRD and HOLT, JJ.

John NEIKIRK *v.* STATE of Arkansas

CR 76-79 542 S.W. 2d 282

Opinion delivered October 25, 1976

Appellant, *Pro Se.*

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

ELSIJANE T. ROY, Justice. In October, 1975, appellant was stopped by an Arkansas State Trooper on Interstate 30

for traveling 73 miles an hour in a 55 mile per hour zone. It was stipulated that the posted speed at the site was 75 miles per hour prior to the reduction to the 55 mile per hour limit. Appellant admits he was driving in excess of the posted limit. He was fined $5 and costs for the violation, and he lodges this appeal raising numerous constitutional issues.

Appellant first avers that the "Congressional speed limit" is not a regulation of interstate commerce and that, in setting the speed limit in Arkansas, Congress acted beyond the scope of its powers under the Commerce Clause of the United States Constitution.

We do not agree with appellant. Congress established the acceptable speed limits to be used on all public highways, but the States had the right to accept or reject the recommended speed limit subject to certain penalties. The Arkansas Highway Commission pursuant to statutory procedures established the Arkansas 55 mile per hour limit. See Ark. Stat. Ann. § 75-601 et seq. (Supp. 1975). These limits are based upon engineering and traffic investigations of the Commission. See § 75-601, *supra*. The Commission adopted the suggested national standard in conformity with its own investigations and thus it, and not the Congress, established the State limit. Appellant's position here, therefore, is without merit.

Appellant's next contention is that the "Congressional speed limit" violates the constitutional guarantee to Arkanaas of a republican form of government. The thrust of this allegation seems to be that the speed limit has not been established by the State and the people have been deprived of some right. This argument is without merit since the people by legislative process have created the Highway Commission and have vested it with the authority to establish and to post speed limits in Arkansas.

Appellant also argues the speed limit is violative of the Fifth and Fourteenth Amendments to the United States Constitution because the action of Congress, as endorsed and adopted by this State, reducing the national speed limit denies him both due process and equal protection of the law.

In *Yarbrough* v. *Ark. State Highway Commission,* 260 Ark. 161, 539 S.W. 2d 419 (1976), this Court had before it a constitutional attack upon the Federal Highway Beautification Act and the Arkansas enabling legislation adopting the guidelines prescribed by the Federal Act regulating the display of signs along certain highways. The legislation was held valid and constitutional issues similar to the ones raised herein were discussed at length.

In *National League of Cities* v. *Usery,* 426 U.S. 833, 96 S. Ct. 2465, 49 L. Ed. 2d 245 (1976), the Court said:

> It is established beyond peradventure that the Commerce Clause of Art. 1 of the Constitution is a grant of plenary authority to Congress. That authority is, in the words of Chief Justice Marshall in *Gibbons* v. *Ogden,* 9 Wheat (22 US) 1, 6 L Ed 23 (1824), " . . . the power to regulate; that is to prescribe the rule by which commerce is to be governed." Id., at 196, 6 L Ed 23.
>
> * * *
>
> "[e]ven activity that is purely intrastate in character may be regulated by Congress, where the activity, combined with like conduct by others similarly situated, affects commerce among the States or with foreign nations." *Fry* v. *United States,* 421 US 542, 547, 44 L Ed 2d 363, 95 S Ct 1792 (1975).

Accordingly, we find this contention without merit.

Appellant further urges that he has been penalized because no special classification based on fuel economy has been made. Since fuel economy vehicles can be driven at more than 55 miles per hour while using less gasoline than other less economical conveyances use when driving at the prescribed limit, appellant insists a classification based on fuel economy should have been made.

Appellant's "classification" is incidental to a broad standard covering all vehicle operators, and the classification is in no way arbitrary or invidious. Furthermore the obvious impossibility of establishing a variable speed limit correlative to

mileage per gallon per vehicle is immediately apparent. A constant limit can provide the only manageable regulation of vehicular speed.

As to appellant's contention of denial of due process, over 40 years ago in *Nebbia* v. *New York,* 291 U.S. 502, 54 S. Ct. 505, 78 L. Ed. 940 (1934) the Court stated:

> The Fifth Amendment, in the field of federal activity, and the Fourteenth, as respects state action, do not prohibit governmental regulation for the public welfare. * * * And the guaranty of due process, as has often been held, demands only that the law shall not be unreasonable, arbitrary or capricious, and that the means selected shall have a real and substantial relation to the object sought to be attained. * * *

See also *Gruenwald* v. *Gardner,* 390 F. 2d 591 (2d Cir. 1968), cert. denied 393 U.S. 982, 89 S. Ct. 456, 21 L. Ed. 2d 445 (1968). Appellant has made no showing that the regulation as it applies to him is arbitrary, unreasonable or capricious. So this contention is without merit.

Other arguments urge that Congress has illegally forced the State into a position of compliance with a federal mandate. In *City of Burbank, et al.* v. *Lockheed Air Terminal, Inc., et al.*, 411 U.S. 624, 93 S. Ct. 1854, 36 L. Ed. 2d 547 (1973), quoting from the early case of *Cooley* v. *Board of Wardens,* 53 U.S. (12 How.) 299, 13 L. Ed. 996 (1851), the Court said:

> * * * Whatever subjects of this power [to regulate commerce] are in their nature national, or admit only of one uniform system, or plan of regulation, may justly be said to be of such a nature as to require exclusive legislation by Congress. * * *

Interstate highways are established for the benefit of all, and insofar as the Congressional determination that the speed limit of 55 is the standard for maintenance of that general welfare, the power is not exercised either arbitrarily or discriminatorily, but with reason and judgment. A declared national objective of curtailing needless energy consumption affects the national economy and is a legitimate

purpose.

Appellant also argues that Congress has unlawfully assumed the policing of highways which is a State power. The answer to this contention is that Congress has not infringed upon the State's right to police the highways and to enforce the speed limit.

We also have considered all other points raised by appellant and find them to be without merit.

Affirmed.

We agree. HARRIS, C.J., and BYRD and HOLT, JJ.

Leon RABORN *v.* R. M. BUFFALO et ux

76-122 542 S.W. 2d 507

Opinion delivered November 1, 1976

*Tom Tanner,* for appellant.

*Charles A. Walls, Jr.,* for appellees.

GEORGE ROSE SMITH, Justice. This is a boundary line dispute. The chancellor, in fixing the boundary in accordance with certain fences and iron pins, relied upon acquiescence in the boundary line (and to a lesser extent upon adverse possession) that continued from 1953 until 1971, this suit being filed in 1975. The pivotal issue is whether the chancellor's conclusions are correct in view of the fact that during the 18-year period in question the right to possession along the disputed line was primarily vested in life tenants rather than in fee simple owners.

The really material facts are not in dispute. The appellant, Leon Raborn, and the principal appellee, Dorothy Buffalo, are brother and sister. The disputed boundary runs east and west and is three quarters of a mile long. Leon owns the three contiguous forties that lie along the north side of the line. Dorothy and her husband own the corresponding three contiguous forties that lie along the south side of the line.

In 1953 Leon and Dorothy's parents, George Raborn and his wife, owned all the six forties except the middle one south of the line. On January 6, 1953, the elder Raborns conveyed the three northern forties to Leon and the two southern forties to Dorothy. Both deeds reserved a life estate in the grantors as long as either of them should live. George Raborn survived his wife and owned the life estate until his death in 1971. In 1955 the Buffalos acquired their middle forty by purchase from a third person.

During the pertinent years the two western forties and

the two middle forties were in cultivation; the two eastern forties were in woods. There was a meandering fence through the woods, north of the true line, but at the trial the Buffalos' attorney readily conceded that it was "a fence of convenience" and did not mark the boundary. The chancellor, however, fixed the line through the quarter mile of woods by drawing a straight line from an iron pin at the eastern end of that fence to another iron pin at its western end.

Along the remaining half mile of the disputed boundary, dividing the four forties to the west, there was a fairly straight fence lying north of the true dividing line. The chancellor, relying upon acquiescence and adverse possession, fixed the boundary along that fence line.

We consider first the disputed boundary between the two middle forties, for here the Buffalos' claim of title by acquiescence is bolstered by their claim of title by adverse possession. The facts are that from 1953 until 1971 the elder Raborn, under the reserved life estate, was in possession of the tract north of the fence. After the Buffalos' purchase of their middle forty in 1955 they were continuously in possession of that tract, up to the fence. Upon this proof the chancellor fixed the fence line as the boundary.

Under our decisions the Buffalos' claim of title by adverse possession must fail. The elder Raborn's possession was solely attributable to his life tenancy, his son Leon being the remainderman. The Buffalos, it is true, were asserting title from a completely independent source, hostile both to the life tenant and to the remainderman. Even so, adverse possession was not effective against the remainderman until the termination of the life estate. Our statute with regard to the recovery of land provides that the action must be brought within seven years after the right to maintain the suit shall accrue. Ark. Stat. Ann. § 37-101 (Repl. 1962). In view of that language we have held, upon facts like those now before us, that the statute does not begin to run against the remainderman until the termination of the life tenancy. *Heustess* v. *Oswalt,* 253 Ark. 730, 488 S.W. 2d 707 (1973); *Hayden* v. *Hill,* 128 Ark. 342, 194 S.W. 19 (1917). Thus the appellees' claim of title by adverse possession cannot be sustained.

The same conclusion must be reached with respect to the Buffalos' claim of title by mutual acquiescence in the fence line. The principle of title by long acquiescence in a boundary rests upon the assumption of an implied agreement. We have said that in such circumstances "the law will presume an agreement concerning the boundary," and that by their long acquiescence the adjoining landowners "apparently consent" to the line. *Stewart* v. *Bittle,* 236 Ark. 716, 370 S.W. 2d 132 (1963). There being no indication in the proof that the elder Raborn acted or had authority to act for his son Leon, the remainderman, it follows that any acquiescence on the part of the father would not be binding on the son.

What we have said also disposes of the controversy with regard to the east one third and the west one third of the disputed line. In both instances the elder Raborn was in possession, as life tenant, of the forties on each side of the disputed line. If he could not bind the remainderman by acquiescence in a line being adversely asserted by someone else, obviously his acquiescence in his own possession on both sides of the line would be even more ineffective.

The decree is reversed and the cause remanded for the entry of a decree fixing the boundary line in accordance with the original Government survey, as shown by the appellant's proof.

We agree. HARRIS, C.J., and FOGLEMAN and JONES, JJ.

# PROVIDENTIAL LIFE INSURANCE COMPANY
*v.* Oscar D. PRICE, Special Administrator
of the Estate of Vera M. PRICE, Deceased

76-97 542 S.W. 2d 504

Opinion delivered November 1, 1976

*Arnold, Arnold & Lavender, Ltd.*, by: *William G. Lavender,* for appellant.

*Lingo, Griffin & Johnson,* by: *Kirk D. Johnson,* for appellee.

J. FRED JONES, Justice. This is an appeal by Providential Life Insurance Company from an adverse circuit court judgment in a suit on a hospitalization insurance policy issued to Miss Vera M. Price, now deceased.

The decedent-insured, Miss Price, died on or about October 9, 1974, following a lengthy illness in which she was treated in several hospitals including the Arkansas State Hospital, Benton Unit, from May 30, 1974, until August 19, 1974. Following the death of Miss Price, her brother Oscar D. Price was appointed special administrator of her estate. The Arkansas State Hospital made demand upon the estate

for 81 days hospitalization at $20 per day, amounting to $1,-620, and the appellee administrator made demand upon the appellant insurance company for the maximum hospital indemnity coverage of 30 days at $30 per day as provided in the policy.

The appellant insurance company denied the claim because of an exclusionary provision in the policy which reads as follows:

> No payment for any indemnity shall be made by the company for any loss caused or contributed to by venereal disease, mental infirmities, rest cures, alcoholism, abortion, threatened abortion, drug addiction, any intentionally self inflicted injury, attempt of suicide — while sane or insane, while committing a felony, or confined to any hospital owned or operated by the Federal or State Government or agency thereof, political subdivision or agency thereof, or any charitable institution where the insured is not obligated to pay, or services rendered for the treatment of any abnormal condition existing, either active or inactive, before the date of this policy. (This exception includes all deformities, ailments, or prior injuries which may thereafter become aggravated by subsequent injuries or diseases.)

The appellee administrator filed suit in circuit court for the amount claimed as indemnity, together with unearned premium paid in the amount of $30.02, and also for attorney's fee and penalty and court costs. The appellant admitted the material facts as set out in the complaint; admitted that it owed the $30.02 in unearned premium which it tendered into the registry of the court, but denied liability for the hospitalization because of the aforesaid exclusionary clause in the policy.

The case was tried before the court sitting as a jury and the court found from the stipulations by the parties that 19 days of the maximum 30-day allowance under the policy had been paid for confinement in a Texarkana hospital and the court entered judgment in favor of the appellee Price for $330, together with 12% penalty and $475 attorney's fee, making a total judgment of $844.60 together with costs.

The appellant argued before the trial court that the effect of the exclusionary language used in the policy was to preclude any benefits while the insured was a patient in any government institution, regardless of responsibility to pay and that the phrase "where the insured is not obligated to pay" referred only to a charitable institution, and did not apply to any other medical facility operated by a governmental agency.

On appeal to this court the appellant contends "the lower court erred in finding that the exclusionary language of the policy in question did not exclude coverage while the insured was confined in the state hospital." In the appellant's brief and argument it recites that the question here is reduced to one narrow issue, that being: "Does the exclusionary clause of the insurance contract in question exclude coverage when the insured is hospitalized in a state owned and operated hospital, whether or not the insured is required to pay for the services received there?" The appellant then stated in its brief as follows:

> The Circuit Court's memorandum opinion, as incorporated in its judgment, found that the questioned language conferred benefits upon an insured patient who is obligated to pay for hospital services, whether or not the hospital be a charitable or governmentally owned or operated one.

The appellant then sets out the exclusionary clause, *supra,* in its entirety and then states:

> Appellant maintains that the quoted language is clear and unambiguous; that it specifically excludes coverage when the insured is hospitalized in a state owned and operated hospital, as was Appellee's decedent here; and that it makes no difference whether or not the insured has to pay for the services received at the state owned and operated hospital since the modifying phrase, "where the insured is not obligated to pay," relates only to charitable institutions.

The Texas case of *Dillingham* v. *American Security Life Ins. Co.*, 384 S.W. 2d 920, relied upon by the appellant, related to

a question different from the one in the case at bar. The policy in *Dillingham* provided:

> This policy does not cover hospitalization for nervous or mental disorders, rest cures, diagnosis, syphilis or venereal disease, dental treatment, loss when hospital facilities are furnished by the City, the state, the Federal government or Veterans Administration. . . .

The appellant-insured was confined in the John Sealy Hospital, which was a State of Texas agency, and was billed for the services. In his suit on the policy he contended that the exclusionary clause "loss when hospital facilities are furnished by the City, the state, the Federal government or Veterans Administration" did not apply since he was *charged* for the services. After pointing out that the policy was clearly one of indemnity against loss suffered by the assured by reason of hospital expenses he pays, or is obligated to pay, in certain hospitals, the court, in affirming the trial court judgment in favor of the company, said:

> We think the term is generally used to mean supply, provide or make available. While the term is used variously as applied to particular situations, in none of the definitions given is the term used to mean make available, provide, or supply without charge or compensation. In fact, the definitions in no way relate the meaning of the term of compensation or not.

It is noted in the case at bar that the entire exclusionary provision of the policy is in one continuous sentence. The first part defines the diseases or related conditions for which indemnity would not be paid, and the second part of the sentence refers to the institutions in which the hospital service or medical treatment is rendered. The first part of the sentence excluded losses caused or contributed by venereal disease, mental infirmities, rest cures, etc., and the second part of the sentence excludes coverage while "confined to any hospital owned or operated by the Federal or State Government or agency thereof, political subdivision or agency thereof, or any charitable institution where the insured is not obligated to pay."

We agree with the trial court that the language employed in the insurance policy here involved is subject to two interpretations and we are unable to say the court erred in interpreting the provision adverse to the contention of the insurance company who prepared the policy. See *Travelers Protective Ass'n of America* v. *Stephens,* 185 Ark. 660, 49 S.W. 2d 364; *State Farm Mut. Auto Ins. Co.* v. *Baker,* 239 Ark. 298, 388 S.W. 2d 920.

The judgment is affirmed.

The appellee is awarded judgment for $300 as attorney's fee for services on this appeal.

We agree: HARRIS, C.J., and GEORGE ROSE SMITH and FOGLEMAN, JJ.

Andie O. PATTY *v.* STATE of Arkansas

CR 76-59 542 S.W. 2d 494

Opinion delivered November 1, 1976
(In Banc)

*John Norman Warnock,* for appellant.

*Jim Guy Tucker,* Atty. Gen., by: *Sam I. Bratton Jr.,* Asst. Atty. Gen., for appellee.

J. FRED JONES, Justice. Andie O. Patty was convicted at a jury trial for manufacturing marijuana, a controlled substance, in violation of Ark. Stat. Ann. § 82-2617 (Supp. 1975) and was sentenced to seven years in the penitentiary.

As a result of a search conducted by law enforcement officers, about 60 young marijuana plants were found growing under apparent cultivation on the appellant's premises, with one large plant growing in her backyard. Some marijuana seed and cigarette butts containing marijuana were found in her house. The plants were confiscated and the appellant readily admitted to the police officers that the plants belonged to her; that she planted the seed and was producing the marijuana for her own use. The appellant Patty testified at her trial that she made a tea from marijuana seed and extracted juice from the marijuana plants and drank the tea and juice as a cure and to prevent the recurrence of cancer, and that this treatment had been very effective for that purpose. She said she intended to harvest the young marijuana plants within about a week after she was arrested and the plants were confiscated. She said she intended to extract the juice from the plants by running them through a juicer, and intended to drink the juice for the cure and prevention of cancer which she thought was recurring in her body. The

appellant was originally charged with the possession of marijuana for the purpose of delivery or sale and with manufacturing marijuana. She was acquitted on the charge of possession with intent to sell but was convicted, as already stated, on the charge of manufacturing.

On appeal to this court the appellant has designated eight points on which she relies for reversal but we shall not discuss them separately because most of them were based on the contention that by statutory exemption marijuana may be legally grown by an individual for his own use. This contention was advanced and rejected on the second appeal in the case of *Bedell* v. *State,* 260 Ark. 401, — S.W. 2d — (1976), which opinion was handed down on the same day the case at bar was orally argued. In *Bedell* we said:

> The appellant is mistaken in his argument that the manufacture of a controlled substance for one's own use is not an offense. The personal-use exemption applies only to the preparation or compounding of such a substance. Ark. Stat. Ann. § 82-2601 (m) (Supp. 1975). Manufacture, however, includes production, which in turn includes planting, cultivating, and growing the substance. § 82-2601 (u). There is abundant proof that Bedell was growing marijuana on his farm. In fact, he so admitted on the witness stand.

Ark. Stat. Ann. § 82-2601 (m) (Supp. 1975), above referred to, reads as follows:

> "Manufacture" means the production, preparation, propagation, compounding, conversion or processing of a controlled substance, either directly or indirectly by extraction from substances of natural origin, or independently by means of chemical synthesis, or by a combination of extraction and chemical synthesis, and includes any packaging or repackaging of the substance or labeling or relabeling of its container, except that this term does not include the preparation or compounding of a controlled substance by an individual for his own use or the preparation, compounding, packaging, or labeling of a controlled substance.

The appellant also argues that there are two sections of the statute providing different penalties for the manufacture of marijuana and that the trial court erred in not reducing the charge against the appellant to the lesser penalty set out in Ark. Stat. Ann. § 82-2618 (Supp. 1975) which reads as follows:

> DISTRIBUTION—Criminal penalties.
> (a) It is unlawful for any person:
> (1) who is subject to this Act [§§ 82-2601 — 82-2638] to distribute or dispense a controlled substance in violation of Section 2 [§ 82-2616] of Article III;
> (2) to manufacture a controlled substance not otherwise authorized by the laws of this State, or to distribute or dispense a controlled substance not authorized by the laws of this State;
> (3) to refuse or fail to make, keep or furnish any record, notification, order form, statement, invoice or information required under this Act;
> (4) to refuse an entry into any premises for any inspection authorized by this Act; or
> (5) knowingly to keep or maintain any store, shop, warehouse, dwelling, building, vehicle, boat, aircraft, or other structure or place, which is resorted to by persons using controlled substances in violation of this Act for the purpose of using these substances, or which is used for keeping or selling them in violation of this Act.
> (b) Any person who violates this Section is guilty of a crime and upon conviction may be imprisoned for not more than one [1] year, fined not more than $25,000 or both.

It will be noted that this provision was contained in the original Controlled Substances Act, Act 590 of 1971. The 1971 Act was amended by Act 186 of 1973 whereby marijuana was removed from Schedule I of the original Act and was placed in separate Schedule VI along with tetrahydrocannabinol, and the penalty for manufacturing marijuana is provided for in § 82-2617 which reads in part as follows:

> (ii) any other controlled substance classified in Schedule I, II, III, or VI is guilty of a felony and upon conviction

> may be imprisoned in the state penitentiary for not less than three (3) years nor more than ten (10) years, fined not more than $15,000, or both.

There has been considerable confusion growing out of the amendments to the Controlled Substances Act pertaining to marijuana. See *White* v. *State,* 260 Ark. 361, 538 S.W. 2d 550 (1976), and *Bedell* v. *State,* 257 Ark. 895, 521 S.W. 2d 200. "Manufacture" includes "production" and "propagation" (§ 82-2601 [m]) and "production" includes the manufacture, planting, cultivation, growing or harvesting of a controlled substance (§ 82-2601 [u]).

The appellant admitted that she planted, cultivated and grew marijuana and intended to harvest it. She contended, however, that she could not be guilty of manufacturing marijuana because the term "manufacture" did not include the preparation for her own use and she intended to extract the juice from the plants for her own use. The fallacy of this contention lies in the fact that the appellant was not charged, tried or convicted for the "conversion or processing of a controlled substance" or with manufacturing a controlled substance "by extraction from substances of natural origin." She was charged, tried and convicted for manufacturing the marijuana by planting, cultivating and growing it, which apparently is the only way it can be manufactured or produced, and the personal reasons one has for such production are of little consequence.

The appellant argues that a witness, Lelland Walker, invoked his Fifth Amendment rights against self-incrimination when called to testify and the prosecuting attorney argued to the jury that Walker was afraid of self-incrimination because he had purchased marijuana from the appellant. The prosecutor's argument and any objections thereto are not abstracted, and the appellant's contention she was entitled to a mistrial is without merit. Furthermore, the appellant was acquitted of possession with intent to sell or deliver.

The appellant contends, however, that she learned after the jury returned its verdict that one Curtis Willingham had heard an adverse witness, Mr. Turner, tell Walker that he could invoke his Fifth Amendment rights and did not have to

testify. It appears that Willingham was called as a witness by the appellant in support of her motion for a new trial, but the trial court sustained the state's objection to Willingham's testimony offered out of the presence of Turner and Walker as hearsay. Apparently the state did not participate in any alleged discussion between Turner and Walker and no proffer as such was made of what Willingham would have testified.

Furthermore, as already stated, the appellant was acquitted of possession of marijuana with intent to deliver or sell and was only convicted of manufacturing by growing it, which she readily admitted.

The judgment is affirmed.

Glen R. VAUGHT and Carolyn Sue VAUGHT *v.* Norman SATTERFIELD and Wilma SATTERFIELD

76-116 542 S.W. 2d 502

Opinion delivered November 1, 1976

*Cearley, Gitchell, Bogard & Mitchell,* for appellants.

*Patterson & Welch,* for appellees.

CONLEY BYRD, Justice. From a directed verdict in favor of appellees Norman Satterfield and his wife, the appellants Glen R. Vaught and his wife appeal contending that the failure of appellees to disclose a defect while selling their house to appellants constituted fraud upon which appellants were entitled to damages.

The record shows that in the early spring of 1971, the Satterfields owned a house at 810 "F" Street in North Little Rock. The house was constructed on a hillside lot that had been excavated in such manner that there was a steep incline sloping from the rear of the house up to the rear property line. About three feet behind the house was a retaining wall. In the early spring the Satterfields contracted with H. W. Tucker Company to construct a concrete swale immediately behind the house. When the Satterfields found out that the concrete swale did not cure the water seepage problem in the house, they listed the house with National Realty Company. Appellant, Glen R. Vaught, who had been issued a real estate license as a salesman with National Realty Company went with Paul Harris, an agent of National Realty Company, to look at the house about August 1, 1971. Appellant Vaught also looked at the house some three days to a week later. As a result of what he saw during those visits the Vaughts, without ever seeing or talking to the Satterfields, purchased the house for $4,000 down and assumed an outstanding mortgage in the approximate amount of $12,000. The purchase price of the house was discounted $600 through an arrangement between Paul Harris and appellant Vaught because of the latter's real estate salesman's license. During the Arkansas-Texas football game in October, 1971, water started seeping into the house. The Vaughts have now corrected the problem through the expenditure of $5,286 over a period of about three years. There is proof in the record that the fair market value of the house in 1971, without the water seepage problem would have been only $15,900 and that with the water seepage problem the value would not have exceeded the $12,000 outstanding mortgage. Appellant Vaught's testimony as to what he observed upon his first visit is as follows:

"Q. All right, did you ever ask Mr. Harris in regard to any kind of water problems? Did you ever inquire in that regard?

A. The first time I looked at the house, Mr. Harris and I went up there by ourselves. We walked through the house, I believe one of Mr. Satterfield's children was at home that day and we went in the house, walked through the rooms and briefly looked at it, walked out the back door, the kitchen or dining door onto the little porch in the back and at that time we walked up the steps in the area where this patio was, along in that area and I believe Mr. Harris was standing down below the steps and I was maybe standing on the steps at the time and I asked Mr. Harris, I said, do you know if there is any water problems here and Mr. Harris said he did not.

Q. And that was the only conversation that took place?

A. And I said well, looked like for some reason they've painted and fixed this up, awful nice here.

Q. You talking about that swale?

A. The swale had been painted green, the wall had been painted green and the swale had been painted green so you couldn't tell whether there was anything new or old or what there. It had just recently been painted and I didn't know whether the swale had been there ten years or two months or the wall either one.

Q. So then that was the only conversation you ever had on it?

A. Right."

To support their position the appellants rely upon *Weikel* v. *Sterns*, 142 Ky. 513, 134 S.W. 908 (1911), and *Lingsch* v. *Savage*, 213 Cal. App. 2d 729, 29 Cal. Rptr. 201, 8 A.L.R. 3rd 537 (1963). In the Kentucky case the appellant had erected a residence over a cesspool into which he was still pumping sewage. The court in that case had no trouble in finding a

duty of disclosure and that the vendor's silence on the subject amounted to fraud.

In the California case the allegation was that the vendors knew the building was illegal and had been placed for condemnation by the city; that the appellants had no knowledge thereof; and that in purchasing the property, they did so in justifiable reliance upon the vendor's nondisclosure and in the belief that said property was legally tenantable. In holding that the complaint stated a cause of action as against a demurrer, the Court stated:

> "It is now settled in California that where the seller knows of facts materially affecting the value or desirability of the property which are known or accessible only to him and also knows that such facts are not known to, or within the reach of the diligent attention and observation of the buyer, the seller is under a duty to disclose them to the buyer. . . ."

Under the facts in the record before us, appellants cannot bring themselves within the results of either the Kentucky or California ruling. The record shows from appellant Vaught's own testimony that his observance of the premises on his first visit was such as to cause him to inquire of Paul Harris as to his knowledge of a water problem. When Paul Harris truthfully answered that he did not know, appellant Vaught dropped the subject and made no further inquiry. As we read the authorities upon which appellants rely, the burden of proof to show the fraud alleged required not only a showing that appellants did not know the facts but also that the ascertainment of the undisclosed fact was not within the reach of their diligent attention or observance. Since appellants failed to show that the facts were not within the reach of their diligent attention or observation, it follows that the trial court correctly directed a verdict against them.

Affirmed.

We agree: HARRIS, C.J., and HOLT and ROY, JJ.

# Howard L. THOMAS and GULPHA CONSTRUCTORS, Inc. *v.* Phillip G. KELLETT

76-107 542 S.W. 2d 501

Opinion delivered November 1, 1976

*Laser, Sharp, Haley, Young & Boswell, P.A.*, for appellants.

*Dean A. Garrett*, for appellees.

FRANK HOLT, Justice. This appeal results from a jury verdict awarding $3,500 damages to appellee in a suit arising out of an automobile accident. Appellants contend that the court erred in giving the following instruction to which the appellants specifically objected that there was no substantial evidence from which the jury could find that the condition of the pickup truck driven by appellant Thomas was the proximate cause of the accident:

> There was in force in the State of Arkansas at the time of the occurrence, a statute which provided: AMI—908 No person shall drive and no owner shall cause or knowingly permit to be driven or moved on any highway a vehicle which is in such an unsafe condition as to endanger any person.

> A violation of this statute, although not necessarily negligence, is evidence of negligence to be considered by you along with all of the other facts and circumstances in the case.

The accident occurred after appellant Thomas, who was driving a pickup truck belonging to his employer, appellant Gulpha Constructors, Inc., passed appellee's tractor-trailer rig. Upon successfully overtaking appellee, Thomas moved back into the right lane, whereupon he heard a "rattling and clanging" noise coming from the truck. Thomas began slowing down, gave a left hand signal and came to a stop in the road to avoid oncoming traffic preparatory to pulling off on a side road to his left in order to determine the source of the noise. The pickup truck had a history of mechanical trouble with the transmission and universal joint and repair efforts had not corrected the condition. He was instructed to stop the truck and check it whenever anything "acted up." There was also evidence of a "possibility of the vehicle just stopping or locking up." When the appellee observed that the truck had stopped in front of him, he was unable to stop and had to leave the road where he lost control of his tractor-trailer. The trailer broke loose and overturned injuring the appellee. Immediately following the accident, Thomas "pulled off over to the [right] side of the road" and "went back there to see if [appellee Kellett] was hurt." Afterwards, Thomas drove the pickup approximately fifty miles before it became necessary to repair the universal joint.

Appellants argue that the mechanical condition of the truck at the time of the accident was not the proximate cause of the accident. The appellee responds that in "considering whether the defective mechanical condition of the pickup truck was the proximate cause of this accident," appellant Thomas the driver of the pickup truck, "had no reason to stop and make a left hand turn, after passing [Kellett's] large tractor trailer rig, except for the emergency situation created by the mechanical difficulties" of the pickup truck. Appellee's reliance upon *Bryant* v. *Thomas,* 230 Ark. 999, 328 S.W. 2d 83 (1959), is misplaced. There the engine malfunction of Bryant's vehicle was the cause of it coming to a "standstill" in the highway. Here, appellant Thomas' vehicle was not forced to come to a stop on the highway due to a mechanical

difficulty. The driver himself stopped the vehicle because he heard a noise in it. As indicated, following the accident, he drove it off to the right side of the road and thereafter approximately fifty miles before it became necessary to make repairs.

When we view the evidence most favorable to the appellee, we hold that the mechanical condition of the vehicle was not a proximate cause of the accident. See *West* v. *Wall*, 191 Ark. 856, 88 S.W. 2d 63 (1935); *Ben M. Hogan & Co.* v. *Krug*, 234 Ark. 280, 351 S.W. 2d 451 (1961); and *Lytal* v. *Crank*, 240 Ark. 433, 399 S.W. 2d 670 (1966). Here, the question of proximate cause involved only the degree of care being used by appellant Thomas and appellee Kellett in the operation of their respective vehicles. Consequently, as asserted by appellants, it was error to give the instruction.

Reversed and remanded.

We agree: HARRIS, C.J., and BYRD and ROY, JJ.

Janice Faye KLINE *v.* Roy Lee KLINE

76-113 542 S.W. 2d 499

Opinion delivered November 1, 1976

*Michael L. Ellig,* for appellant.

*William M. Stocks,* for appellee.

FRANK HOLT, Justice. This appeal is from a proceeding under the Uniform Reciprocal Enforcement of Support Act (URESA), Ark. Stat. Ann. § 34-2401, *et seq.* (Supp. 1975) in which appellant sought enforcement of a child support order which was rendered in a Tennessee divorce action between herself and appellee. Here, by the provisions of the Act, Tennessee is the initiating state and Arkansas the responding state. Upon trial of the cause, the Arkansas chancellor considered that a change in circumstances had affected appellee's ability to pay. Therefore, the court reduced his payment from $400 a month to $25 a week for the support and maintenance of his two minor children. The payments, however, were made contingent upon the appellant making their children available to appellee for visitation both in Tennessee and at appellee's home in Fort Smith, Arkansas. From that portion of the order making the support payments contingent on visitation rights, appellant brings this appeal. Appellant contends that the Arkansas trial court had no jurisdiction to adjudicate the visitation rights of the parties in a proceeding under the URESA and, therefore, it was error to make the child support payments contingent upon visitation rights. We must agree.

§ 34-2401, the first section of the Act, states: "The purposes of this Act are to improve and extend by reciprocal legislation the enforcement of duties of support." § 34-2423 provides:

> If the action is based on a support order issued by another court, a certified copy of the order shall be received as evidence of the duty to support, subject only to any defenses available to an obligor [appellee] with respect to paternity as provided in § 27 hereof or to a defendant in an action or a proceeding to enforce a foreign money judgment.

Further, § 34-2432 states: "Participation in any proceeding under this Act does not confer jurisdiction upon any court over any of the parties thereto in any other proceeding." Obviously, the Act is intended to facilitate enforcement of support orders rendered in our sister states by way of an *exparte* proceeding whereby a duly rendered valid support decree is prima facie evidence of the obligor's duty. The URESA is a uniform law, remedial in nature and purpose, and should be liberally construed in order to effectuate its purpose to accomplish and enforce the duty of a parent to support his children. *State of Illinois* v. *Sterling,* 80 N.W. 2d 13 (Minn. 1956). There it was also said that parental visitation rights are governed by the laws of that state, Tennessee here, where the divorce was secured. Consequently, the visitation rights or the enforcement of them should be addressed to the Tennessee court where the appellant mother and children continue to reside following the divorce action there. That is the court which has continuing jurisdiction over the parties as to visitation rights.

Reversed.

We agree: HARRIS, C.J., and BYRD and ROY, JJ.

Ross Allen MILBURN *v.* STATE of Arkansas

CR 76-122 542 S.W. 2d 490

Opinion delivered November 1, 1976
(In Banc)

*Skillman, Durrett & Davis,* for appellant.

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

FRANK HOLT, Justice. Appellant was convicted by a jury of possession of marijuana with intent to deliver and his sentence was assessed at imprisonment for nine years in the Department of Correction and a fine of $15,000. Appellant first argues for reversal that the trial court erred in not granting his motion to suppress the items (marijuana) removed from the trunk of appellant's car. Appellant claims there was no probable cause for the search at the time. We cannot agree.

At about midnight on an interstate highway, police stopped appellant for speeding after a chase of about four miles at a speed reaching 115 m.p.h. When appellant stepped from his car, he was in a staggering condition with a noticeable odor of alcohol and marijuana. After some resistance by the appellant, the officer frisked him, placed him in his patrol car, and asked him for his driver's license. The appellant said his license was in his billfold laying on the seat of the car. When the officer went to the car and opened the door, "there was a strong pungent odor of smoke [coming] from the vehicle. On the seat, in the floor, were loose cigarette papers laying all around the car. The billfold

was on the dash laying beside a bank bag half zipped up with a large amount of money [$11,480.02] bulging from the bank bag. I also noticed laying on the seat was a bond where he had been released that morning on possession of a controlled substance, St. Louis County, Missouri, I believe it was, on a fifteen hundred dollar bond." When the officer mentioned finding the money in the car to the appellant, he kicked the door of the patrol car open, jumped out and refused to get back in the vehicle. Appellant was finally subdued and handcuffed by the officer and two other officers, who had arrived at the scene, and placed back in the patrol car. Thereupon the arresting officer, being trained in the discernment of marijuana, took appellant's ignition key, unlocked the trunk and noticed marijuana in loose and brick form there. The officer relocked the trunk without removing anything and had the car towed in and impounded at the local county jail. The next day the contraband, weighing 9.1 pounds, was removed from the car in the presence of appellant pursuant to a search warrant, which appellant also attacks as jurisdictionally invalid.

All warrantless searches and seizures are not prohibited by our state and federal constitutions, only those which are unreasonable. An automobile, given probable cause, is subject to a warrantless search. *Gordon* v. *State,* 259 Ark. 134, 529 S.W. 2d 330 (1976); and *Wickliffe & Scott* v. *State,* 258 Ark. 544, 527 S.W. 2d 640 (1975). See also *Carroll* v. *U.S.,* 267 U.S. 132 (1925); *Chambers* v. *Maroney,* 399 U.S. 42 (1970); and *Coolidge* v. *New Hampshire,* 403 U.S. 443, 463 N. 20 (1971). Here, the circumstances attending appellant's apprehension and subsequent conduct, the detection by the officer of the odor of marijuana in appellant's vehicle and on his person, and the items observed in the front seat of appellant's car were amply sufficient to justify probable cause for a warrantless search of his vehicle. *Gordon* v. *State, supra.* In the case at bar, since the initial intrusion was clearly justified by probable cause, the subsequent seizure of the contraband the next day comports with constitutional standards. The subsequent search was a continuation and consummation of a valid initial intrusion. *Wickliffe & Scott* v. *State, supra.* Therefore, here, we need not determine the asserted invalidity of the warrant used in the subsequent seizure of the contraband.

Appellant next contends that the contraband was improperly admitted into evidence because the chain of custody was incomplete as to whether the substance removed from his car the morning after his arrest was the same substance first observed by officers in the limited search at the time of his arrest. The record shows that following the initial discovery of the marijuana, appellant was transported to the local jail and one officer remained with appellant's car until a wrecker arrived. This officer followed the wrecker which towed appellant's car to the impoundment lot at the local jail where it was stored inside the locked perimeter of the fenced storage area. The lot was routinely checked approximately every hour. The arresting officer was present during the search of appellant's car the next morning. He testified that he removed, in the presence of appellant, "a box containing the vegetable substance that I had found the night before." The substance was given by him to the county sheriff who kept it locked in his office until he personally delivered it to a Mr. Raborn at the Arkansas Department of Health for analysis. Mr. Raborn conducted the required tests on the substance, logged and stored the contraband in his locked file until produced and identified by him at appellant's trial.

"The purpose of the chain of identification is to prevent the introduction of evidence which is not authentic." *Fight* v. *State*, 254 Ark. 927, 497 S.W. 2d 262 (1973). In *Wickliffe & Scott* v. *State*, *supra*, we said:

> To establish a chain of custody of articles to be introduced in evidence, it is not necessary to exclude all possibilities of tampering but the court need only be satisfied that in reasonable probability the articles had not changed in important aspects.

Here, we are of the view that the trial court did not err in admitting into evidence the marijuana since in all reasonable probability the contraband removed from the trunk of appellant's car was the same as observed there the previous night. The jury was free to weigh and disregard the evidence as a result of the asserted deficiency.

Appellant next contends that the trial court erred in not instructing the jury "on the lesser misdemeanor charge of

possession" of marijuana. We must agree. An accused may be convicted of a lesser offense than charged when both belong to the same generic class, the commission of the higher may involve commission of the lower, and the charge of the higher contains all the substantial allegations necessary to let in proof of the lesser. *Caton* v. *State*, 252 Ark. 420, 479 S.W. 2d 537 (1972). There we said:

> This court has zealously protected the right of an accused to have the jury instructed on lesser offenses included in a greater offense charged. We have consistently held that a trial court commits reversible error when it refuses to give a correct instruction defining a lesser included offense and its punishment when there is testimony on which the defendant might be found guilty of the lesser rather than the greater offense.

Here, the offense charged and the evidence adduced require the giving of the requested instruction because there is evidence of the lesser included offense. The state's own evidence supplies the evidentiary requirement. The officer observed within the appellant's car "scattered cigarette papers." Upon his searching the appellant's person at the jail, he found a "roach clip" in appellant's sock and approximately one ounce of marijuana secreted in his underwear. The "roach clip" is used by marijuana smokers in order to smoke "a marijuana cigarette butt" without burning the fingers. There was a "strong pungent odor" of marijuana smoke in appellant's vehicle and on his person.

Ark. Stat. Ann. § 82-2617 (d) (Supp. 1975) provides that the mere possession of a controlled substance, marijuana here, in excess of one ounce "shall create a rebuttable presumption that such person possesses such controlled substance with intent to deliver. . . . ." Here, pursuant to the statute, the theory of the state's case was that appellant possessed marijuana with intent to deliver. Certainly, it must be said there is an abundance of testimony to sustain the finding of the jury to that effect. However, the theory of the defense, as enunciated by the requested instruction, was that the defendant's possession constituted a misdemeanor. As indicated, we hold the appellant was entitled to have the jury consider his version. *Bedell* v. *State*, 257 Ark. 895, 521 S.W. 2d

200 (1975); and *Fike* v. *State,* 255 Ark. 956, 504 S.W. 2d 363 (1974). See also *Stone* v. *State,* 254 Ark. 1011, 498 S.W. 2d 634 (1973). In these cases we again recognized that it was solely the prerogative of the jury, as the trier of the facts, to evaluate the conflicting evidence and draw its own inferences as to why appellant had the marijuana in his possession. Furthermore, § 82-2617 (d) provides, as indicated, that the mere possession in excess of one ounce of marijuana, as here, constitutes a presumption of intent to deliver, although it is a rebuttable presumption. It appears that it could be validly argued that this presumption becomes conclusive in the absence of the lesser included offense instruction which was sought here. *Stone* v. *State, supra.*

Appellant finally asserts that the trial court erred in giving an instruction relating to the statutory inference provided by § 82-2617 (d), *supra.* Appellant contends that the instruction constituted a comment on the evidence. The instruction reads:

> The amount or quantity of any marijuana which you find beyond a reasonable doubt to have been possessed by the defendant, if any, is evidence which goes to you for your consideration along with all the other facts and circumstances of the case in determining the purpose or intent for which the marijuana was possessed.

The instruction is not in the verbatim statutory language which we disapproved in *French* v. *State,* 256 Ark. 298, 506 S.W. 2d 820 (1974). Here, the instruction tells the jury that if it found appellant possessed the marijuana, the amount so possessed could be considered along with all the other facts and circumstances of the case as to the purpose or intent of appellant's possession. This type of instruction leaves guilt or innocence solely to the jury and allows it to draw an inference which is allowable by the statute. See *Petty* v. *State,* 245 Ark. 808, 434 S.W. 2d 602 (1968). A.M.I. Civil 2d 703.

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

HARRIS, C.J., dissents.

CARLETON HARRIS, Chief Justice, dissenting. I would affirm this case because, in my view, there was no evidence whatsoever that Milburn only possessed the marijuana for his own use; in fact, I consider the evidence as definitely reflecting the contrary. The amount in his possession was 9.1 pounds which, as pointed out by the state in its brief, is more than 140 times the amount which the legislature declared sufficient to create a presumption of intent to deliver; not only that, but there was a bag of money on the floor containing $11,480.00.

The majority state that the theory of the defense was that the defendant's possession constituted a misdemeanor and he was entitled to have the jury consider that version. I would agree if there had been any evidence reflecting that Milburn only had the marijuana for his own consumption, but I do not find such evidence. The presumption of intent to deliver where one possesses more than one ounce of marijuana is rebuttable, i.e., it may be overcome by evidence sufficient to create a reasonable doubt. The majority mention that scattered cigarette papers were found within the car; a "roach clip" and approximately an ounce of marijuana were secreted in his clothing, and there was an odor of marijuana smoke in the vehicle. Several cases are then cited in support of the position taken and it is stated:

> In these cases we again recognized that it was solely the prerogative of the jury, as the trier of the facts, to evaluate the *conflicting* evidence and draw its own inferences as to why appellant had the marijuana in his possession. (My emphasis.)

The fact that appellant had also been smoking marijuana does not, in my opinion, constitute *conflicting* evidence. After all, one can both smoke it, and deliver it, and this has been true in several cases before this Court.

I would affirm.

Ronald Gene KILLION *v.* CITY of Waldron

CR 76-142 542 S.W. 2d 744

Opinion delivered November 8, 1976

Appellant, *Pro Se.*

*Donald Goodner,* for appellee.

GEORGE ROSE SMITH, Justice. The appellant was fined in the Waldron municipal court for having failed to stop for a red traffic light. Upon trial *de novo* in the circuit court the jury returned a verdict of guilty and imposed a $25 fine. This appeal is evidently prosecuted as a matter of principle.

The appellant asserts, although the record does not clearly show, that the trial in the municipal court consisted of this statement by the municipal judge: "The officer is going to say that you did run the light, you will say you did not. I will find you guilty, and I know that you will appeal. I do not wish to waste my time. I find you guilty; now file your appeal." An appeal to circuit court was duly taken.

If the appellant's version of what occurred in the municipal court is correct, the municipal judge clearly deserves censure for conduct wholly lacking in that patience and impartiality which should characterize all judicial proceedings. Nevertheless, we cannot follow the appellant's argument that the circuit court was somehow deprived of jurisdiction to hear the matter. It is true that the municipal court had exclusive jurisdiction in the first instance over violations of city ordinances. Ark. Stat. Ann. § 22-709 (Repl.

1962). That jurisdiction, however, was exercised by the municipal court's finding of guilty and its imposition of a fine. Even though the court's exercise of its jurisdiction was erroneous, owing to its refusal to hear testimony, the statute provides for an appeal to the circuit court, where the accused is entitled to an entirely new trial, "as if no judgment had been rendered" in the municipal court. Ark. Stat. Ann. § 44-509 (Repl. 1964). It appears that the appellant received a fair trial in the circuit court — a trial that was not influenced or affected by whatever may have taken place in the municipal court. We find no basis for setting aside the circuit court's judgment.

Affirmed.

We agree. HARRIS, C.J., and FOGLEMAN and JONES, JJ.

Ronald MASON et ux *v.*
Lindsey S. RUSSENBERGER et al

76-126 542 S.W. 2d 745

Opinion delivered November 8, 1976
(In Banc)

*Richard J. Orintas,* for appellants.

*Matthews, Purtle, Osterloh & Weber,* for appellees.

GEORGE ROSE SMITH, Justice. The appellants, Mr. and Mrs. Mason, brought this action for damages arising from the appellees' asserted failure to complete a contract by which they were to construct a dwelling house for the Masons. The trial judge directed a verdict for the defendants, on the ground that the plaintiffs' proof of damages was insufficient to enable the jury to fix the pecuniary loss. For reversal it is contended that the proof was sufficient.

The trial judge was right. The measure of damages in a case of this kind is the difference between the unpaid portion of the contract price and the reasonable cost of completing the construction. *Sternberg Dredging Co.* v. *Dawson,* 171 Ark. 604, 285 S.W. 32 (1926); *Northern Constr. Co.* v. *Johnson,* 132 Ark. 528, 201 S.W. 510 (1918). At the trial these appellants offered no evidence whatever that would have enabled the jury to fix the amount of damages in dollars and cents.

Even so, the appellants, citing *Crow* v. *Russell,* 226 Ark. 121, 289 S.W. 2d 195 (1956), argue that if the loss is shown with certainty the damages need not be proved with exactness. That case is distinguishable, however, not only because it involved a loss of future profits but also because the opinion recites a number of dollars-and-cents figures that were considered by the jury. The case at hand is similar to *Tolbert* v. *Samuels,* 229 Ark. 676, 317 S.W. 2d 715 (1958). There we upheld the chancellor's refusal to award damages, because "there is no evidence at all by which we could attempt to determine the pecuniary loss that resulted from this injury. That damage of this kind may be hard to prove in dollars and cents does not justify our reaching into the air for a figure that would represent only an unsupported guess on our part." That same difficulty would have confronted the jury in the present case. Moreover, an experienced builder would presumably have been able to estimate the cost of completing the house for the Masons.

We note that the appellants did establish a breach of contract on the part of the contractors, All-Servis Builders, Inc., and Albert Cullipher, and therefore might have sought nominal damages. The point is not before us, however, as no such request was made in the trial court, nor has the point been argued on appeal. Even if the issue had been raised, we do not remand a cause for a new trial merely because nominal damages were not awarded. *Crutcher* v. *Choctaw, O. & G. R.R.*, 74 Ark. 358, 85 S.W. 770 (1905).

Affirmed.

FOGLEMAN and BYRD, JJ., would award nominal damages and costs.

Leo WINTERS d/b/a W W FEEDERS a/k/a W. W. CATTLE COMPANY *v.* Major LEWIS, d/b/a MAJOR LEWIS LIVESTOCK AUCTION SALES

76-102 542 S.W. 2d 746

Opinion delivered November 8, 1976

*Clark, McNeel & Watson,* for appellant.

*Hartze & Burton,* for appellee.

JOHN A. FOGLEMAN, Justice. This appeal was taken from a default judgment entered against appellant. We find that the judgment was erroneously entered and reverse.

Appellee Major Lewis, doing business as Major Lewis Livestock Auction Sales, filed its complaint against Ed Hall, W W Feeders a/k/a W W Cattle Company, and others, alleging that all the defendants were indebted to Lewis in the sum of $32,308.29 for cattle purchased as shown by a statement of account exhibited with the complaint. Hallous Garrett was also a plaintiff and alleged that Ed Hall was indebted to him in the sum of $2,100 for freight and hauling expense "surrounding" the purchase of cattle. It was alleged that Ed Hall was agent for W W Feeders a/k/a W W Cattle Company. Judgment in favor of the plaintiffs for $34,408.29 was sought against all defendants. This complaint was filed on August 6, 1975. An amendment to this complaint was filed August 15, 1975. In this amendment, the plaintiffs alleged that appellant Leo Winters was a resident of the State of Oklahoma; that W W Feeders a/k/a W W Cattle Company was, in fact, Leo Winters d/b/a W W Feeders a/k/a W W Cattle Company; and that Leo Winters d/b/a W W Feeders was indebted to the plaintiffs in the sum of $34,408.29 for cattle sold and delivered to him and for which he had not paid. No other allegation was made as to the cause of action and no reference was made to the statement of account exhibited with the original complaint. The amendment contained these allegations:

> That the plaintiffs should be allowed to amend their complaint to include the defendant Leo Winters as a party defendant.
>
> That this court have jurisdiction over the defendant by virtue of his business dealing within the State of Arkansas personally and by his agents under Arkansas

Stats. 27-2501 et seq.

Thereafter summons was issued and was served on August 20, 1975, upon Winters by the sheriff of Oklahoma County, Oklahoma in that county, pursuant to Ark. Stat. Ann. § 27-2501 et seq (Supp. 1975). A few days prior to this service, Winters had been served with summons on the original complaint. According to the testimony of Winters and his Oklahoma City attorney, Winters had delivered the summons to which the original complaint was attached to this attorney, who then employed an Arkansas attorney to file an answer. This answer and a separate motion to dismiss were filed on behalf of W W Feeders a/k/a W W Cattle Company on September 10, 1975. The answer consisted of a denial that Ed Hall was agent for W W Feeders a/k/a W W Cattle Company, and a general and specific denial of each and every other material allegation of the complaint. The motion to dismiss was based upon allegations that W W Feeders a/k/a W W Cattle Company was not an entity that could sue or be sued.

On October 23, 1975, Leo Winters filed an answer, in "his own right," in which he alleged that he had previously answered the complaint in the name of W W Feeders a/k/a W W Cattle Company. In this answer Winters denied that Hall was an agent for Leo Winters d/b/a W W Feeders a/k/a W W Cattle Company and generally and specifically denied each and every other material allegation of the complaint.

On December 19, 1975, the plaintiffs filed a motion for default judgment, alleging that Leo Winters d/b/a W W Feeders a/k/a W W Cattle Company was served with a copy of the complaint and amended complaint on August 20, 1975, but that Winters had failed to file a timely answer to the complaint and amended complaint and a hearing was held on this motion on the day it was filed. It was granted. The judgment for $34,408.29 and interest was entered on January 16, 1976.

After the hearing, Winters testified that W W Cattle Company was not a corporation, but that he did business under both that name and as W W Feeders. He testified that he

was served with summons and a copy of the complaint in Oklahoma sometime in August, 1975. He also admitted having been served a few days later on the same cause of action, but said that the pleading then served appeared to be identical to the complaint originally served on him and he so advised his Oklahoma City attorney. This attorney, Robert C. Grove, testified that he examined the pleading served on Winters with the second summons and since it appeared to him to be identical with the original complaint, he did nothing more, knowing that Arkansas counsel had already filed an answer to the complaint. Winters testified that the officer who served him with the summons at his office in Oklahoma City had apologized for bothering him again, saying that the summons was exactly like those previously served on him. The officer's affidavit proving service states that he served the complaint in the case, but does not mention the amendment.

It clearly appears that the amendment added nothing to the original complaint except identification of appellant Winters as W W Feeders and W W Cattle Company. It seems clear that process on the original complaint was served on Winters although that summons and its return do not appear to be in the record. The amendment did not state any new or different cause of action or any new factual basis for the recovery sought. The answer to the original complaint was timely filed. The second answer raised no issue not previously raised by the previous answer. It admitted the only new allegation which had been made by the amendment to the complaint. This answer was never stricken, but seems to have been totally disregarded in awarding the default judgment, apparently on the basis that it was not timely.

The default judgment recites that Winters is indebted to Major Lewis d/b/a Major Lewis Livestock Auction Sales and Hallous Garrett in the sum of $34,408.29 with interest. The only witnesses who testified were Winters and his attorney Grove, neither of whom admitted the indebtedness. The judgment was based only upon the allegations of the plaintff's pleadings and the unverified statements and cancelled checks exhibited with the original complaint, which was also unverified.

Default judgments are not the favorites of the law. *Sharp* v. *Sharp,* 196 Kan. 38, 409 P. 2d 1019 (1966); *Springer Corporation* v. *Herrera,* 85 N. M. 201, 510 P. 2d 1072 (1973); *Ryan* v. *Collins,* 481 S.W. 2d 85 (Ky. 1972); *Lambert Bros. Inc.* v. *Tri City Construction Co.,* 514 S.W. 2d 838 (Mo. App., 1974). *Lindsey* v. *Drs. Keenan, Andrews and Allred,* 118 Mont. 312, 165 P. 2d 804, 163 ALR 487 (1946); *Rogers* v. *Lyle Adjustment Co.,* 70 N.M. 209, 372 P. 2d 797 (1962); *Westring* v. *Cheyenne National Bank,* 393 P. 2d 119 (Wyo., 1964). The granting of a default judgment is a harsh and drastic action and may deprive a party of substantial rights. *Lambert Bros. Inc.* v. *Tri City Constructiion Co.,* supra; *Janoske* v. *Porter,* 64 F. 2d 958 (7 Cir., 1933); *Widicus* v. *Southwestern Electric Cooperative, Inc.,* 26 Ill. App. 2d 102, 167 N.E. 2d 799 (1960); *Springer Corp.* v. *Herrera,* supra; *In Re M____ & M____,* 446 S.W. 2d 508 (Mo. App. 1969); *Holder Turpentine Co.* v. *M. C. Kisser Co.,* 68 Fla. 312, 67 S. 85 (1914). Such a judgment should only be granted when strictly authorized and when the party to be defaulted should clearly know that he is subject to default if he does not act in a certain manner. *Janoske* v. *Porter,* supra; *State of Missouri* v. *Fidelity and Casualty Co.,* 107 F. 2d 343 (8 Cir., 1939); *Holder Turpentine Co.* v. *M. C. Kisser Co.,* supra. They are to be avoided if fairly possible. *Sawyer* v. *Sawyer,* 261 Iowa 112, 152 N.W. 2d 605 (1967).

This is not to say that our governing statutes leave as broad a latitude of discretion in the granting or denial of a default judgment as our courts once had, or that the effect of the statutes should be diluted or diminished. See Ark. Stat. Ann. § 29-401 (Repl. 1962); *Moore* v. *Robertson,* 242 Ark. 413, 413 S.W. 2d 872. Still, we have found substantial compliance by a defendant with statutory requirements to be sufficient to avoid the harshness of a default judgment in several instances. See *Cummings* v. *Lord's Art Galleries,* 227 Ark. 972, 302 S.W. 2d 792; *Gent* v. *State,* 239 Ark. 474, 393 S.W. 2d 219, rev. on other grounds, 386 U.S. 767, 18 L. Ed. 2d 515, 87 S. Ct. 1414; *Easley* v. *Inglis,* 233 Ark. 589, 346 S.W. 2d 206; *Barkis* v. *Bell,* 238 Ark. 683, 384 S.W. 2d 269; *Fitzwater* v. *Harris,* 231 Ark. 173, 328 S.W. 2d 501. See also, *Arkansas Electric Co.* v. *Cone-Huddleston, Inc.,* 249 Ark. 230, 458 S.W. 2d 728; *Sparks* v. *Shepherd,* 255 Ark. 969, 504 S.W. 2d 716. And the filing of any responsive pleading, even one which does not go to the merits of the case, has been held sufficient compliance to prevent a

default. *West* v. *Page,* 228 Ark. 13, 305 S.W. 2d 336 (1957); *Cummings* v. *Lord's Art Galleries,* supra; *Fitzwater* v. *Harris,* supra. See also, *Gent* v. *State,* supra.

For some reason appellee did not move to strike the answer of October 23 and did not move for a default judgment until December 19. This was virtually three months after they would have been entitled to judgment even if the second service on Winters is considered as the date from which the time for pleading was to be determined and the first answer disregarded. It was nearly two months after Winters' answer to the amended pleading was filed. When we consider the entire record, including the answer to the complaint, the limitation of the amendment to identification of W W Feeders, the admissions in Winters' subsequent answer, and the lapse of time before a default was sought, we find that there was a waiver of strict compliance with the statutory requirements and that there was substantial compliance sufficient to bar a default judgment. See *Utley* v. *Heckinger,* 235 Ark. 780, 362 S.W. 2d 13; *Fitzwater* v. *Harris,* supra.

We have held that where there is some justification for a belief on the part of a defendant that he has filed a pleading meeting the statutory requirements a default judgment should not be granted. *Barkis* v. *Bell,* supra. See also, *Arkansas Electric Co.* v. *Cone-Huddleston,* 249 Ark. 230, 458 S.W. 2d 728. Either a general or special appearance is sufficient compliance. Ark. Stat. Ann. § 29-401; *Fitzwater* v. *Harris,* supra.

Even though Winters was sued under a trade name, we do not take that to be necessarily fatal to the cause of action or to permit the answer filed by W W Feeders to be ignored in deciding whether there was substantial compliance with statutory pleading requirements.

When a defendant is sued under a trade name, the complaint is amendable by alleging and asserting the true name of the individual doing business under that name. *Manistee Mill Co.* v. *Hobdy,* 165 Ala. 411, 51 S. 871, 138 Am. St. Rep. 73 (1910); *Mauldin* v. *Stogner,* 75 Ga. App. 663, 44 S.E. 2d 274 (1947). Since service was had on Winters for W W Feeders and Winters was the individual doing business as W W Feeders, the amendment to the complaint only corrected a

misnomer and did not substitute a new party. *Thune* v. *Hokah Cheese Company,* 260 Iowa 347, 149 N.W. 2d 176; *Box* v. *Boilermaker National Health & Welfare Fund,* 47 Ala. App. 266, 253 So. 2d 326 (1971); *Manistee Mill Co.* v. *Hobdy,* supra. Appellant was before the court at all times under his trade name and the amendment only clarified his identity by adding his real name. *Thune* v. *Hokah Cheese Company,* supra. Upon this rationale, an amendment such as that made here has been held not to constitute a new action which would have been barred because the statute of limitations ran between the filing of the original complaint and the filing of the amendment. *Manistee Mill Co.* v. *Hobdy,* supra. Cf. *Evans* v. *List,* 193 Ark. 13, 97 S.W. 2d 73; *Williams* v. *Edmondson,* 257 Ark. 837, 520 S.W. 2d 260.

Under our statute, the court may, in the furtherance of justice and on such terms as may be proper amend any pleadings by correcting a mistake in the name of any party, or when the amendment does not change the claim or defense, by conforming the pleading or proceeding to the facts proved. Ark. Stat. Ann. § 27-1160 (Supp. 1975). It is consistent with both the spirit and letter of our statutes governing pleadings to consider, under the circumstances prevailing, that the amendment to the complaint in this case (which raised no new issue but simply corrected the name of the defendant) related back to the original complaint, so that a default judgment was barred by the original answer. If the bar of the statute of limitations may be avoided by such means, the declaration of a default should, by a similar treatment, be prevented.

The judgment is reversed and the cause remanded for further proceedings consistent with this opinion.

We agree: HARRIS, C.J., and GEORGE ROSE SMITH and JONES, JJ.

Raymond OLLES and Richard ANDERSON
*v.* STATE of Arkansas

CR 76-130 542 S.W. 2d 755

Opinion delivered November 8, 1976

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

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

JOHN A. FOGLEMAN, Justice. Appellants were convicted of burglary of the residence of Jimmy "Red" Jones in Perry County and of grand larceny of property taken from that house. Appellants contend that there was insufficient evidence to support the verdict of guilt, and we agree, insofar as Raymond Olles is concerned. We find sufficient evidence as to Anderson's guilt.

The testimony of Sue Markham, a participant in the crimes, would support the verdict, if this were sufficient. The testimony of an accomplice must be corroborated by other evidence tending to connect the defendant with the commission of the offense and it is not sufficient to show that the offense was committed and the circumstances of the offense. Ark. Stat. Ann. § 43-2116 (Repl. 1964). The corroborating evidence must be sufficient to establish the commission of the offense and the connection of the accused therewith if the testimony of the accomplice is eliminated from the case. *Prather* v. *State,* 256 Ark. 581, 509 S.W. 2d 309. The evidence connecting the accused with the crime must be independent of the testimony of the accomplice. *Anderson* v. *State,* 256 Ark. 912, 511 S.W. 2d 151; *Jackson* v. *State,* 256 Ark. 406, 507 S.W. 2d 705. It may be circumstantial, but it must be substantial. *Jones* v. *State,* 254 Ark. 769, 496 S.W. 2d 423. Even though it need only tend to connect the accused with the crime, it must do more than raise a suspicion of guilt. *Prather* v. *State,* supra. It need not be sufficient, in and of itself, to sustain a conviction and it may be slight and not altogether satisfactory and convincing, if substantial. *Klimas* v. *State,* 259 Ark. 301, 534 S.W. 2d 202. It must, however, be of a substantive character (*Yates* v. *State,* 182 Ark. 179, 31 S.W. 2d 295), i.e., it must be directed toward proving a fact in issue, not simply toward discrediting a witness or corroborating his testimony. Black's

Law Dictionary, 4th Ed.; *Zimmerman* v. *Superior Court,* 98 Ariz. 85, 402 P. 2d 212, 18 ALR 3d 909 (1965). See also, *State* v. *Fitch,* 162 S.W. 2d 327 (Mo. App., 1942); *Kitchen* v. *Commonwealth,* 291 Ky. 756, 165 S.W. 2d 547 (1942); *Foster* v. *Copeland,* 27 Tenn. App. 777, 159 S.W. 2d 96 (1942).

When we eliminate the testimony of Sue Markham, the other evidence clearly shows that a burglary and a theft amounting to grand larceny were committed. The evidence connecting appellant Olles with the crime does no more than raise a suspicion of guilt. As to Anderson, the only independent evidence to connect him with the crime is a statement he made to an officer and his own testimony. But the acts, conduct and declarations of the accused before or after the crime, including his testimony at the trial may furnish the necessary corroboration. *Long* v. *State,* 192 Ark. 1089, 97 S.W. 2d 67; *Stroud* v. *State,* 167 Ark. 502, 268 S.W. 850; *Mallett* v. *State,* 165 Ark. 613, 263 S.W. 384; *Ford* v. *State,* 205 Ark. 706, 170 S.W. 2d 671; *Dickson* v. *State,* 197 Ark. 1161, 127 S.W. 2d 126; *Russell* v. *State,* 97 Ark. 92, 133 S.W. 188.

Perry County Deputy Sheriff Clyde Booher testified that when he asked Anderson if he helped burglarize Jones' home, Anderson answered, "I don't know. I guess so. I was drinking at the time." Anderson testified at the trial that he was so drunk he remembered nothing from the time he got into the back seat of an automobile with Sue Markham and Raymond Olles on the evening of the burglary and until he "awoke" when they were near the Arkansas River and Sue was cooking some eggs. Booher had testified that Anderson told him that he remembered leaving with Sue and Raymond Olles and being under a building which was "high off the ground" down along the river, and cooking some eggs. The officer went to such a place, not identified, and found eggshells on the ground.

Anderson's wife testified that when she got home from work at 10:30 p.m. on the night of the burglary there was a box of clothes, sheets, pillow cases and towels in the house which had not been there earlier. She said that when Anderson got up the next morning he just told her there was a box of clothes there in the house. Anderson himself testified that he told the officers some sheets "stayed out there" on his

porch. He said he went out the next morning when he sobered up and there was a box of clothes in the yard, folded up in a long, pasteboard box, and there was a little piece of copper wire laying out in the driveway. Mrs. Anderson said that she started using the clothing. The owner testified that the property stolen included certain ladies' garments and a heavy cardboard box 36 inches wide, 24 inches deep and 48 inches long containing approximately 14 sheets, 15 pillow cases and 24 towels.

Sue Markham testified that she, Raymond Olles, with whom she was living, and Richard Anderson, her uncle, had gone to the Jones residence, where Olles and Anderson got out of the car, went to the house and brought back a couple of boxes of "stuff" and put them in the car. She said that Anderson made two or three trips, after which Olles and Anderson got in the car with her and the three went down to the river to a house built up on poles above the ground where they cooked some hamburger meat and boiled two dozen eggs. They then went by Anderson's home where he unloaded a box, after which Olles and Markham went home.

The possession of the stolen property would not be sufficient, standing alone, to corroborate the testimony of the accomplice, because the property at the Anderson house was not sufficiently identified at the trial. See *Scott* v. *State,* 63 Ark. 310, 38 S.W. 339. Still this evidence showing that articles of the type of those stolen mysteriously appeared in Anderson's possession on the night of the burglary, without any explanation except that Anderson claimed to be drunk and ignorant of their source, is certainly a circumstance to be considered in determining whether there is a chain of circumstances making the corroborating evidence sufficient. See *King* v. *State,* 254 Ark. 509, 494 S.W. 2d 476.

The circumstances, coupled with Anderson's own statements putting him in the automobile with Sue Markham and Raymond Olles immediately before the burglary and at the house along the river where eggs were cooked by Sue immediately after the burglary, constituted substantial circumstantial evidence tending to connect Anderson with the crime sufficient to warrant submission of the question to the jury. *Hubbard* v. *State,* 258 Ark. 472, 527 S.W. 2d 608 [and

*State* v. *Bassett,* 86 Idaho 277, 385 P. 2d 246 (1963) therein cited]; *Shaw* v. *State,* 133 Ark. 599, 202 S.W. 704; *Cook* v. *State,* 182 Ark. 1185, 31 S.W. 952; *Middleton* v. *State,* 162 Ark. 530, 258 S.W. 2d 995; *Yates* v. *State,* supra, 182 Ark. 179; *Stout* v. *State,* 249 Ark. 24, 458 S.W. 2d 42. Since the accomplice was corroborated as to particular material facts, the jury could infer that she spoke the truth as to all. *Payne* v. *State,* 246 Ark. 430, 438 S.W. 2d 462.

We are unable to find substantial evidence tending to connect Olles with the crimes. The fact that an officer found eggshells at a house similar to that where Sue Markham said she and Olles had cooked eggs after the burglary cannot be considered as substantive evidence, even though it tends to be corroborative of her testimony. Even if we considered Anderson's testimony as connecting Olles with the crime, the testimony of one accomplice cannot be corroborated by another. *Edmondson* v. *State,* 51 Ark. 115, 10 S.W. 21; *Melton* v. *State,* 43 Ark. 367. Otherwise the only circumstance connecting Olles with the offenses is that some of the merchandise stolen was recovered from the home of Olles and Sue Markham at 3814 Shackleford Road in Little Rock, after he had been arrested on a warrant issued on another charge. Possession of stolen property by the accused is a proper circumstance to consider in determining whether there was evidence tending to connect him with the crimes of burglary and grand larceny. *Klimas* v. *State,* supra, 259 Ark. 301. But the mere fact that several days after Olles had been arrested and incarcerated some of the stolen goods were recovered from the dwelling shared by the accused and Sue Markham, whose participation in the crime was admitted, is not sufficient corroboration, standing alone, even though it certainly would arouse a suspicion. In this respect, there is a similarity to such cases as *Cockrell* v. *State,* 256 Ark. 19, 505 S.W. 2d 204 and *Pitts* v. *State,* 247 Ark. 434, 446 S.W. 2d 222. In Cockrell, we held that the mere fact that stolen guns were found in the trunk of the accused's automobile was not sufficient corroboration of the testimony of an accomplice who lived with the accused and had free use of the car, especially when the accused was at work.

There is another point for reversal we must consider as to Anderson. He argues that he was incapable of having com-

mitted the crimes because he was so intoxicated at the time that he could not have entertained the specific intent to commit burglary or larceny. He contends that the undisputed evidence clearly establishes this defense. Of course, voluntary intoxication is not a defense, even though it may produce a form of "temporary insanity" or render the person charged unconscious of what he is doing. *Robertson* v. *State,* 212 Ark. 301, 206 S.W. 2d 748; *Wood* v. *State,* 34 Ark. 341. Still, when an offense can be committed only by doing a particular thing with a specific intent, it may be shown that an accused was so drunk at the time of the crime that he could not have entertained or formed the necessary intent, but the determination whether there was that degree of intoxication is solely within the province of the jury. *Stevens* v. *State,* 246 Ark. 1200, 441 S.W. 2d 451.

Undoubtedly, Anderson had been drinking beer in large quantities before and after the crimes. Sue Markham and Anderson's aunt (neither of whom was a medical expert) testified that Anderson had Huntington's Chorea and that one who has this disease does not know or remember what he is doing or has done, after drinking. Markham testified that he "passed out" on the way to Perry County, but that he made two or three trips to the Jones house and that he unloaded a box when she and Olles took him to his home. Even though Anderson testified that he did not know how the box got there, he did tell his wife of the presence of the box and she later used some of the contents. In *Wood* v. *State,* supra, we quoted authorities pointing out that, if one who is too drunk to entertain the specific intent to steal, relinquishes property taken by him before the intent could arise in his mind, there is no larceny. Despite Anderson's protestations that he knew nothing of the crimes, the question of intent was still for the jury's determination.

There remains another point affecting Olles which will arise on a new trial. He contends that evidence obtained by Deputy Sheriff Booher from his residence was erroneously admitted into evidence as the fruit of an illegal search. A motion to suppress this evidence was made and a pretrial hearing was held in camera, but the motion was denied. It is appellant's contention that the search and seizure resulted from an earlier "illegal" entry into Olles' place of residence

by the officer. We find no merit in this contention, because we cannot say that the circuit judge's findings of fact are clearly against the preponderance of the evidence.

Booher testified substantially as follows:

> Olles told me that he lived at 3814 Shackleford Road when I arrested him. I went to the house there with Raymond Olles' father. I don't remember the date but it was after Olles had been arrested on another charge. The senior Olles asked a Mrs. Speigel, the lady who owned the house, about Raymond's gun, saying that he was afraid someone might steal it. She told him the house was open and to go out there and get the gun. I went in the house with him, but I didn't see anything. The place was pretty badly torn up. I had no permission to enter from Raymond Olles or Sue Markham. I just went in there with Raymond's father. He took some jumper cables which were just inside the door on the right, saying they were his. I did not try to stop him. I had no authority there. Mrs. Speigel gave us permission to go in.
>
> A few days later (November 12) I went back to this residence to talk to Sue Markham, who lived there with Raymond Olles, about the burglary. She and her sister were there and she invited me in. I talked with her for a few minutes, advised her of her rights, told her that she was accused in a burglary, and she signed a statement and gave me permission to search. I asked her about the Jimmy "Red" Jones incident and she said, "I've got some of his stuff here, part of it." She signed papers giving me the authority to search the house, but I did not search it. She gave me the merchandise and I took it back to Perryville. At first, Sue Markham said she didn't know anything about the burglary, but I didn't force her into answering any questions. We had a very cordial conversation. I talked to her at some length. She went into details and it took some time to write it all down. She seemed intelligent enough to me.

Sue Markham testified reluctantly. She was called by the court as a witness. When asked what was said when

Booher talked to her about the Jones burglary, she responded:

> Well, at first I, see, I said I didn't know anything about it, then he said that, "Well, we've been up to Raymond, I and Raymond's daddy have come up here and you wasn't at home and we walked in." He said that his daddy was just looking for the gun and he said, "I know you got the stuff," he said, "but is it all here," and then, I mean, since he already knew, I thought well, I'd return the stuff.

She said Booher had seen the toaster and electric blender while there on the second visit and asked her if they came from the Jones house and she told him, "Yes, sir." She admitted that she had been advised of her rights. On cross-examination by appellants' counsel, the following questions were propounded and answers given:

> Q. - - and it was after Deputy Booher told you that he'd been in your house and he'd seen the stuff there, that he knew it was there, that you told him about it, wasn't it?
>
> A. Yes, sir.
>
> Q. He told you he'd been in there and he told you he knew the stuff was there?
>
> A. Uh huh.

The witness had not previously stated that Booher had seen anything in the house on his prior visit. The witness also testified that she helped dispose of some of the "stolen stuff" and kept some of it in her house, knowing it was stolen.

The trial court ruled as follows:

> *** The Court finds that Deputy Booher, when he went in there the first time, as he has testified to, did not receive anything that would incriminate anyone. He merely went there with the father of the defendant, Olles, who he himself had apparently had a right to be there picking up some of his own goods, and then when

> he went back to the premises on the 12th, apparently, he did not make a search of the premises. The witness here, who is available to testify, voluntarily gave him the goods that had been stolen from the victim's home. They are available, I guess, so I find that there was, in fact, no search.

We are in no position to say that the trial judge erred in holding that there was no search and that the stolen goods had been voluntarily delivered to the officer. There is little conflict in the testimony of the two witnesses. The only suggestion that Sue Markham's turning over the stolen property was not voluntary, because of knowledge obtained by a trespass on the part of the deputy sheriff, lies in affirmative answers to questions which put into the mouth of the witness words she had not otherwise spoken. This is largely a matter which turns upon the credibility of the witnesses, who were seen and heard by the trial judge. We cannot say that his determination was erroneous.

The judgment as to Anderson is affirmed. As to Olles, it is reversed and the cause remanded for further proceedings consistent with this opinion.

We agree. HARRIS, C.J., and GEORGE ROSE SMITH and JONES, JJ.

B.D.T., INC. & S.E., INC. *v.*
William MOORE, Randolph County Assessor,
Lucille STOLT, Randolph County Clerk &
Betty J. JOHNSON, Randolph County Tax
Collector

76-125 543 S.W. 2d 220

Opinion delivered November 8, 1976
(In Banc)
[Rehearing denied December 13, 1976.]

*Wilson & Grider*, by: *Murrey L. Grider*, for appellants.

*King & King*, by: *Jim King*, for appellees.

J. FRED JONES, Justice. This is an appeal by two corporations from a chancery court decree denying their petition for a restraining order against the appellee county officials to prevent the assessment and collection of ad valorem taxes on two tracts of land owned by the city of Pocahontas and leased to the appellants through the Municipal Airport Commission.

The Airport Commission leased one of the tracts here involved to William and Harold Baltz who constructed buildings thereon and then assigned all their interest to the appellant B.D.T., Inc. who was apparently a private

manufacturing company. The other tract was leased to the appellant S.E., Inc. who erected buildings thereon and sub-leased to the Black River Seed Company, Inc. Both leases provided that industrial buildings would be erected on the land, and both leases contained clauses providing as follows:

> The Lessees shall pay all taxes and special assessments, betterments, general or specific, whether levied or to be levied in the future and any other governmental charges and impositions whatsoever, whether forseen or unforseen.
>
> * * *
>
> The parties hereto covenant and agree that the lands above demised shall be used solely for industrial purposes and for no other reason.

Randolph County, through the appellee-officials, levied an ad valorem tax against the properties for the year 1974 in the amount of $2,248.99 resulting in the petition and decree as already stated. On appeal to this court the appellants have designated one point they rely on for reversal as follows:

> The Assessment of an ad valorem real property [tax] on real estate leased from a municipality for a public purpose constitutes an illegal exaction in violation of Article 16, Section 13 of the Constitution of the State of Arkansas.

Section 13 of Article 16 reads as follows:

> Any citizen of any county, city or town may institute suit in behalf of himself and all others interested, to protect the inhabitants thereof against the enforcement of any illegal exactions whatever.

The right of the appellants to institute suit to protect against enforcement of any illegal exaction is not questioned in this case. The real question involved is whether the property was exempt from taxation under Article 16, Section 5, of the Constitution which provides such exemption for "public property used exclusively for public purposes."

The appellants rely heavily on our decision in *Wayland* v. *Snapp,* 232 Ark. 57, 334 S.W. 2d 633, but we are of the opinion that our decision in *School District of Fort Smith* v. *Howe,* 62 Ark. 481, 37 S.W. 717, is more in point with the issues presented in the case at bar. The primary question in *Snapp* was the validity of a municipal ordinance authorizing a bond issue under Act No. 9 of 1960 for the purchase of land and erection of facilities to be leased to Seiberling Rubber Company, Inc. The secondary ad valorem tax issue in *Snapp* only arose out of an alleged promise of ad valorem tax exemption. Our statement of the law in disposing of that issue in *Snapp* can be of no assistance to the appellants in the case at bar, for in *Snapp* we said:

> In his Complaint appellant alleges that: "The City of Batesville has represented to Seiberling that the land and manufacturing facilities to be leased to Seiberling by the City will be exempt from ad valorem taxes" in violation of Article 16, Sections 5 and 6 of the Arkansas Constitution. * * * As we understand the above provisions of the Constitution, for property to be exempted from taxation two elements must be present: (a) the subject property must be "public property," that is, it must be owned (in this instance) by the City of Batesville; (b) it must be used exclusively for public purposes. In our opinion both of these elements are present in the case under consideration as we shall attempt to show.
>
> (a) It must be admitted here that the grounds, the building and facilities will be owned by the City of Batesville and will, therefore, be public property.
>
> (b) Likewise, we think it is clear that the property will be used exclusively for a public purpose. If it is, it will be exempt from taxation under the Constitution and if it is not it must be taxed.

The dissenting opinion in *Snapp, supra,* did not differ with the majority opinion as to the law on the question of tax exemption. In the dissenting opinion is found the following pertinent language:

> The constitution exempts "public property used exclusively for public purposes." Const., Art. 16 § 5. Obviously the framers did not mean to exempt all public property, for in that event there would have been no need to insert the phrase, "used exclusively for public purposes." The inclusion of that phrase demonstrates conclusively that the exemption does not embrace all publicly owned property; it must also be used exclusively for a public purpose.

After citing and discussing *School District of Fort Smith* v. *Howe, supra,* the dissent in *Snapp* then continues as follows:

> We have many other cases to the same effect, holding that the tax exemption must be strictly construed and that property falls within one of the exemptions only if it is actually used for the exempt purpose. *Brodie* v. *Fitzgerald,* 57 Ark. 445, 22 S.W. 29; *Pulaski County* v. *First Baptist Church,* 86 Ark. 205, 110 S.W. 1034; *Burbridge* v. *Smyrna Baptist College,* 212 Ark. 924, 209 S.W. 2d 685; *Hilger* v. *Harding College,* 231 Ark. 686, 331 S.W. 2d 851.

The majority and dissenting opinions in *Snapp* agreed as to the law pertinent to tax exemption under Article 16, Section 5 of the Constitution, they only disagreed on this point as to the application of the law to the facts in *Snapp.*

We are unable to say the chancellor's finding that the property here involved was not "used exclusively for public purposes" was against the preponderance of the evidence.

The decree is affirmed.

BYRD and HOLT, JJ., concur.

Robert L. LISENBY *v.* STATE of Arkansas

CR 76-47 543 S.W. 2d 30

Opinion delivered November 8, 1976
(In Banc)

*Reinberger, Eilbott & Smith,* for appellant.

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

J. FRED JONES, Justice. The appellant Robert L. Lisenby was charged on information filed by the prosecuting attorney with the crime of "assault with intent to kill by use of a firearm." He was found guilty at a jury trial and sentenced to 27 years in the state penitentiary with at least nine years to be served before parole.

On appeal to this court Lisenby has designated eight points on which he relies for reversal, but having concluded that he was entitled to a directed verdict as contended under his third point, we find it unnecessary to discuss the other assignments.

The information filed against Lisenby also included a co-defendant, Barney B. Norton, and the specific charge in the information was as follows:

> The said defendants on or about the 2nd day of February, 1975, in Garland County, Arkansas, did unlawfully, wilfully and with malice aforethought make an assault upon one Norman Hall and Richard James with a deadly weapon, to-wit: a handgun by then and there shooting at them, the said Norman Hall and Richard James with said gun then and there had and held in the hands of him, the said Barney B. Norton, with the unlawful and felonious intent then and there, them, the said Norman Hall and Richard James wilfully and maliciously to kill and murder, in violation of Ark. Stats. Ann. 41-606, and the use of said firearm in the perpetration of the said assault being in violation of Ark. Stats. Ann. 43-2336.

The facts appear as follows: In the early morning hours of February 2, 1975, one Norman Hall, a security guard at the Diamondhead Resort in Garland County, discovered that the "Pro Shop" at the resort had been burglarized and a quantity of merchandise had been removed therefrom. A golf cart was also missing and the golf cart was located near the premises adjacent to Highway 290. The canvas top of the golf cart had been removed and placed on the ground near the cart and the stolen merchandise was placed on top of the canvas top.

Mr. Hall and Richard James, in charge of golf course maintenance and construction, secreted themselves where they could watch the merchandise and around 6:30 A.M. an automobile stopped near the merchandise and two men got out of the automobile. The automobile traveled a short distance where it turned around and stopped again at the same location where it had first stopped. The two men went to the golf cart cover and started back toward the automobile carrying the canvas cover with the merchandise thereon between then. Mr. Hall shouted to the two men to halt and fired a pistol shot over their heads. The appellant Lisenby stopped and fell forward to the ground and his companion ran a distance of about 360 feet where he entered the waiting automobile. Mr. Hall then approached Lisenby and ordered him to get up from the ground, which Lisenby did, and at this point three shots were fired from the direction of the automobile. The bullets struck the ground near where James, Hall and Lisenby stood and Mr. Hall placed Lisenby between himself and the direction the shots were coming from.

A crime of assault with intent to kill and the penalty provided therefor are set out in Ark. Stat. Ann. § 41-606 (Repl. 1964) as follows:

> Whoever shall feloniously, wilfully and with malice aforethought, assault any person with intent to murder or kill, or shall administer or attempt to give any poison or potion with intent to kill or murder, and their counselors, aiders and abettors, shall, on conviction thereof, be imprisoned in the penitentiary not less than one [1] nor more than twenty-one [21] years.

Thus, it is seen that "feloniously, wilfully and with malice aforethought" are necessary elements of an assault with intent to murder or kill, and Lisenby was charged in the language of this statute. To sustain an indictment for an assault with intent to murder, the evidence must be such as would warrant a conviction for murder if death had ensued from the assault. *McCoy* v. *State,* 8 Ark. 451; *Lacefield* v. *State,* 34 Ark. 275; *Allen* v. *State,* 117 Ark. 432, 174 S.W. 1179; *Francis* v. *State,* 189 Ark. 288, 71 S.W. 2d 469. Of course, intent to kill may be inferred from acts and circumstances of the

assault but it cannot be implied as a matter of law. *Ward* v. *State,* 208 Ark. 602, 186 S.W. 2d 950.

The above comments are especially important in the light of additional statute, Ark. Stat. Ann. § 41-2507 (Repl. 1964), which provides as follows:

> If any person shall shoot at any person, with the intent to kill or wound, although he may miss or fail to hit the person aimed at, he shall be deemed guilty of an attempt to kill or maim, and on conviction shall be fined not exceeding three thousand dollars [$3,000], and imprisoned not exceeding seven [7] years.

In *Lacefield* v. *State, supra,* the distinction as to intent becomes important as between the two statutes. In *Lacefield* we said:

> The proposition is incontrovertible that to sustain an indictment for an assault with intent to murder, the evidence must be such as to warrant a conviction for murder had death ensued from the assault.

This court has said that in order to convict for assault with intent to kill, the state must prove without a reasonable doubt that an accused committed an assault and that it was with intent to murder. *Allen* v. *State,* 117 Ark. 432, 174 S.W. 1179. It is elementary under Arkansas law that one who is present, aiding and abetting in the commission of a crime is equally guilty as reiterated in *Cheeks* v. *State,* 169 Ark. 1192, 278 S.W. 10; *Woolbright* v. *State,* 124 Ark. 197, 187 S.W. 166, and *Lacy* v. *State,* 177 Ark. 1056, 9 S.W. 2d 314. These were assault with intent to kill cases but in them the accused, unlike Lisenby, were aiding and abetting in the commission of the crime charged or at least there was evidence from which the jury could have so found.

In 23 C.J.S. § 786 (2) is found the following:

> In order to be an accomplice, one must in some way be connected with the crime charged against accused. Thus, it is not sufficient that he was connected with the accused in commission of other offenses.

See *State* v. *Walters,* 209 P. 349, 105 Or. 662. See also *Coleman* v. *State,* 121 A. 2d 254; *People* v. *Webb,* 25 N.Y.S. 2d 554, reversed on other grounds, 26 N.Y.S. 2d 386; *State* v. *Bowman,* 70 P. 2d 458, 111 A.L.R. 1393; *Washburn* v. *State,* 318 S.W. 2d 627; *Warren* v. *State,* 132 S.W. 136. See also *Soloman* v. *Commonwealth,* 270 S.W. 780; *People* v. *Cowan,* 101 P. 2d 125; *Warren* v. *Commonwealth,* 333 S.W. 2d 766.

There is considerable difference in the case at bar and such cases as *Bosnick* v. *State,* 248 Ark. 846, 454 S.W. 2d 311. In *Bosnick* a father and son and two other young men were in the process of robbing a store when a policeman appeared on the scene and two of the robbers shot and killed the policeman. Each participant was charged with first degree murder. Bosnick, Sr., took the other defendants to the grocery store; all of them were armed and Bosnick, Sr., waited outside the store while the other three carried out the robbery with stocking masks over their faces. The defendants in *Bosnick* were not charged with the homicide in perpetration of robbery, but were simply charged with first degree murder. We pointed out in *Bosnick* that when a group plans an armed robbery, "Each one of the party would be responsible for everything done which followed directly and immediately in the execution of the common purpose as one of its probable and natural consequences." Citing *Clark* v. *State,* 169 Ark. 717, 276 S.W. 849 (1925). Then in *Bosnick* we continued as follows:

> [T]he jury could have attributed to the elder Bosnick a full share of responsibility for what took place inside the Gatteys store, even though the original plan did not contemplate a homicide. *Henry* v. *State,* 151 Ark. 620, 237 S.W. 454 (1922). But the jury was not required to do so. By the decided weight of authority, and by what we regard as the better rule, the jury may assign degrees of guilt among the conspirators in accordance with their respective culpability.

In the case at bar the evidence is clear that Lisenby was associated with Norton and another individual in the theft of the merchandise from the Pro Shop, but Lisenby was apprehended in the theft of the merchandise. He offered no resistance to his arrest and was under the observation and

complete control of the arresting officers when the shots were fired toward him and the officers. All three participants in the attempted theft of the merchandise abandoned the merchandise when the officers appeared, Lisenby surrendered and the other two ran away. After Lisenby was completely in custody offering no resistance whatever, one of his two former companions in fleeing from the scene fired three shots in the direction of Lisenby and the officers, and that was the sole basis for the charge against Lisenby of assault with intent to murder or kill.

As already pointed out, to sustain a conviction for assault with intent to kill the evidence must be such to have sustained a conviction for murder had the homicide occurred. In *Jones* v. *State,* 89 Ark. 213, 116 S.W. 230, the appellant was convicted of the crime of assault with intent to kill. The evidence was to the effect that the appellant chased the prosecuting witness with an ax threatening to kill him, but never did get in striking distance. In reversing the judgment, this court said:

> There was no evidence to show that appellant at any time had the present ability to injure Carter in the manner alleged in the indictment. It is argued that appellant might have thrown an ax at Carter and have injured him with it in that manner. But the proof does not show that appellant made any effort to injure the prosecuting witness by throwing the ax at him. Even if an injury could have been inflicted in that manner, it was not attempted. Appellant must be convicted, if at all, upon the attempt he actually made, and not upon what he might have done had he made the attempt. So the evidence is not sufficient to sustain the verdict, and the court should have set it aside for that reason.

In the case styled *Slim and Shorty* v. *State,* 123 Ark. 583, 186 S.W. 308, peace officers were advised of a train robbery and attempted to arrest the appellants who had alighted from the train. Upon approaching the appellants the officers said to them: "Boys, we want you; put up your hands." (The appellants refused to give their names and were referred to as Slim and Shorty). The evidence was to the effect that both appellants were armed when apprehended and that they

"started for their guns" when the officers accosted them. Slim's gun hung in its holster and Deputy Sheriff Pierce told another deputy to watch Slim, Pierce then told Shorty not to pull his gun. Shorty, nevertheless, pulled his gun and pointed the gun at the face of Deputy Finley. Finley and Pierce fired about the same time and Shorty fell. Pierce then immediately looked at Slim and Slim's hands were going up and his gun fell out in front of him. Both appellants were indicted for the crime of assault with intent to kill and also jointly indicted for the crime of resisting an officer. They both were convicted on the charge of resisting an officer and Shorty was convicted of assault with intent to kill. In reversing Shorty's conviction for assault with intent to kill, this court said:

> There was testimony tending to show that when the officers approached the appellants the driver ran the motor car up within a few feet of them and the officers jumped out with their guns presented towards the appellants before anything was said by the officers. A majority of the court is of the opinion that the testimony is not legally sufficient to sustain a conviction of appellant Shorty for the crime of assault with intent to kill, and that the court erred in not granting his motion for a new trial as to this offense.

In the Kentucky case of *Warren* v. *Commonwealth,* 333 S.W. 2d 766, the appellant Warren, Everett Perry, and three other men, were jointly indicted for the murder of Woodrow Smith. Smith operated a small coal mine and the appellant and Perry were members of a local union which was on strike. The homicide grew out of an effort on the part of the appellant Warren, Perry, and other union members to force Smith and his employees to join the union and participate in the strike. Warren and Perry and other members of the union armed themselves and converged on Smith's coal mine. As they approached the mine, Perry dropped out of the group and suggested to Warren that he do likewise but Warren insisted on going on. Smith, in an attempt to elude the group, passed by where Warren and Perry were standing and Perry warned Smith that the group was going to kill him. Smith threw his own pistol to the ground and Warren retrieved it. Perry asked for the pistol and Warren refused to surrender it

but put it in his pocket and walked off. Perry walked to where Smith had stopped and advised him that they had come up to talk with him about joining the union. At this point other shooting started. Perry saw Smith fall over and saw Warren standing about six feet away with a gun in his hand. He called Warren a "damn fool" and Warren walked away. The question on appeal was whether the court erred in not giving an instruction that if the jury believed Perry was an accomplice of the defendant, Warren could not be convicted without corroborative evidence, and in affirming the judgment the court said:

> Perry certainly started out with the mass movement of the striking miners. But it is clear from his undenied testimony that when violence developed, he not only refused to participate in the intimidation of Smith, but sought to prevent Warren from harming him. The familiar definition of an accomplice is one who participates in the commission of a crime, whether as a principal aider and abettor or accessory before the fact. The usual test is whether or not the witness could be convicted of the crime with which the accused is charged. *Soloman* v. *Commonwealth,* 208 Ky. 184, 270 S.W. 780. *Mountjoy* v. *Commonwealth,* 262 Ky. 426, 90 S.W. 2d 362. Mere association with the accused or mere presence at the time of the commission of the offense does not make one an accomplice. *Head* v. *Commonwealth, Ky.,* 310 S.W. 2d 285.

In the Oregon case of *State* v. *Walters,* 209 P. 349, two soldiers, Walters and Tillman, while A.W.O.L., committed several robberies in Portland. Policemen Palmer and Thorpe intercepted Walters and Tillman on a street corner and quoting from the opinion the following occurred:

> When the officers met the soldiers at the corner, Thorpe said: "Boys, just a minute; I want to see you." Tillman "stopped right there," but Walters "walked right on — stepped off the curb." Palmer gave his attention to Walters, and Thorpe gave his attention to Tillman. Thorpe ordered Tillman to take his hands out of his pockets, and Tillman "had just started to pull his hands out of his pockets when Walters shot Palmer." Thorpe

> immediately took his "gun off of" Tillman and shot at Walters, and it is probable that this was the shot which wounded Walters in the shoulder.
>
> Walters proceeded about 14 feet after he and Tillman were accosted by Thorpe, and Walters was only 5 or 6 feet from Palmer when he shot Palmer.

Tillman testified for the state at Walters' trial and testified as to the robberies prior to the homicide. It appears that the statutes of Oregon contain a subdivision in § 868 "that the testimony of an accomplice ought to be viewed with distrust," and the appellant assigned error in the trial court's failure to give an instruction to that effect. In disposing of this contention the Supreme Court of Oregon said:

> Tillman was an accomplice in the commission of the three robberies; but the record does not disclose a word of evidence having the slightest tendency to show that he participated in or was connected with the homicide. Tillman was not an accomplice in the killing of Palmer, and therefore the trial judge properly omitted to instruct the jury about viewing the testimony of an accomplice with distrust.

We conclude that the same situation exists in the case at bar. There is no evidence whatever, either circumstantial or otherwise, that Lisenby entertained any malice aforethought, or any intent to murder, or kill anyone, and there is no evidence that he counseled, aided or abetted in firing the shots toward him and the officers. There is not even any evidence that Lisenby participated in the burglary. It is true he was participating in retrieving the stolen merchandise when accosted by the officers, but he had submitted to arrest and his former companions had made good their escape when the shots were fired. Whether the shots were fired at Lisenby, the two officers, or at all three, is not in evidence. It would require the highest degree of speculation to say they were fired at the officers to effect Lisenby's release, or fired at Lisenby to silence him. It would also be pure conjecture and speculation to say the shots were fired as a probable and natural consequence of burglary under the evidence of record in this case.

The judgment is reversed and the cause dismissed.

HARRIS, C.J., concurs in part, dissents in part. FOGLEMAN, J., dissents.

CARLETON HARRIS, Chief Justice, concurring in part, dissenting in part. I agree with the Court that this case should be reversed, but I would not reverse and dismiss; rather, I would remand for another trial.

It is my view that the Court committed error in giving its instruction No. 5. That instruction reads as follows:

> When persons combine to do an unlawful thing, if the act of one, proceeding according to common plan, terminates in a criminal result, though not the particular result meant, all are liable.
>
> If the defendants, or either of them, drew a weapon on Norman Hall and Richard James, their victims, with the common intent to effect an unlawful theft of property belonging to the Diamondhead Pro Shop or to prevent apprehension by the victims while engaging in the commission of an unlawful theft or in furtherance of such criminal act, and, by reason of such conduct on their part, such weapon was fired at the victims, or either of them, with the present capability to kill them, then each of the defendants, being present, aiding and abetting the acts and conduct aforesaid, would be guilty of an unlawful assault and, if such acts were done with malice, then the defendants would be guilty of assault with intent to kill. Malice shall be implied when no considerable provocation appears or when all the facts and circumstances manifest an abandoned or wicked disposition. Intent to kill may be inferred from facts and circumstances tending to reveal the state of mind of the defendants. It is not necessary for the state to prove that defendants weighed in their minds the consequences of a course of conduct before they acted.
>
> In other words, a man may be guilty of a wrong which he did not specifically intend if it came naturally, or even accidentally, from some other specific or general

evil purpose.

This instruction, in my view, told the jury that if they found that either Norton or Lisenby fired a weapon at the officers under the circumstances set out in the majority opinion, then *both* were guilty of an unlawful assault, and if the firing was done with malice, then *both* would be guilty of assault with intent to kill. It was undisputed that the other party who had been with Lisenby had fired a weapon in the direction of the officers.[1]

The instruction was specifically objected to, it being appellant's contention that he was entitled to have the jury pass upon the question of whether his participation with Norton had terminated at the time of his surrender to the officers, and that the Court's instruction did not afford the jury this opportunity. I agree. It is true that counsel did not offer a written instruction, but to have done so would have been futile since the Court in announcing the instructions that it intended to give stated:

> Now, gentlemen, you may make your objections to the Court's instructions into the record. And you may also make your objections because I am not giving whatever instructions you think should be given in place of the Court's instructions. I have taken the liberty of studying this thing fairly well.

I would reverse, but remand for another trial.

JOHN A. FOGLEMAN, Justice, dissenting. I do not agree that there was no substantial evidence to support the jury verdict finding appellant Lisenby guilty of assault with intent to kill. The "pro shop" at Diamondhead was burglarized. The burglars Norton, Lisenby and an unidentified person were in the process of transporting the loot when surprised by Hall, the chief of security at Diamondhead, and his companion, Richard James. Lisenby did not voluntarily surrender. He dropped the canvas on which the stolen goods were being

[1]Subsequently, Barney Norton was convicted of assault with intent to kill, and his conviction affirmed by this Court on September 20, 1976. See *Norton* v. *State,* 260 Ark. 412.

carried and fell to the ground when a pistol shot was fired over his head by the security guard. His companion ducked behind a bank, fled, and was picked up by Norton, who was driving the car from which Lisenby and this companion had alighted and which, obviously, was to be used by the three to haul away the loot. The first shots fired from the direction of the automobile rang out about the time Lisenby arose on Hall's command to do so. The bullet struck a bank right beside Hall, who raised up and fired back. Hall commanded, "Everybody get down," after the driver had gotten out of the automobile and fired another shot. After Hall returned the fire he saw someone, apparently the unnamed companion, running toward the car. After a third shot was fired from the direction of the automobile, the driver and this other person got into the car and left.

James testified that he had hold of Lisenby when the firing started, "like my arm around his throat or something like that" and that he was behind Lisenby, so that Lisenby was facing in the direction of the gunfire. He said he, Lisenby and Hall all were seeking to get up a bank and over a fence seeking cover, but that he held on to Lisenby all the while. James said that he pushed Lisenby to the ground during the firing. Some of the shots struck near James and Lisenby. Lisenby was not armed when arrested. He offered no "actual resistance" to Hall and James. He was in the custody of Hall and James throughout the shooting. Hall said he cooperated.

These facts are stated in the light most favorable to the state, as we are required to view them, but they are not disputed or in substantial conflict. It is obvious that Norton, Lisenby and their companion were apprehended while their crimé of burglary and larceny was in progress. Asportation of the stolen property was an integral part of the crimes. The majority's statement that there is no evidence that Lisenby participated in the burglary is unwarranted. His possession of the stolen property is itself sufficient evidence to have sustained Lisenby's conviction of that offense, in the absence of an explanation satisfactory to the jury. *Gatewood* v. *State,* 259 Ark. 325, 532 S.W. 2d 749; *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.

There was never a time when Lisenby voluntarily disassociated himself from the criminal activities of his co-conspirators and accomplices or communicated any withdrawal from the criminal enterprise (if indeed he did withdraw) to his confederates, or either of them. A reasonable inference that the jury might draw from the testimony is that Norton and the third man, who could have made good their escape without returning to a place on the road from which they could shoot at Hall and James, were endeavoring to recapture the loot and free Lisenby, who was unarmed. The original criminal venture was not terminated before Norton and the third person fled, or at least the jury had the right to so find, and Lisenby was fully responsible for all their acts.

Our law as to the responsibility of one conspirator for the acts of his co-conspirator is well settled. In *Caton* v. *State,* 252 Ark. 420, 479 S.W. 2d 537, we said:

> A conspiracy is a combination between two or more persons to do something unlawful, and it may be established by circumstantial evidence as well as by direct evidence. *** When the combination of persons to do an unlawful act is shown, each of them is liable for the act of one proceeding according to the common plan, if it terminates in a criminal result. ***

In *Johnson* v. *State,* 252 Ark. 1113, 482 S.W. 2d 600, we said:

> *** Each conspirator or participant is responsible for everything done which followed directly and immediately in the execution of the common purpose as one of its probable and natural consequences. *Bosnick* v. *State,* 248 Ark. 846, 454 S.W. 2d 311. The burglary and larceny, if committed, or the scheme to commit these crimes, if it existed, did not terminate until the perpetrators had left the scene. *Clark* v. *State,* 169 Ark. 717, 276 S.W. 849. The acts of the participants in an effort to escape are a part of the continuous scheme or conspiracy and the act of one is the act of all. *Wilson* v. *State* [188 Ark. 846, 68 S.W. 2d 100]; *Clark* v. *State,* supra; *Maxwell* v. *State,* 188 Ark. 111, 64 S.W. 2d 79. In the cases cited in *Wilson* from other

> jurisdictions, it is clearly recognized that the law holds a participant in a crime responsible for the acts of another acting in concert with him or in the furtherance of a common object, design or purpose. ***

It is also clear that under our law the acts of one co-conspirator in furtherance of the common design may be shown in evidence against his associates. *Local Union No. 858* v. *Jiannas,* 211 Ark. 352, 200 S.W. 2d 763; *Gurein* v. *State,* 209 Ark. 1082, 193 S.W. 2d 997; *Butt* v. *State,* 81 Ark. 173, 98 S.W. 723. "[I]t is well settled that each conspirator is responsible in any place where any overt act by any of his co-conspirators is done." *Wilkin* v. *State,* 121 Ark. 219, 180 S.W. 512.

We have spoken clearly on the matter of accomplice liability[1] for a criminal act where a specific intent is an element of that offense. In *Carr* v. *State,* 43 Ark. 99, we said:

> The law upon this subject is, that "a man may be guilty of a wrong which he did not specifically intend, if it came naturally or even accidentally from some other specific, or a general, evil purpose. When, therefore, persons combine to do an unlawful thing, if the act of one, proceeding according to the common plan, terminate in a criminal result, though not the particular result meant, all are liable." Bishop Cr. Law, Sec. 636, and authorities there cited.

In *Spear* v. *State,* 184 Ark. 1047, 44 S.W. 2d 663, a case involving a charge of murder, with malice aforethought and after premeditation and deliberation, in common law form, and not as a felony-murder, the court instructed the jury as follows:

> *** The court instructs the jury that if you find from the evidence beyond a reasonable doubt that the defendant, Percy Spear, in Crawford County, Arkansas, and within three years from the finding of this indictment, entered into a conspiracy with any other person or persons to

[1]The sort of liability the state asserts against Lisenby, i.e., responsibility as an accomplice for the acts of another participant in a criminal design, has been referred to by some writers as "accomplice liability."

> rob the Reynolds Drug Store in the city of Van Buren, Arkansas, and that the defendant with such other person or persons with common intent to rob same did rob said Reynolds Drug Store with a common purpose and you further find from the testimony beyond a reasonable doubt that by reason of such common conduct on their part and while carrying out such common purpose and intent, an altercation arose on account of the carrying out of such common conduct in which Elmore Brown was shot and killed by either one of the persons so engaged, the defendant, Percy Spear, being present aiding and abetting in the acts and conduct aforesaid of his companion or companions, then each would be guilty of an unlawful homicide in some degree, and if the fatal injury was inflicted upon Elmore Brown with malice aforethought but without premeditation or deliberation, then the defendant would be guilty of murder in the second degree, and if the fatal injury was inflicted on Elmore Brown with malice aforethought and after premeditation and deliberation by either one of the three, then the defendant Percy Spear would be guilty of murder in the first degree, and if the fatal injury was inflicted without malice and without deliberation, but upon a sudden heat of passion caused by provocation apparently sufficient to make the passion irresistible, then the defendant would be guilty of manslaughter.

The instruction was challenged on the ground that felony-murder had not been charged. It was held to be correct for the following reason:

> *** The general rule is that all who join in a common design to commit an unlawful act, the natural and probable consequence of which involves the contingency of taking life, are responsible for a homicide committed by one of them while acting in pursuance or furtherance of the common design, although the homicide might not have been in contemplation of the parties when they conspired to commit the unlawful act, and although the actual perpetrator is not identified.

The court relied upon *Carr* v. *State,* supra, and elaborated upon the authority supporting the *Carr* rule. It was an Ohio

case, *Stephens* v. *State,* 42 Ohio St. 150, in which it was held that each of several associated to commit the crime of robbery was presumed to have intended to authorize the other to kill if it became a necessary means to the consummation of the crime. We said that the instruction, held correct under the indictment, made the crime charged murder in the first degree as to the three participants in the robbery, if the homicide was committed with malice aforethought, deliberation and premeditation by either one of the three. In that case the circumstantial evidence clearly indicated that the accused was inside the store where the robbery was committed at the time of the shooting and that the shot which killed the victim was fired outside the store by a participant who never entered the store, that the accused did not actually participate in the shooting and that the victim of the shooting was not the victim of the robbery. Under the rationale of that case, Spear would have been as much responsible for the assault upon the victim of the shooting if death had not ensued as he was for the killing. See also, *Turnage* v. *State,* 182 Ark. 74, 30 S.W. 2d 865.

The holding in *Boone* v. *State,* 176 Ark. 1003, 5 S.W. 2d 322 is to the same effect. Citing *Carr* as authority, we said:

> The general rule is that, where persons combine to do an unlawful thing, if the act of one, proceeding according to the common plan, terminated in a criminal result, though not the particular result meant, all are liable.***

It should be noted that a specific intent to kill was a necessary element of first degree murder with malice aforethought and after premeditation and deliberation, but not of felony-murder. *Tippett* v. *State,* 224 Ark. 981, 278 S.W. 2d 110; *Clark* v. *State,* 169 Ark. 717, 276 S.W. 849 (on rehearing). It is significant, however, that we have embraced the concept that an accomplice may be found guilty of first degree murder where specific intent is a required element, even though he did not intend to take life. This is a clear acceptance of the principle that the intent of the actor who commits an assault while engaged in the execution of a crime according to a common design may be imputed to his accomplices who entered into that design.

More importantly we have actually applied the principle of accomplice liability to a charge of assault with intent to kill. In *Lacy* v. *State,* 177 Ark. 1056, 9 S.W. 2d 314, the court refused to instruct the jury that the accused would not be guilty of assault with intent to kill unless he and his accomplice went to the place the victim was for the purpose of injuring or doing bodily harm to him. We affirmed, saying:

> *** If appellant and Sexton entered into a conspiracy to go to the Barnes home on an unlawful mission, which is conceded, and the act of one of them, proceeding according to the common plan, terminated in a criminal result, both would be liable, although not the particular result intended. *Boone* v. *State,* 176 Ark. 1003, 5 S.W. 2d 322. Therefore the above instruction did not correctly state the law in requiring the jury to find that they went to the Barnes home for the purpose of doing Davidson bodily harm or injuring him.

There was certainly sufficient evidence that the crime in which all three of the persons involved participated had not been terminated at the time the shooting took place. There is a unity of criminal action between the execution or attempted execution of a crime and the flight from the scene. *Commonwealth* v. *Kelly,* 337 Pa. 171, 10 A. 2d 431 (1940). Both the securing of the plunder and escape, where there are unities of time, manner and place, may be so immediately connected with a crime as to be a part of its commission. *People* v. *Walsh,* 262 N.Y. 140, 186 N.E. 422 (1933); *People* v. *Jackson,* 20 N.Y. 2d 440, 231 N.E. 2d 722 (1967), cert. den. 391 U.S. 928, 88 S. Ct. 1815, 20 L. Ed. 2d 668. The crime was still in progress so long as the essential ingredient of asportation continued. *Carter* v. *U.S.,* 96 U.S. App. D.C. 40, 223 F. 2d 332 (1955), cert. den. 350 U.S. 949, 76 S. Ct. 324, 100 L. Ed. 827. Any effort to escape with the loot was a furtherance of the common purpose of the participants here. *People* v. *Anthony,* 90 Cal. App. 2d 122, 202 P. 2d 776 (1949); *People* v. *Goree,* 30 Mich. App. 490, 186 N.W. 2d 872 (1971). The underlying crime is not complete when some of the joint conspirators are in possession, but not in absolute control, of the stolen property. *Commonwealth Heinlein,* 256 Mass. 387, 152 N.E. 380 (1926). The crime continues until the thief has unmolested dominion over the stolen property and not before. *State* v. *McCarthy,* 160

Or. 196, 83 P. 2d 801.

On the question of termination of a crime, the Pennsylvania Supreme Court, in *Commonwealth* v. *Kelly,* supra, has aptly said:

> It is a legitimate assumption that one who plans a robbery or burglary and by an overt act attempts to carry it out has also planned to escape from the scene of his crime. He must intend to make his felonious venture successful and it cannot be successful until he has made his escape. Even though, as here, the felon was frightened away before obtaining any plunder, his escape remains as part of his felonious design. His commission or attempted commission of the felony and his flight are but integrated parts of a single campaign in his war against society. The same malice that motivated his commission or attempted commission of the felony attended him in his flight. ***

Even if it could be said that the crimes of burglary and larceny were both complete in the sense that all three of the persons who participated could have been prosecuted and convicted of both crimes at the time Lisenby was arrested, the criminal enterprise was not terminated so that each conspirator was no longer responsible for the acts of his confederates. *Commonwealth* v. *Dellelo,* 349 Mass. 525, 209 N.E. 2d 303 (1965); *State* v. *Turco,* 99 N.J. Law 96, 122 A. 844 (1923). It has been held that a shooting done two minutes after a robbery, which was apparently done for the purpose of preventing detection, was part of a continuous assault lasting from the robbery to the shooting. *State* v. *Williams,* 28 Nev. 395, 82 Pac. 353 (1905). There must be an appreciable interval between the termination of the crime and the shooting and it must show a detachment from criminal enterprise. *Commonwealth* v. *Dellelo,* supra. See also, *Commonwealth* v. *Kelly,* supra. Whether the crime or attempted crime has been completely terminated is usually a question of fact for the jury to be viewed objectively, and its end is marked by what is done, rather than what is thought. *Commonwealth* v. *Dellelo,* supra; *People* v. *Walsh,* supra; *Payne* v. *State,* 81 Nev. 503, 406 P. 2d 922 (1965), cert. den. 391 U.S. 927, 88 S. Ct. 1826, 20 L. Ed. 2d 666; *Carter* v. *U.S.,* supra; *People* v. *Jackson,* supra. The

authorities from other jurisdictions on the question of termination of the crime are completely harmonious with our own decisions cited and quoted earlier.

In treating the problem of determining when the underlying felony has been terminated, in applying the felony-murder doctrine, the courts have generally spoken in terms of the res gestae of the crime. *Payne* v. *State,* supra; *State* v. *Turco,* supra. The res gestae of the crime begins when an indictable attempt is reached and ends where the chain of events between the attempted crime or completed felony is broken with that question usually being a fact determination for the jury. *Payne* v. *State,* supra. There is no distinction to be made between a case where the charge is assault with intent to kill and a felony-murder case insofar as questions pertaining to termination of the crime and the withdrawal of a participant are concerned. The only room for distinction, other than death of the victim, is the requirement of specific intent on the part of someone when the charge is assault with intent to kill.

There was ample evidence that the shooting by appellant's accomplices was an integral part, the res gestae and a continuation of the crime of burglary and larceny.

A principal in the crime is responsible for all the natural or probable consequences that flow from the common purpose. *Johnson* v. *State,* 9 Md. App. 37, 262 A. 2d 325. See also, *Turnage* v. *State,* 182 Ark. 74, 30 S.W. 2d 865; *Johnson* v. *State,* 252 Ark. 1113, 482 S.W. 2d 60; *Bosnick* v. *State,* 248 Ark. 846, 454 S.W. 2d 311. Our own cases clearly indicate that an accomplice is criminally responsible for acts of his confederate in the execution of the crime which follow directly and immediately in the execution of the common design as one of its natural and probable consequences.

Co-conspirators in a dangerous criminal enterprise, such as larceny, should expect that in the event they are detected in the theft, violence endangering life or limb may ensue and, in contemplation of law, whatever is done by one, is done by all and all are equally responsible. *Hamilton* v. *People,* 113 Ill. 34 (1885). One who enters into such a design must be presumed to have understood the consequences which might reasonably be expected to flow from carrying it into effect and

to have assented to the doing of whatever would reasonably or probably be necessary to the accomplishment of the objects of the conspiracy. *McMahon* v. *People,* 189 Ill. 222, 59 N.E. 584 (1901). It is not essential to the criminal liability of one who confederates or combines with others for the acts of all those who participate with him in the execution of the unlawful design that the acts be a part of the original plan, if the act on which liability is asserted is one of the probable consequences of the illegal purpose in which they did join. *Commonwealth* v. *Dellelo,* 349 Mass. 525, 209 N.E. 2d 303 (1965). Certainly the jury was justified in believing that what did happen was a natural and probable consequence of the burglary and larceny.

The question whether one of the participants in a crime has withdrawn from the criminal enterprise so that he is no longer responsible for the acts of other participants is usually a question of fact. See *Commonwealth* v. *Dellelo,* supra. There can be no effective withdrawal by one of multiple participants in a crime unless it is shown, not only that he determined that he would go no further with the criminal enterprise, but that he also communicated that decision to his confederates in sufficient time that they, too, might abandon the undertaking. *Commonwealth* v. *Dellelo,* supra; *Commonwealth* v. *Green,* 302 Mass. 547, 20 N.E. 2d 417 (1930). We have held that a conspirator cannot withdraw from the crime planned by a mere mental process of which one perpetrating the crime is unaware, but that he must communicate his withdrawal to the perpetrator. *Karnes* v. *State,* 159 Ark. 240, 252 S.W. 1. There is no evidence that Lisenby either withdrew from the criminal enterprise or that he communicated or attempted to communicate, any withdrawal or attempt to withdraw from the crime.

The mere fact that a participant in a crime has been arrested does not relieve him of responsibility for the acts of others associated with him in the criminal enterprise. See *People* v. *Walsh,* 262 N.Y. 140, 186 N.E. 422 (1933). Such an act is far from being voluntary. In a case involving a robbery and a kidnapping for the purpose of robbery, the conviction of one of the participants of assault with intent to commit murder was sustained, even though he fired no shots at the police officer assaulted, and was lying on the ground during the firing

and remained there until he was handcuffed. *People* v. *Beaumaster,* 17 Cal. App. 3rd 996, 95 Cal. Rptr. 360 (1971). The court said:

> *** Beaumaster claims that he withdrew from any conspiracy by submitting to a search and by his general cooperation with the police when stopped. A defendant's failure to continue previously active participation in a conspiracy is not enough to constitute withdrawal; there must be an affirmative and bona fide rejection or repudiation of the conspiracy communicated to the co-conspirator. *** A failure to complete a crime because of threatened arrest or the appearance of the police is not such a free and voluntary act as to constitute an abandonment. *** Each member of the conspiracy is liable as such for the acts of any of the others in carrying out the common purpose, i.e., all acts within the reasonable and probable consequences of the common unlawful design. Liability extends to acts unintended or even actually forbidden by a co-conspirator. *** Defendant did not communicate any withdrawal to his partner in crime. He was apprehended by the police, and his "abandonment" (if it can be so classed) was not voluntary. He, in fact, handed the gun to Chapman, and the probable consequences of this act are chargeable to Beaumaster. We cannot find that there was insufficient evidence to sustain Beaumaster's conviction of assault with intent to commit murder (omitting citations only).

The fact that an accomplice actually fired the shot does not make the evidence insufficient to support an assault with intent to kill conviction of an accused who participated in the underlying crime. *Johnson* v. *State,* 9 Md. App. 37, 262 A. 2d 325 (1970); *People* v. *Anthony,* supra; *McMahon* v. *People,* supra. See also, *Hamilton* v. *People,* supra.

Upon the rationale of rules governing accomplice liability, a participant may be found guilty of an assault with intent to kill when his armed accomplice seeks to take the life of a victim of the crime or an officer when the crime is discovered or in an attempt to escape, even though the assault was not a part of the original plan and there is no evidence that the participant charged had the intent to kill the officer or victim.

*McMahon* v. *People,* supra.

It seems to me that the majority has erroneously concluded that the original crimes of burglary and grand larceny had come to an end. Otherwise, they could not distinguish *Bosnick* v. *State,* 248 Ark. 846, 454 S.W. 2d 311. This might be done by a jury, but it cannot be sustained as a matter of law. I daresay not one of my brethren of the majority would hesitate to say the evidence was sufficient if Lisenby had been arrested with the loot in the "pro" shop, his companion had taken flight and the shooting had commenced immediately. Yet, there really is no difference in that situation and this.

Cases cited in the majority opinion afford no basis for distinction. Neither accomplice liability nor res gestae arose in *Jones* v. *State,* 89 Ark. 213, 116 S.W. 230. In *Warren* v. *Commonwealth,* 333 S.W. 2d 766 (Ky., 1960), the accused actively took steps to protect the victim. In *Slim & Shorty* v. *State,* 123 Ark. 583, 186 S.W. 308, the assault was committed in resisting an arrest for crimes committed at a different time and place and the evidence showed that the arresting officers had not sufficiently identified themselves before presenting their weapons, making an issue as to self-defense. *State* v. *Walters,* 105 Or. 662, 209 P. 349 (1922) falls into the same category. A homicide or assault in resisting arrest for crimes committed at other times and places is hardly the natural and probable consequence of those crimes.

I cannot agree with the Chief Justice that the judgment should be reversed because of the court's instruction No. 5.

Appellant admits that the first paragraph of the instruction given is correct. He then argues that the words "their victim" in the first sentence of the second paragraph constituted a prohibited comment on the evidence. If this was so, it could easily have been corrected if the court's attention had been called to the matter. The question cannot be considered for the first time on appeal. Appellant also argues here that the words, "then each of the defendants, being present, aiding and abetting the acts and conduct aforesaid, would be guilty of an unlawful assault" constituted a comment on the evidence. I simply do not see how this can be so considered. Appellant theorizes that because Norton was a principal, not

an accessory, and the court told the jury by this language that Lisenby was an accessory, it was a comment on the evidence. This the instruction does not do and it is difficult for me to see how it can possibly be so read. Nowhere did the court tell the jury that Lisenby was present, aiding and abetting the acts and conduct of Norton. Here again, this objection is made for the first time on appeal. No party was in anywise prevented from offering any objection he wanted to make to any instruction. The trial judge specifically afforded an opportunity to the parties to make objections to the instructions.

The only other argument made here goes to an objection that was made, i.e., that Lisenby personally must have had the specific intent to kill at the time the assault was made. In my view, this is a fallacious argument as set out in the first part of this opinion and the instruction was not erroneous in that respect. The only remaining objection made in the trial court, aside from a general objection which we do not consider, was to the omission of a requirement that the jury find a specific intent to kill and to the denial of a verbal request that the jury be instructed,

> . . . . . that when two persons are proceeding according to a common plan, that if they detour or terminate, if they detour from their original plan and a specific intent crime is committed by one of the other parties, the second party must have some knowledge of that intent or knowledge that the other defendant is capable, has the capacity to develop that intent.

The ground upon which the Chief Justice bases his finding of error was not argued by the appellant on appeal. Objections not argued on appeal are waived. *Roach* v. *State,* 255 Ark. 773, 503 S.W. 2d 467. See *In re Briefing of Criminal Cases,* 234 Ark. 846, 354 S.W. 2d 740.

I should note that the court's instructions did include the following:

> *** Before the defendants can be convicted of assault with intent to kill, you must find that the defendants committed a willful assault with malice aforethought upon another with the specific intent to murder or kill

> that person. Malice and intent to kill may be inferred from acts and circumstances of the assault such as the use of a deadly weapon in a manner indicating an intention to kill or an act of violence which ordinarily would be calculated to produce death. You may properly consider the character of the weapon employed, the way it was used, the manner of the assault, the violence attendant thereon, and all other facts and circumstances tending to reveal the state of mind of the defendants.
>
> In considering these instructions and in deliberating and voting on your findings, you will bear in mind that these defendants are charged here as individuals and you must determine the guilt or innocence of each separately. Accordingly, you must make separate findings as to each defendant.
>
> In this connection, you are also charged that it is not necessary that you reach the same verdict for each defendant. You may find one or more innocent while at the same time finding the other guilty, your verdict being controlled only by the evidence and these instructions.

Thus, even assuming that appellant's request is a correct statement of law, the jury, in the light of the instructions given was not totally deprived of guidance on the fact issues presented. In any event, this was not such an error as would justify our treating the case, on appellate review, as we do those cases wherein the death penalty or life imprisonment is the punishment imposed. In order to reverse this case for the failure of the circuit judge to instruct the jury as appellant requested, we would have to do so.

I would add that the fact that appellant's requested instruction was not made in writing is of no significance whatever. The request was made and denied. There was still a waiver here.

I recognize that other points for reversal have been asserted but time and space limitations make it inadvisable that I treat them. Suffice it to say that I find no reversible error and would affirm the judgment.

G. L. GLOVER et al *v.* Maxine RUSSELL et al

76-312 542 S.W. 2d 751

Opinion delivered November 8, 1976
(In Banc)

*Lee A. Munson,* Pros. Atty., 6th Judicial Circuit, by: *William H. Trice III,* for appellants.

*John T. Harmon,* for appellees and cross-appellants.

CONLEY BYRD, Justice. This election litigation arises as a result of a local option petition filed with the Pulaski County Clerk on September 8, 1976, for a wet or dry election in Precinct 180A at the general election to be held on November 2, 1976. The Special Chancellor invalidated the petitions because they were not filed more than 60 days before the election. Appellants G. L. Glover, Sharon Cissell and Dr. Joel Anderson, as members of the Board of Election Commissioners of Pulaski County and Charles F. Jackson as Clerk of Pulaski County appeal contending that there is no mandatory filing deadline for local option petitions filed pursuant to Ark. Stat. Ann. § 48-801. Appellees Maxine Russell,

Russell's Liquor, Inc., M. C. Garrison and N. G. Mitchell cross-appeal contending that the Special Chancellor erred in holding that Precinct 180A was a valid, legal and established precinct of Pulaski County.

Both the appellants and appellees recognize that a local option election is not an initiative petition under the initiative and referendum provisions of Amendment No. 7 to the Arkansas Constitution. Yet both the appellants and appellees rely upon dictum from our decision in *Armstrong* v. *Sturch,* 235 Ark. 571, 361 S.W. 2d 77 (1962), to support their respective positions on the direct appeal issue. The sole issue involved in *Armstrong* v. *Sturch, supra,* was whether local option petitions filed on July 23, 1962, prior to the general election on November 6, 1962, had been filed too early. In construing Acts 1955, No. 15, we held that the petitions had been filed within the time prescribed by law. Here, however, the issue on the direct appeal is whether the petitions filed on September 8, 1976, were filed too late for the general election to be held 55 days later on November 2, 1976.

To understand how this problem arises, we must first consider Init. Meas. 1942, No. 1, § 1, Acts 1943 [Ark. Stat. Ann. § 48-801 (Repl. 1964)], which permitted 15% of the qualified voters to petition the county court for a wet or dry election. That act required the county court to hold a public hearing within 10 days to determine the sufficiency of the petitions. That provision directed the county court to order a special election not earlier than 20 days nor later than 30 days following the public hearing. Provision was also made for the time of taking an appeal from the county court to the circuit court, Ark. Stat. Ann. § 48-804.

After some experience with the provision for special local option elections, the General Assembly by a two-thirds vote adopted Acts 1955, No. 15 [Ark. Stat. Ann. §§ 48-824 and 48-825 (Repl. 1964)]. Section 1, thereof, required local option elections to be held only on the regular biennial November general election days. Section 2 of the Acts 1955, No. 15 [Ark. Stat. Ann. § 48-825] provides:

> "Every petition for a local option election shall be prepared in accordance with Initiated Act No. 1 of 1942,

*and it shall be filed,* and the subsequent proceedings thereupon shall be had and conducted, *in the manner provided for county initiative measures by Initiative and Referendum Amendment No. 7 to the Constitution of Arkansas and enabling acts pertaining thereto.*" [Emphasis ours].

The time table for the filing and processing of petitions on county initiative measures is controlled by Amendment No. 7, to the Constitution of Arkansas and the enabling legislation pertaining thereto, Acts 1935, No. 4 [Ark. Stat. Ann. §§ 2-301 — 2-314 (Repl. 1976)]. Amendment No. 7 provides that " . . . In municipalities and counties the time for filing an initiative petition shall not be fixed at less than sixty days . . . before the election at which it is to be voted upon." After the filing of the petitions Ark. Stat. Ann. § 2-303 gives the county clerk 10 days to certify the sufficiency or insufficiency of the petitions. If the clerk certifies the petitions insufficient, the petitioners pursuant to Ark. Stat. Ann. § 2-309 are given 10 days to obtain additional signatures or to submit proof to the clerk on rejected signatures and the clerk thereafter has another 5 days to certify as to the sufficiency or insufficiency of the petitions. Ark. Stat. Ann. § 2-310 thereafter gives to any taxpayer 15 days to petition the chancery court for review of the clerk's certification. Ark. Stat. Ann. § 2-311 then requires the chancery court to hold a hearing within 10 days. When viewed from the perspective of handling the requirements for certifying and contesting of petitions filed pursuant to the Enabling Act for initiative measures, one can readily understand that the process is expected to take as much as 50 days.

If we should accept the appellants' position that Ark. Stat. Ann. § 48-825 does not fix a deadline for local options, then of course there is no reason why petitions filed only 30 days before the election would not also be filed within the time allowed by law, yet there would not be sufficient time for the county clerk after making his certification to give his notice of publication for two consecutive weeks as required by Ark. Stat. Ann. § 2-307, not to say anything about the rights of aggrieved taxpayers to review the clerk's findings. Of course, if the clerk should certify the petitions insufficient, then under the appellants' contention the chancery court would not be required to act until the election would be over.

We do not believe the General Assembly intended any such absurd procedural results. Rather we interpret Ark. Stat. Ann. § 48-825, *supra,* in its grammatical sense as providing that every petition for a local option election " . . . shall be filed . . . in the manner provided for county initiative measures . . . " — *i.e.* at least 60 days before the general election. It follows that the Special Chancellor properly invalidated the petitions here filed 55 days before the general election.

With reference to the validity of the establishment of Precinct 180A we must consult Acts 1969, No. 465, Art. 6, § 1 [Ark. Stat. Ann. § 3-601 (Repl. 1976)], which after empowering the County Election Commissioners to alter and establish election precincts, provides:

> "The action of said commissioners . . . in altering the boundaries of any precinct, or in establishing any new one, shall be entered in the record to be kept by them, and a copy of said order shall set out intelligently and accurately the boundaries of said precincts as so altered or established, shall be filed with the Clerk of the County Court who shall record the same at full length on the record book on which the minutes of the proceedings of the County Court are recorded. . . . "

The only record for the establishment of Precinct 180A is shown by the minutes of the meeting of the Pulaski County Election Commission under date of October 8, 1974. Those minutes which were not filed for record with the county court until just immediately before the trial of this case provide:

> "Commission Attorney Tom Tanner read the court order from Judge Warren Wood ordering the placing of both the Sherwood Annexation and North Little Rock Annexation proposals on the November 5, 1974 General Election Ballot and ordering County Clerk Charles Jackson to notify the affected voters. There were to be no precinct boundary changes, but to set up provisions to allow the proper voters to vote on the questions. A copy of the court order attached.
>
> Chairman Mears made the motion to set up the precincts in question; draw a hypothetical and

geographical line to accommodate the Sherwood Annexation Proposal. One part of the line will remain its presently designated number, the other part will have the designation 'A' added. Those voters in Precincts 180A, 204A, 205A and 215A are to be notified by the County Clerk that the designation is for the November 5, 1974 Election *only*; Those areas designated 'A' are the parts of Hill Township proposal to be annexed to Sherwood."

The circuit court order signed by Judge Warren Wood and attached to the minutes of the County Election Commission does not contain a description.

Obviously the foregoing minutes of the Board of Election Commissioners do not intelligently and accurately set out the boundaries of Precinct 180A in the manner required by Ark. Stat. Ann. § 3-601 (Repl. 1976). Furthermore, the Precinct 180A by the minutes of the Board of Election Commissioners existed *only* for the 1974 election. Consequently, it follows that the Special Chancellor erred in holding that Precinct 180A was a valid, legal and established precinct of Pulaski County.

Affirmed on direct-appeal and reversed on cross-appeal.

Willard JOHNSON and Judith ROSENKRANTZ
*v.* Robert MUNGER

76-321 542 S.W. 2d 753

Opinion delivered November 8, 1976
(In Banc)

*Kenneth L. Schorr,* for appellants.

*Rose, Nash, Williamson, Carroll, Clay & Giroir,* for appellee.

FRANK HOLT, Justice. The only issue on appeal is whether there was sufficient compliance with the notice requirement of § 19.2 of the Little Rock City Code to allow a proposed initiated measure, Lifeline Electric Rates Ordinance, to be placed on the November 2, 1976, ballot. The chancellor held there was a substantial compliance with the publication requirements. However, the court felt constrained to hold the publication was insufficient because, when enforcement of election laws is sought before the election, a strict compliance is mandatory. Consequently, the measure should be removed from the ballot. Appellants contend for reversal that a substantial compliance is sufficient.

It is true that in some election contests we have held all provisions of the election laws are mandatory if enforcement is sought before election in a direct proceeding for that purpose and, generally, after election all should be held directory only in support of the result. *McKenzie* v. *City of Dewitt,* 196

Ark. 1115, 121 S.W. 2d 71 (1938); *Phillips* v. *Rothrock,* 194 Ark. 945, 110 S.W. 2d 26 (1937); *Cowling* v. *City of Foreman,* 238 Ark. 677, 384 S.W. 2d 251 (1964). However, strict compliance of the notice of publication has never been required where to do so would place it in the power of a ministerial officer to prevent the holding of a legal election. *Hildreth* v. *Taylor,* 117 Ark. 465, 175 S.W. 40 (1915); and *Wheat* v. *Smith,* 50 Ark. 266, 7 S.W. 161 (1887).

§ 19.2 *supra,* provides, in pertinent part, that after the city clerk determines the sufficiency of any initiative petition filed with that official "[t]hen the city clerk shall report his final finding to the board of directors, and if it be ascertained that such petition is signed by the requisite number of electors, said directors shall direct the city clerk to publish for one time, not less than thirty (30) days prior to the municipal election, in some newspaper having a general circulation in the municipality the full text of the proposed measure to be submitted to a vote of the people. . . ."

Here, it appears undisputed that appellants filed their initiated petition with the city clerk on September 1, 1976, or 62 days before the November election. Amendment No. 7, Arkansas Constitution (1874), prescribes the time frame for filing the petition as being not more than 90 nor less than 60 days. The provisions of § 19.2, *supra,* are derivative of our Amendment No. 7, our Initiative and Referendum Amendment.

The proposed measure here was published by appellants themselves on October 2, 1976, which was within the required 30 day limitation. However, the publication by the city clerk, as required by § 19.2, *supra,* was October 8, 1976, or 25 days before the election. With respect to Amendment No. 7, we have long accorded a liberal interpretation to that Amendment. In *Coleman* v. *Sherill,* 189 Ark. 843, 75 S.W. 2d 248 (1934), the sufficiency of the ballot title of a local initiated act was questioned before the election. In ordering the proposed measure placed on the ballot, we said " . . . Amendment No. 7 contemplates a liberal construction and, if substantially complied with, the proposition should be submitted to the vote of the electors." In *Reeves* v. *Smith,* 190 Ark. 213, 78 S.W. 2d 72 (1935), an action challenging the sufficiency of

the initiative petitions was instituted before the election. In upholding the sufficiency of the petitions, we said:

> Amendment No. 7 necessarily must be construed with some degree of liberality, in order that its purposes may be well effectuated. Strict construction might defeat the very purposes, in some instances, of the amendment.

In *Leigh* v. *Hall,* 232 Ark. 558, 339 S.W. 2d 104 (1960), there was an action brought before the election alleging the publication of an initiative proposal was not within the time frame. The petitions were filed on various dates. We found the publication sufficient by selecting a filing date that would validate the measure. We said:

> This court is definitely committed to the proposition that Amendment Seven should be liberally construed to effectuate its purpose.

There we again recognized:

> Strict construction might defeat the very purposes, in some instances, of the amendment. **** 'A realization that behavior and conduct in all affairs of life is never perfect, requires due allowances must be made for human frailties. Therefore only a substantial compliance is required.'

Accordingly, in the case at bar, we apply the rule of liberal construction since this is an initiated measure.

Here, on the record presented, it appears that the initiated petition was filed 62 days before the election date or within the permissible time frame. Thirty days before the election the appellants themselves published "the full text of the proposed measure" for the adoption or rejection by the voters on November 2, 1976. Five days later, or 25 days before the election, the city board of directors published exactly the same proposed ordinance to be voted upon November 2, 1976. We note, however, that it is conceded the city clerk was not at fault nor derelict in her duties in any manner. The substance of the two publications is substantially identical even to the extent that both indicate that the voters would have an

opportunity to approve or reject the measure at the general election. We hold there was substantial compliance with the publication requirement.

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

Reversed and remanded.

Bobby HOLLAND *v.* STATE of Arkansas

CR 76-95 542 S.W. 2d 761

Opinion delivered November 8, 1976
(In Banc)

[redacted]

*Wilson & Wilson,* by: *Ralph Wilson Jr.,* for appellant.

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

FRANK HOLT, Justice. Appellant was convicted by a jury of the sale of marijuana in violation of Ark. Stat. Ann. § 82-2617 (Supp. 1975). This was the third trial of a marijuana sale by the same jury panel within three days. Each case involved different defendants. However, the same prosecuting witness, Richard Lott, an undercover officer, was the principal state witness in each case. Immediately before appellant's trial, he moved for a continuance on the grounds that some of the jurors, because of the guilty verdicts in the two previous trials, had prejudged the credibility of the prosecuting witness. The motion was denied. Appellant then challenged for cause those persons who had served on the two preceding cases. These challenges were denied by the court whereupon appellant exhausted his peremptory challenges. Appellant contends on appeal that the trial court erred in its refusal to grant him a continuance and in not granting his challenges for cause.

The thrust of appellant's argument is that since several jurors in his case had previously sat on juries which convicted defendants based on the testimony of Lott, the state's main witness in all three cases, he was denied his constitutional rights of an impartial jury and due process of law because appellant's jury had prejudged Lott's credibility. Defendants in the two previous cases were assessed $2,000 fines and five year prison sentences. Here, the jury assessed appellant's punishment at seven years' imprisonment and a $1,000 fine.

Appellant first invokes Ark. Stat. Ann. § 43-1920 (Repl. 1964), which provides that a challenge for implied bias is proper when it is shown that a prospective juror has "served on a trial jury, which has tried another person for the offense charged in the indictment." We have held adversely to appellant's argument that this statute is applicable in the case at bar. *Hall* v. *State,* 125 Ark. 263, 188 S.W. 801 (1916);

and *Sorrentino* v. *State,* 214 Ark. 115, 214 S.W. 2d 517 (1948). See also 47 Am. Jur. 2d Jury § 309. In *Hall* we held:

> The mere fact that the jurors had served in another case in which the defendant and others had been indicted would not disqualify them as jurors in the present case; and in order to sustain the exception, it devolved upon the defendant to show affirmatively that the jurors had served in another case which disqualified them from serving in the present case. **** The presumption is, until the contrary appears, that they were not disqualified by prejudice or otherwise.

In *Sorrentino* we said:

> The juror was not incompetent merely because he had served at the trial of some other defendant charged with an offense of the same character as that charged against appellant.

However, appellant vigorously argues the better view is that a defendant is denied an impartial jury whenever a jury, which convicts him, is selected from the same jury panel which has decided cases involving the same government witness or witnesses in a similar, although separate, transaction. As persuasive authority, appellant relies upon *Priestly* v. *State,* 19 Ariz. 371, 171 P. 137 (1918); *State* v. *Hammon,* 84 Kan. 137, 113 P. 418 (1911); *Temple* v. *State,* 15 Okl. Cr. 176, 175 P. 733 (1918); *Scrivener* v. *State,* 63 Okl. Cr. 418, 75 P. 2d 1154 (1938). See also 3 A.L.R. 1201 and 160 A.L.R. 732 and the dissenting view at p. 619 in *Casias* v. *United States,* 315 F. 2d 614 (10th Cir. 1963), cert. denied 374 U.S. 845.

However, our U.S. 8th Circuit Court of Appeals has addressed itself to this subject. In *U.S.* v. *Williams,* 484 F. 2d 176 (1973), it was held that the two defendants there were not denied an impartial jury merely because it was the seventh consecutive jury that had been selected from the same jury panel involving the same government witnesses. There, as here, the court conducted an extensive voir dire of the jury and no juror indicated that he could not serve as an unbiased and impartial juror. Further, here appellant's counsel addressed the jury on the subject of impartiality after ex-

hausting his challenges and no juror indicated actual or implied bias. In *Williams* the court said:

> At the most the challenge must rest entirely on a *per se* theory of implied bias. This Court rejected a like argument in *Johnson* v. *United States,* 484 F. 2d 309 (8th Cir. 1973), and prior federal cases are uniformly to the same effect. **** As this Court stated in *Johnson, supra,* we do not endorse the procedure followed here as being preferred or the most desirable. Still we cannot say that its use is reversible error in the absence of some showing of actual prejudice.

Here, as indicated, according to the record, neither the voir dire by the court nor the defense counsel's query to the jury established any bias or prejudice on the part of any member of the jury. Furthermore, it is well established that our constitutional guarantee of an impartial jury is a judicial question which is addressed to the sound discretion of the trial court. *Lane* v. *State,* 168 Ark. 528, 270 S.W. 974 (1925); and *Montaque* v. *State,* 219 Ark. 385, 242 S.W. 2d 697 (1951). Also the refusal of a motion for a continuance is within the sound discretion of the trial court. *Perez* v. *State,* 236 Ark. 921, 370 S.W. 2d 613 (1963). In the case at bar appellant has not demonstrated a manifest abuse of the discretionary authority which is accorded the trial court. However, as aptly said in *Williams, supra,* "[A]s this Court stated in *Johnson, supra,* we do not endorse the procedure followed here as being preferred or the most desirable." Consequently, we do not foreclose the possibility that an abuse of discretion could be shown in other cases.

Neither can we agree with appellant that the credibility of the government witness is a question of fact within the meaning of Ark. Stat. Ann. § 39-105 (Supp. 1975), which disqualifies a petit juror who has served in a previous case "involving any of the same questions of fact." Here it was for the jury at each trial to determine Lott's credibility in the separate transactions which involved different defendants. Therefore, his credibility was not the "same" question of fact in each case.

Affirmed.

BYRD, J., dissents.

John BAKOS, Kenneth BAKOS and Ronald BAKOS, Heirs at Law of Mayme (May) Bakos GAFFNEY, Deceased *v.* William Howard KRYDER and Raymon LEDWIDGE, Co-executors of the Estate of Mayme (May) Bakos GAFFNEY, Deceased

76-103 543 S.W. 2d 216

Opinion delivered November 8, 1976
[Rehearing denied December 13, 1976.]

*Harry E. Cook Jr.* and *Ray S. Smith Jr.*, for appellants.

*Evans, Farrar, Patterson & Farrar,* for appellees.

ELSIJANE T. ROY, Justice. Mayme (May) Bakos Gaffney, a resident of Garland County, died testate on July 16, 1972. Her will, dated January 31, 1972, and an instrument purporting to be a holographic codicil[1] were duly admitted to probate, and William Howard Kryder and Raymon Ledwidge, the designated co-executors, qualified and were duly appointed.

[1]The codicil is not at issue herein.

The will provided for numerous charitable dispositions and the establishment of a fund, known as the Bakos Fund, for the benefit of certain children in the Hot Springs Children's Home. Appellants, the sole heirs at law of decedent, filed a petition for construction of the will alleging for various reasons the Bakos Fund and bequests were illegal and that consequently a large part of the estate must pass by intestacy to them. The probate court held the bequests involved were valid and that the fund established by decedent constituted a charitable trust for the benefit of the intended recipients.

As to the bequests appellants contend there is no language in the will signifying that the testatrix intended that *any* portion of her estate should be paid to the named organizations. This contention is answered by a mere reading of pertinent parts of the will.

> I. I hereby constitute Rev. Wm. Kyrder and Raymon Ledwidge to be co-executors of this my Last Will and Testament directing my said co-executors to *pay* all my just debts and funeral expenses, and *the legacies hereinafter given*, out of my estate [italics supplied].
>
> II. Hot Springs Children's Home:-5%
>
> III. Good Shepherd's Children's Home, Hot Springs, Arkansas:-5%
>
> IV. Hillcrest Children's Home, Hot Springs, Arkansas:-5%
>
> V. Little Rock Crippled Children's Home, Little Rock, Arkansas:-5%
>
> VI. Shriners Crippled Children's Home:-5%
>
> VII. Salvation Army, Hot Springs:-2%
>
> VIII. Abilities Unlimited:-2%
>
> IX. Heart Fund:-2%

X. Cancer Fund:-2%

XI. United Fund:-2%

As is evident the testatrix in Article I of the will directed that the "legacies hereinafter given" be paid out of the estate and then indicated the percentage each named organization was to receive.

The instruction to an executor to pay a legacy is indicative of a donative intent; the exact words "give and bequeath" are not necessary. See *Hamel* v. *Springle, Adm'r,* 237 Ark. 356, 372 S.W. 2d 822 (1963).

Furthermore, in construing a will we are mindful that:

> . . . [A] will should be given that construction which accomplishes the purposes and objectives of the testator and, further, that consideration must be given to every part of the will in ascertaining the testator's intentions. *Walt* v. *Bevis,* 242 Ark. 644, 414 S.W. 2d 863 (1967).

*Carroll* v. *Robinson, Executor,* 248 Ark. 904, 454 S.W. 2d 329 (1970). Thus there is no merit to this contention.

Appellants next contend the lower court erred in holding that the will created a valid charitable trust. Pertinent provisions of the will read as follows:

> XII. I hereby establish a fund to be called "The Bakos Fund." The co-executors of this Will are to pay each child, who departs from the Hot Springs Children's Home, $100.00 upon such departure when the child reaches the age of eighteen (18). This age of eighteen is to be flexible depending upon the recommendation of the manager of the children's home and the agreement of my co-executors. The departing child must be of good character. If the departing child, in his struggle to improve himself and to find a proper place for himself in society, is in need of an additional $100.00, then the co-executors shall pay the $100.00 to the said child if, in their judgment, it would be a prudent step to take.

> XIII. The last hereinabovementioned procedures shall be continued *until all of the funds of my estate have been depleted* or until the estate must be closed in accordance with the laws of Arkansas regarding the number of years that an estate is permitted to be kept open [italics supplied]. If it does become necessary to close the estate, while there are still funds therein, Rev. Wm. Kyrder and Raymon Ledwidge shall become co-trustees of my savings account at First Federal Savings and the disbursements to the children departing the Hot Springs Children's Home shall be continued until the Bakos Fund, in the form of a savings account at First Federal Savings is depleted. * * *

Appellants argue as to these foregoing provisions that the class of recipients created is so indeterminable that none of the class members can be ascertained with the legal certainty necessary to create a valid trust. We cannot agree. The fact that the class is indefinite in the sense that it lacks specifically designated beneficiaries does not invalidate a charitable trust. As long ago as *McDonald* v. *Shaw,* 81 Ark. 235, 98 S.W. 952 (1906), this Court in speaking of charitable trusts, quoting from the case of *Russell* v. *Allen,* 107 U.S. 163, 2 S. Ct. 327, 27 L. Ed. 397 (1882), said:

> . . . "They may, and indeed, must, be for the benefit of an indefinite number of persons; for, if all the beneficiaries are designated, the trust lacks the essential elements of indefiniteness, which is one characteristic of a legal charity."

Continuing the Court quoted 2 Perry on Trusts, § 732, as follows:

> ". . . Uncertainty as to the individual beneficiaries is characteristic of a charitable use."

See also Restatement (Second) of Trusts, § 364 (1959) and 15 Am. Jur. 2d Charities, § 93 (1964). Here no uncertainty inheres in the class designated by the Fund. The discretion left to the appellees, co-trustees of the Fund, is confined to selecting qualified recipients from within a class certain, and we conclude that the class defined by the Fund does not fail for

lack of specificity.

Appellants also contend, under this same argument, that the Fund lacks a charitable purpose, that there is no guarantee the children in the Home are all impoverished, and that it contravenes the rule against perpetuities. The record reflects most of the children are from homes that are impoverished and all are there because of unfortunate circumstances. Furthermore, as heretofore indicated, disbursements are left in part to the discretion of the co-trustees.

Restatement (Second) of Trusts, § 374 (1959), provides:

> A trust for the promotion of purposes which are of a character sufficiently beneficial to the community to justify permitting property to be devoted forever to their accomplishment is charitable.

Continuing in this section we find:

> A trust to assist young men or women to establish themselves in life is charitable; . . . .

Relief of poverty is also a charitable purpose. See *McDonald* v. *Shaw, supra.* The Bakos Fund was established to pay $100 and possibly another $100 to the departing 18 year old resident as he left the home and to aid ". . . in his struggle to improve himself and find a proper place for himself in society, . . . . " This purpose is unquestionably beneficial to the community since society has a valid interest in the productive integration of its citizenry.

As to the rule against perpetuities, in *Garrett* v. *Mendenhall, Executor,* 209 Ark. 898, 192 S.W. 2d 972 (1946), the Court held that a devise to the trustees of a certain church is a devise creating a trust for charitable use for the benefit of an indefinite number of persons and does not fall within the rule against perpetuities. See also *Bisco* v. *Thweatt,* 74 Ark. 545, 86 S.W. 432 (1905).

The decedent's will instructed appellees that the payments therefrom were to be distributed "until the funds of my estate have been depleted or until the estate must be clos-

ed in accordance with the laws of Arkansas regarding the number of years an estate may remain open." Appellants insist that since there is no law in Arkansas specifying the number of years an estate may remain open, a condition precedent to the trust is not met. Ark. Stat. Ann. § 62-2802 (Repl. 1971) requires the personal representative to close the estate as promptly as practicable. Thus the provision of the will is in complete harmony with the statute. Restatement (Second) of Trusts, § 365 (1959) states:

> A charitable trust is not invalid although by the terms of the trust it is to continue for an indefinite or an unlimited period.

Accordingly, we find the trial court was correct in holding that the will creates a valid trust.

The court then found the trust was funded by the residuary estate of the testatrix after deduction of debts, expenses and the charitable bequests totaling 35% of the estate. Appellants argue this conclusion is erroneous and that the residuary estate must pass to them as heirs since no funding was provided by the will for the Bakos Fund.

In *Rufty* v. *Brantly,* 204 Ark. 32, 161 S.W. 2d 11 (1942), we noted a strong presumption against partial intestacy unless the language of the instrument compels a different result. See also *Bradshaw* v. *Pennington, Administrator,* 225 Ark. 410, 283 S.W. 2d 351 (1955).

Appellants contend that if the alleged charitable trust is found valid the funding must be restricted to the savings account in the First Federal Savings. We view the reference to a savings account at First Federal Savings as not being so restrictive. The intention of the testatrix is evidenced by the statement in Article XIII that the trust shall "continue until all of the funds of my estate have been depleted." Also, the testatrix directed that if funds remained in the estate when it was closed, the Bakos Fund was to be continued "in the form of a savings account" with appellees to be co-trustees to handle disbursements therefrom. Thus it is evident the intention of the testatrix was that the First Federal Savings account was to serve as a depository for the residue of

the estate pending distribution to the youth at the Children's Home.

As further indication of the testatrix's intent that residuary sums go to the Bakos Fund and not to any of her heirs we note the following provisions of the will:

> XVIII. I bequeath to my brother John and his daughter, Ellen Poat, share and share alike, as joint tenants with right of survivorship and not as tenants in common, all of my share in my sister's home *provided the home has not been sold and the proceeds divided prior to my demise* [italics supplied].
>
> XIX. I bequeath to each of my relatives, with my thanks, the sum of five and no/100 ($5.00) Dollars, *when as and if they make claims* [italics supplied].
>
> XX. My sincerest thanks and God's blessings to you two gentlemen whom I have named as my co-executors of this Will and *my co-trustees of my savings account at First Federal Savings which, after my death, and after the closing of my estate, is to be used for the benefit of the children departing from the Hot Springs Children's Home* [italics supplied]. You both have made my rough road here a little smoother and a little brighter and I know you both will try to make the road brighter for the aforementioned children who may be in need of a friend, as I was.

These provisions clearly reflect that the testatrix, contrary to appellants' assertions, did not intend that any part of her estate should pass intestate, but meant for all funds except the specific legacies to become a part of the charitable trust, as determined by the trial court.

Affirmed.

We agree. FOGLEMAN, BYRD and HOLT, JJ.

Henry ZGLESZEWSKI *v.* Carol ZGLESZEWSKI and Peter T. HORNE

76-120 542 S.W. 2d 765

Opinion delivered November 8, 1976

*Lawson E. Glover* and *David M. Glover,* of *Glover Law Office,* for appellant.

*Legal Aid Bureau of Pulaski County,* by: *Robert H. Wood Jr.* and *Gilbert L. Glover,* for appellees.

ELSIJANE T. ROY, Justice. Appellant Henry Zgleszewski and co-appellee Carol Zgleszewski married in 1971. Co-appellee Peter Horne was formerly married to Carol Zgleszewski, the marriage having been terminated by divorce in Pennsylvania in 1970. At that time she was awarded custody of the two children born during her marriage to Horne. Appellant filed a petition for adoption in July, 1975, requesting that he be allowed to adopt the issue of co-

appellee's earlier marriage.

In the petition appellant alleged that under Ark. Stat. Ann. § 56-106 (Repl. 1971) appellee Horne should be found to have abandoned his children. Appellee Carol Zgleszewski consented to her present husband's adoption of the children, but appellee Horne refused to give consent. Horne is presently imprisoned in the Pennsylvania State Prison as he was at the time of the filing of the adoption petition. The probate court held that Horne had not abandoned the children and consequently denied the adoption.

For reversal appellant contends that the decision of the trial court is against the preponderance of the evidence and that he is entitled to an order granting the adoption on grounds of abandonment. Appellant testified the children call him father and they engage in a number of recreational activities together. He further testified he wanted to adopt the children; he thought it was in their best interest for him to adopt them; he has a savings account; he has sufficient money to take care of them and meet their obligations and their expenses; he has done this since 1971 and can and will continue; he has ample life insurance; he and his wife have a child of their own; and he carries health and accident insurance on all three children where he works.

It is noted that the children had been living with appellant and had been supported by him for five years when he filed the petition for adoption. The children, he testified, go to church and both make straight A's in school, and there have never been any disciplinary problems at home.

Ark. Stat. Ann. § 56-106 (Repl. 1971) provides for the non-consensual adoption of a child under certain specified circumstances. Section 56-106 (a) and (b) (I) upon which appellant relies reads:

> Consent of parents or guardian. — (a) The adoption of a child shall not be permitted without the written consent verified by affidavit, of its parents or parent, if living, except as follows:
>
> (b) The consent of a parent or parents may be dispensed

with if the court, upon competent evidence, makes one of the following findings:

(I) The parent has abandoned the child for more than six [6] months next preceding the filing of the petition.

In any proceeding in which the custody of a child is involved the paramount consideration is the best interest of the child. *Richards* v. *Nesbitt,* 237 Ark. 888, 377 S.W. 2d 40 (1964); *Cotten* v. *Hamblin,* 234 Ark. 109, 350 S.W. 2d 612 (1961).

Carol Zgleszewski and Peter Horne were married in 1964. In 1967 Horne was imprisoned after having been found guilty on three charges of rape, and he admitted he would not be eligible for parole until January, 1978. His former wife testified she visited him regularly with the children until 1968 or 1969, but was forced to discontinue the visits after he became increasingly accusatory and abusive toward her. Mrs. Zgleszewski further stated that after appellant's confinement because of the necessity of caring for the children she was unable to work and had to go on welfare. Her testimony reflected that although her former husband held various jobs in prison, he did not send any money to her or the children nor did he communicate with the children by cards, letters, telephone calls or in any way.

After her divorce from Horne in 1970, Mrs. Zgleszewski moved to another town some four or five miles distant from where she and her former husband had lived. She maintained a cordial relationship with Horne's family, and the wedding reception for her marriage to appellant was held at the home of Horne's brother. The only time Horne saw his children subsequent to 1969 was for about five minutes at his father's funeral in December, 1973. In July, 1975, the Zgleszewskis moved to Arkansas and prior to this move notified Horne's family, but did not notify Horne directly of the move.

In Horne's interrogatories he stated he had communicated with his children until 1970, but not thereafter because he did not know their whereabouts. This reason lacks substantive basis since from 1970 until July, 1975, Mrs. Zgleszewski and her husband (appellant) lived only a short distance from her former home with appellee Horne. They

had a friendly relationship with her former husband's parents as well as his brother's family, and the Horne family was in frequent contact with Peter Horne. It is not unreasonable to suppose that normal parental love would impel Horne to ask them about the whereabouts of his children.

Appellee Horne admitted having saved some $1400 but did not use any of this in trying to contact or help his children. Nor did he indicate any intention to do so even though at the time of the trial he knew where they were living.

Our cases require that in order to show abandonment the evidence must indicate the parent deserted, forsook entirely, "or relinquished all connection with, or concern in," the child. *Walthall* v. *Hime,* 236 Ark. 689, 368 S.W. 2d 77 (1963). We are aware that imprisonment imposes an unusual impediment to a normal parental relationship. However, even when parenthood is disadvantaged by this unfortunate factor, one could still solicit visits from his children and contact them with cards, letters and small gifts if he did not have the means of support.

*In re Adoption of McCray,* Pa., 331 A. 2d 652 (1975), in which abandonment was the main issue the court, in granting the adoption, stated:

> . . . [W]e have held that the parent has an affirmative duty to love, protect and support his child and to make an effort to maintain communication and association with that child. * * *
>
> . . . [A] parent's absence and/or failure to support due to incarceration is not conclusive on the issue of abandonment. Nevertheless, we are not willing to completely toll a parent's responsibilities during his or her incarceration. Rather, we must inquire whether the parent has utilized those resources at his or her command while in prison in continuing a close relationship with the child.

The cumulative evidence here indicates appellee's interest in the welfare of his children from 1967 to the date of trial had been minimal. Appellee's willful criminal acts and

the course of conduct followed thereafter indicate a conscious disregard of the children and an indifference to their welfare tantamount to voluntary abandonment. Accordingly we find the decree of the chancellor is against the preponderance of the evidence.

Reversed and remanded for action not inconsistent with this opinion.

We agree. HARRIS, C.J., and BYRD and HOLT, JJ.

James PICKENS *v.* STATE of Arkansas

CR 76-99 542 S.W. 2d 764

Opinion delivered November 8, 1976

*Bill E. Ross,* Public Defender, for appellant.

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

ELSIJANE T. ROY, Justice. Appellant James Pickens was

charged with the sale and delivery of a controlled substance, which charge arose as a result of his sale of two LSD tablets to Richard Lott, a police undercover agent. Appellant was found guilty and sentenced to 10 years' imprisonment and fined $5,000.

On appeal, appellant first contends that the trial court erred in not dismissing jurors who sat on previous consecutive cases involving the sale of controlled substances. Richard Lott was the State's principal witness against appellant in this case, and also was the primary witness in the earlier cases. However, we find no merit in this contention for the reasons set out in *Holland* v. *State,* 260 Ark. 617, 542 S.W. 2d 761 (1976), decided this same day. Also we note that in the instant case appellant's attorney voir dired the jurors extensively and no prejudice or bias was revealed because of having served on the previous trials.

Appellant next asserts the trial court erred in failing to dismiss, for cause, Juror Elmer Cole during voir dire. In examining Cole the following facts were developed:

> MR. ROSS: * * * Mr. Cole, do you have any friends or relatives that are employed in connection with the law enforcement agencies?
>
> JUROR COLE: I have a nephew who is a police lieutenant in L.A.
>
> MR. ROSS: Los Angeles?
>
> JUROR COLE: Yes.
>
> MR. ROSS: Is there anything about that relationship that would cause you to have any preconceived notions about the guilt or innocence of an accused?
>
> JUROR COLE: *I am afraid so after hearing him talk about it. He is an undercover man in narcotics.*
>
> MR. ROSS: Your Honor, we would submit Mr. Cole.
>
> COURT: What was the basis of that?

MR. ROSS: He has formed an opinion, Your Honor, based upon the fact that he has a nephew who is an undercover law enforcement agent in Los Angeles and his conversations with him.

* * *

COURT: * * * Have you talked with your nephew concerning his work in the Los Angeles area?

JUROR COLE: *Not any more than his just telling me his experiences with these dope heads.*

COURT: Based upon your knowledge which you have gathered through your conversation with your nephew in reference to his work, do you think that you do have an opinion concerning this type of case which would influence your verdict in the matter?

JUROR COLE: I don't *think* so.

COURT: Would you be inclined or tend to give more weight or credibility to a drug undercover agent than you would to any other witness merely because of the fact that he was a drug undercover officer?

JUROR COLE: I don't *think* that I would. (Italics supplied.)

When asked several more questions Cole's responses were clearly equivocal, i.e., "I think so" and "I don't think so."

In all criminal prosecutions both the Sixth Amendment to the United States Constitution and the Arkansas Constitution, Article 2, § 10 guarantee the accused trial by an impartial jury. In spite of the rehabilitative efforts of the trial court, we cannot say that Cole's apparent prejudice was satisfactorily expunged. Ark. Stat. Ann. § 39-105(c) and (e) (Supp. 1975) excludes from petit jury service any person who has " . . . formed or expressed an opinion concerning the matter in controversy which may influence his judgment;" or who is ". . . biased or prejudiced for or against any party to the cause or is prevented by any relationship or circumstance from ac-

ting impartially;. . . . " Here, even after court interrogation, residual prejudice remained sufficient to invoke the exclusionary provisions of § 39-105. See also, *Glover* v. *State,* 248 Ark. 1260, 455 S.W. 2d 670 (1970), where standards controlling juror qualification are outlined in detail. In light of Juror Cole's presumptive bias and the cited authorities it was error for the trial court not to exclude Cole for cause.

It is not necessary to discuss appellant's remaining contentions since one is not likely to arise on retrial, and the evidence presented upon the other issue on retrial may differ somewhat from that presented in this case.

Reversed and remanded.

We agree. HARRIS, C.J., and BYRD and HOLT, JJ.

CITY of HOT SPRINGS et al *v.*
McGEORGE CONTRACTING COMPANY,
Inc. et al

76-317 543 S.W. 2d 475

Opinion delivered November 15, 1976
(In Banc)

*Eudox Patterson,* for appellants.

*E. Harley Cox, Jr.,* of *Coleman, Gantt, Ramsey & Cox,* and *Bill S. Clark,* of *Smith, Williams, Friday, Eldredge & Clark,* for appellees.

GEORGE ROSE SMITH, Justice. This is an attempt by the city of Hot Springs and its airport commission to appeal from an order of dismissal entered on June 14, 1976. Our clerk refused to file the record, because the notice of appeal was not filed until July 15 — the 31st day after the entry of the order. The appellants argue that the belated filing was excusable, because the order was signed and filed without notice to counsel, and the clerk of the trial court failed to mail a copy to the appellants' attorney, as is the custom of that office.

We cannot grant the relief sought, because the timely filing of a notice of appeal is essential to our jurisdiction. *Ward* v. *Universal C.I.T. Credit Corp.*, 228 Ark. 275, 307 S.W. 2d 73 (1957); *General Box Co.* v. *Scurlock*, 223 Ark. 967, 271 S.W. 2d 40 (1954). We must therefore deny the appellants' motion, without prejudice, however, to an application to the trial court for relief. Cf. *Karam* v. *Halk*, 260 Ark. 36, 537 S.W. 2d 797 (1976).

STATE FARM GENERAL INSURANCE COMPANY of Bloomington, Illinois *v.* Zeefer CHAMBERS, now Zeefer SMITH

76-115 543 S.W. 2d 470

Opinion delivered November 15, 1976

[Rehearing denied December 13, 1976.]

*Crouch, Blair, Cypert & Waters,* for appellant.

*Robert S. Blatt,* for appellee.

J. FRED JONES, Justice. This is an appeal by State Farm General Insurance Company of Bloomington, Illinois, from an adverse decision of the Johnson County Circuit Court in a suit brought by the appellee Zeefer Chambers, now Zeefer Smith, to recover on a fire insurance policy covering a house trailer.

The facts appear as follows: In October, 1972, the appellee purchased a house trailer in Oklahoma and in March, 1973, she insured same against loss by fire with the appellant insurance company. In February, 1973, the appellee moved the house trailer to a trailer court at Lowell, Arkansas, where she occupied it with her two sons. In December, 1973, the appellee married Mr. Clyde Smith who lived in Johnson County, Arkansas. Upon her marriage to Smith she vacated the house trailer and moved to Johnson County with Mr. Smith. On March 22, 1974, she paid a renewal premium on the insurance.

A Mrs. Lois Donovan managed the trailer court at Lowell where the appellee's trailer was set up, and in January, 1974, as an accommodation to Mrs. Smith, she rented the trailer to a Mrs. Phillips. Mrs. Donovan collected the rent payments and remitted to the appellee. Mrs. Phillips lived in the trailer until March 25, 1974, when it was destroyed by fire. The appellee made claim against the appellant for payment under the policy and the claim was denied because of a provision in the policy which, in pertinent part, reads as follows:

This Company shall not be liable under Section 1 of this

policy:
* * *

3. While the mobile home is rented to others for a period in excess of 60 days, except that it is permissible to rent a portion of the mobile home which is occupied by an insured to not more than two roomers or boarders.

It is clear from the evidence in this case that the trailer was rented to Mrs. Phillips on January 19, 1974, and that she continuously occupied it as a tenant until March 25, 1974, when the fire loss occurred. It is, therefore, clear from the evidence that the loss here involved occurred while the mobile home was rented to others for a period in excess of 60 days and clearly fell within the exclusionary provision as above set out.

The trial court, however, over the objections of the appellant, gave appellee's instruction No. 3 as amended. The appellee requested instruction No. 3 as follows:

> You are instructed that the renewal of the insurance contract on March 24, 1974, was a separate and distinct contract between Mrs. Smith and State Farm Insurance Company.

The court gave the instruction as follows:

> You are instructed that the renewal of the insurance contract on March 24, 1974, if you so find, was a separate and distinct contract between Mrs. Smith and State Farm Insurance Company.

We are of the opinion that the trial court erred in giving this instruction.

The insurance policy here involved was dated April 25, 1973, and was for a 12-month period from March 24, 1973, to March 24, 1974. The policy contained a provision as follows:

> This policy will be renewed automatically subject to provisions of the forms then current, for each succeeding policy period thereafter and is subject to termination by this company only after ten (10) days' written notice to

> insured and lienholder the premium for succeeding policy periods will be computed at this company's rates then current.

The appellee's attorney took full advantage of the court's instruction in his closing argument to the jury as follows:

> The Court has instructed you and I will read what he said:
>
> "You are instructed that the renewal of the insurance contract on March 24, 1974, if you so find, was a separate and distinct contract between Mrs. Smith and State Farm General Insurance Company.
>
> Now, Your Honor has told you that that's the law. That that's a separate contract. Therefore, I submit to you that when she renewed this policy that she gets another 60 days, just like she got when she first took this policy out.

It was entirely proper for the appellee's attorney to argue as above set out under the instruction given, but the trial court erred in giving the instruction under the uncontroverted evidence in this case. The contract here involved was not a new and separate contract. No new policy was issued and no new contract was entered into or involved. The old and only insurance contract was simply extended for an additional year by the payment of the premium for the ensuing year as plainly provided in the face of the policy. The original policy was kept in force by automatic renewal upon the payment of premium for the ensuing year; it had not lapsed nor was it subject to cancellation until after ten days' written notice as provided in the very first provision of the policy, *supra*.

The appellee relies heavily on our decision in *Home Mut. Fire Ins. Co.* v. *Pierce*, 240 Ark. 865, 402 S.W. 2d 672, but the case at bar is clearly distinguishable from the *Pierce* case on the facts. In *Pierce* the insured was engaged in livestock and poultry production conducted on four separate farms. Prior to December 23, 1964, the appellant insurance company had issued a separate policy of insurance on dwellings and other named structures on each of the four farms. In December,

1964, a new five-year policy was written consolidating the coverage as to the four farms and on December 31, 1964, an endorsement was placed on the new policy increasing some of the coverage. The coverage on the equipment in the brooder house was increased from $5,000 to $6,000. Under the new policy a brooder house on one of the farms was insured for $10,000 against loss by fire and, as above stated, the equipment and supplies therein were insured for $6,000. A dwelling house on the same farm was occupied by a tenant who, well-known to the agent writing the insurance, attended to swine production on the farm and had nothing whatever to do with the brooder house operation. Prior to issuing the new policy, the tenant moved from the dwelling house and it remained vacant for more than 30 days before the brooder house and equipment were destroyed by fire on January 12, 1965. The new policy contained a provision reading as follows:

> Unless otherwise provided by agreement in writing added hereto, this Company shall not be liable for loss or damage occurring. . . . (f) while a described building whether intended for occupancy by owner or tenant, is vacant or unoccupied beyond a period of thirty days.

And the endorsement thereon contained an "otherwise provision" reading as follows:

> In consideration of the waiver of additional premium for increased hazard by reason of vacancy or unoccupancy, permission is hereby given for dwelling insured under this policy to become or remain vacant or unoccupied for periods in excess of thirty days, provided that in case any dwelling is damaged or destroyed by fire during such vacancy or unoccupancy in excess of thirty days this company shall not be liable to pay or make good to the insured in excess of two-thirds of the amount of insurance covering such dwelling.

When claim was made for the full loss coverage on the brooder house and equipment, the insurance company contended that it was not liable under the policy for more than two-thirds of the amount of coverage on the brooder house under the above endorsement. The trial court rendered judg-

ment for the full amount of coverage and we affirmed.

The question in *Pierce, supra,* was whether the vacancy endorsement on the separately insured dwelling house extended to coverage on the separately insured brooder house and we agreed with the trial court that it did not. We agree with the appellant in the case at bar, that the sole question before the trial court and before this court on appeal is whether the premium payment of March 24, 1974, constituted a new and separate contract which prevented the application of the 60-day rental period from running under the exclusionary provision. Upon the payment of the renewal premium in the case at bar the policy was automatically renewed under its terms and nothing was added to or taken from the terms of the policy. In other words, it remained the same identical contract without alteration.

The case of *Aetna Ins. Co.* v. *Short,* 124 Ark. 505, 187 S.W. 657 (1916), involved an oral renewal of a fire insurance policy and in that case we said:

> The terms of the policy are neither enlarged, restricted or changed by the renewal but the rights of both parties, no matter how often a policy of insurance may have been renewed, are still bound by the provisions of the policy as originally issued. *Witherell* v. *Maine Insurance Company,* 49 Maine 200; *Aurora Fire & Marine Ins. Co.* v. *Kranich,* 36 Mich. 289; *Hartford Fire Ins. Co.* v. *Walsh,* 54 Ill. 164. Therefore, the court did not err in refusing to instruct the jury that the renewal contract must be established by clear and convincing testimony and that the burden was upon the plaintiff to establish that fact by clear preponderance of the evidence.

In Couch on Insurance 2d, vol. 17, § 68:42, is found the following statement:

> The rule has thus been declared that a renewal of a fire policy by the payment of a new premium and the issuance of a receipt therefor, where there is no provision in the policy for its renewal, is a new contract on the same terms as the old, *but that where the renewal is in pursuance of a provision to that effect it is not a new contract but an*

*extension of the old.* (Italics supplied.)

Citing *Lewis* v. *Western Assur. Co.,* 175 Tenn. 37, 130 S.W. 2d 982.

The *Lewis* case, thus cited, involved fire loss insurance on a dwelling house. Under a Tennessee statute, recovery on a fire insurance policy was limited to the actual value of the loss where inspection of the property was made within 90 days after issuance of the policy. Where such inspection was not made, the policy became a valued policy for the face amount recited in the policy. A dwelling house was involved in *Lewis* and it was insured for a period of one year for $1,000 and no inspection was made. The policy was renewed at the end of the year by the issuance of a new and separate policy containing the same provisions as the first policy. The house was totally destroyed by fire less than two months after the issuance of the renewal policy. The insured claimed the face value of $1,000 and the insurance company resisted because the property had not been inspected and the 90-day period for such inspection had not expired under the renewal policy. The trial court held that the new policy was an extension of the old policy and that the 90-day inspection period ran from the issuance of the first policy. In affirming the trial court the Supreme Court of Tennessee said:

> The renewal a year later, under the express terms of the original policy, had the effect of extending the original contract for another year. The situation was the same as though the policy had been issued originally for two years, in which event defendant, so far as value was concerned, had ninety days from the date of issuance to inspect.

The court then quoted from 27 C.J., page 111, as follows:

> "The renewal receipt is more than a mere receipt for money; it is evidence of a contract. But it is an extension of the original policy, and not a substitute therefor."

The Tennessee Court further quoted from 14 R.C.L., pages 889-890, as follows:

> "A renewal of insurance by the payment of a new premium and the issuance of a receipt therefor, there being no provision in the policy for its renewal, is a new contract on the same terms as the old, *but where the renewal is in pursuance of a provision to that effect it* is not a new contract but an extension of the old."

In 44 C.J.S., Insurance, § 285, is found the following:

> Where the renewal agreement so recites, or unless it provides otherwise, the terms and conditions of the existing policy are not changed, enlarged, or restricted by a renewal but are merely continued in force as binding on the parties; and an agreement to renew, in the absence of expressions to the contrary, is presumed to contemplate the same terms and conditions as the existing insurance, the only change being the time of its expiration.

In the case of *New York Life Ins. Co.* v. *Campbell,* 191 Ark. 54, 83 S.W. 2d 542, a lapsed policy was reinstated under provision in the policy providing:

> This policy may be reinstated at any time within five years after default upon written application by the insured and presentation at the home office of evidence of insurability acceptable to the company, and upon payment of overdue premiums, with six per cent interest thereon from their due date.

The policy involved was issued in 1928; it was reissued with a change of beneficiary on February 4, 1932, and expressly provided that it would take effect as of the 19th day of November, 1928 (the anniversary date of the policy). The policy lapsed for nonpayment of premium on March 19, 1932, and on March 29, 1932, the insured made written application for reinstatement which was granted on March 30, 1932, and the policy was reinstated. The policy contained a two-year incontestable clause. About September 10, 1933, the insured suffered a stroke and so advised the insurance company, who filed a petition in chancery to cancel the policy because its reinstatement was produced by fraud. The insured stated in his application for reinstatement that his

health and physical condition were in the same state as they were when the original policy was issued in 1928, and that he had had no past illness, injury or disease, nor had he been treated by or consulted a physician within two years last past. A doctor testified that he had treated the insured from October 2, 1931, until February 1, 1932, and had diagnosed the appellee's condition as chronic nephritis. In upholding the chancellor's denial of the petition for cancellation, this court said:

> It necessarily follows from what we have said, and the cases cited in support thereof that the reinstatement of the insured by appellant created no new contract between them, but simply revives and reinstates the original contract and all provisions thereof, and subsequently the rights and obligations of the respective parties thereto must be measured thereby.

See: *Munn* v. *Robinson,* 92 F. Supp. 60, affirmed in *John Hancock Mut. Life Ins. Co. of Mass.* v. *Munn,* 188 F. 2d 1; see also *New York Life Ins. Co.* v. *Dandridge,* 202 Ark. 112, 149 S.W. 2d 45, 134 A.L.R. 1519.

In *Life & Cas. Ins. Co. of Tenn.* v. *McCray,* 187 Ark. 49, 58 S.W. 2d 199, a life insurance policy was involved which contained a provision against suicide as follows:

> If, within one year from the date of issue of this policy, the insured shall, whether sane or insane, die by his own hand, the liability of the company shall be limited to the amount of the premiums paid hereon.

The policy also contained a provision for reinstatement after lapse by the payment of premiums and production of evidence of insurability satisfactory to the company. The premium on May 1, 1931, was not paid when due nor within the period of grace, but on August 1, 1931, the policy was reinstated. Thereafter, on May 10, 1932, more than one year from the date of the policy, but less than one year from the date of reinstatement, the insured committed suicide. In the suit on the policy the insurance company contended that the one year suicide clause ran from the date of the reinstatement of the policy and not from the date of the policy itself. In affir-

ming the trial court this court said:

> We do not understand there was ever but one policy, and it bore date of November 3, 1930. Certainly there was never but one policy issued by appellant to insured. It lapsed and became void after 30 days, from May 1, 1931, until August 1, 1931, during which time there was no insurance, but on the latter date the very same policy, not a new or different one, was reinstated by the payment of all delinquent premiums and furnishing evidence of insurability satisfactory to appellant. There is no room for the contention that any new or different contract or policy was in force after reinstatement.

The policy involved in the case at bar, by its plain and unambiguous terms, provided for automatic renewal for an additional year upon payment of the premium for the ensuing year. We are forced to the conclusion that the renewal here involved was not a new contract and the trial court erred in instruction to the jury that it was.

The judgment is reversed and the cause dismissed.

We agree: HARRIS, C.J., and GEORGE ROSE SMITH and FOGLEMAN, JJ.

Charles C. HARRIS *v.* STATE of Arkansas

CR 75-40 543 S.W. 2d 459

Opinion delivered November 15, 1976
(In Banc)

*Putman, Davis & Bassett,* by: *W. B. Putman* and *Ronald E. Bumpass,* for appellant.

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

J. FRED JONES, Justice. Charles C. Harris and Lonny McGuire were jointly charged, tried and convicted at a jury trial with the possesscon of marijuana with intent to deliver and were sentenced to ten years in the penitentiary. This is an appeal by Harris in which he has designated two points he relies on for reversal as follows:

I

The lower court erred in refusing to grant appellant's motion for a severance because:

A. Voir dire by separate counsel for Appellant's co-defendant and the remarks of the Trial Court deprived Appellant of his option as to whether or not his failure to take the stand would be brought to the attention of the jury.

B. Testimony by a State's witness as to statements made by the co-defendant tended to incriminate Appellant in violation of his rights under the Sixth Amendment to the Constitution of the United States.

II

The lower court erred in refusing to grant a mistrial because of the state's comment in closing argument on

the failure of appellant to take the witness stand.

The facts appear as follows: James R. Adkins, special agent for the Federal Drug Enforcement Administration, while working under cover, made arrangements with Harris and McGuire for the purchase of 100 pounds or marijuana for $10,000. Delivery was made on the highway outside the corporate limits of Fayetteville resulting in the arrests and subsequent convictions of Harris and McGuire.

Harris and McGuire were represented at the trial by separate attorneys. The appellant Harris's attorney filed a motion for severance on the ground that he anticipated the state's witnesses would quote statements made to them by McGuire which would tend to incriminate Harris; and that to deny the motion for severance would deny Harris the protection afforded him under the Sixth Amendment to the Constitution, the right to be confronted by witnesses, and the right to cross-examination. The motion was denied by the trial court.

The errors assigned under point I-A pertain to the voir dire examination of three prospective jurors, Van Duesen, Miller and Shepherd by McGuire's attorney, Mr. Carlisle. The entire record on this point appears as follows:

> MR. CARLISLE: Q. I will not belabor this, but there is one matter I would like to inquire about. Mr. Putman has, in general terms, described that when a defendant walks into this courtroom he is, first of all, presumed to be innocent, and until such time as the State proves beyond a reasonable doubt all of the elements of the offense with which he has been charged he is presumed innocent. As you know, I represent Lonny McGuire. In your deliberations would any of you give any weight to the fact that a defendant did not take the witness stand in his own behalf as any circumstance against him? The laws of the State of Arkansas say that a defendant is not required to take the witness stand; that the burden is upon the State of Arkansas to prove him guilty beyond a reasonable doubt. Now, some people have a little bit of difficulty in understanding that the fact that a defendant does not speak in his own behalf should not be held

against him, and, in fact, go the other way and say to themselves, "Well, he didn't get on the witness stand and deny it, so that is some inference of guilt." That last statement is incorrect under the law and I want to see how you all feel about it. Do you follow my thought?
MRS. VAN DUESEN: Yes.
MRS. MILLER: (She nods her head affirmatively.)
MR. SHEPHERD: (He nods his head affirmatively.)
Q. How about you, Mr. Shepherd? Would you hold it against the defendants in this case if one or both of them did not take the witness stand? Would that infer to you in any way their guilt?
MR. SHEPHERD: No.
Q. How about you, Mrs. Van Duesen?
MRS. VAN DUESEN: No, I don't think so.
Q. Mrs. Miller?
MRS. MILLER: No.
Q. And the testimony offered by the State of Arkansas in this case will primarily come from three (3) Federal Agents who will identify themselves as law enforcement officers of the United States Government, in the Federal Bureau of Narcotics. Do either of you have any tendencies to believe a witness merely because he happens to be a policeman?
MR. SHEPHERD: No.
MRS. VAN DUESEN: Not necessarily.
MRS. MILLER: (She shakes her head negatively.)
Q. It is sometimes felt that just because a man works in a law enforcement capacity or is a policeman, whatever you want to call it — of course these men are non-uniformed and proof will show they were undercover agents, commonly referred to as "narcs," but they are policemen and some people think that policemen should always be believed, regardless of the circumstances.
MR. GIBSON: Your Honor, I am going to interpose an objection. This is argument.
THE COURT: I believe that it is argument. Rephrase your question.
MR. CARLISLE: I haven't asked the question, Your Honor.
THE COURT: I know, but I think you should limit it to a direct question.
MR. CARLISLE: Q. The mere fact that these three (3)

gentlemen are law enforcement officers, would that give you any reason to give their testimony more weight than you would any other witness?
MR. SHEPHERD: (He shakes his head negatively.)
THE COURT: Let me ask it this way. I am going to tell you that any witness on the stand should be treated the same, as far as evaluation of his testimony, regardless of his sex, color, age or religion.
MRS. VAN DUESEN: Yes, we understand.
THE COURT: You shouldn't believe him or disbelieve him because he is a police officer, *or if he is the defendant and takes the stand.* You shouldn't arbitrarily believe him or disbelieve him. In other words, the same set of criteria is applied to any witness regardless of occupation, sex, creed or color.
MR. CARLISLE: Q. My question is —
THE COURT: Can you follow that?
All three answer: Yes.
MR. CARLISLE: Q. Can you follow the Court's instruction?
All three answer: Yes.
THE COURT: Are they acceptable?
MR. GIBSON: Yes.
THE COURT: Are they acceptable, Mr. Putman?
MR. CARLISLE: Your Honor, I will excuse Mr. Shepherd.
THE COURT: Mr. Putman, are they acceptable to you?
MR. PUTMAN: Yes, Your Honor, the other jurors are acceptable.
THE COURT: All right. Call one more name.
(The Court proceeds to interrogate the next three (3) jurors. Mr. Putman approaches the bench.)
THE COURT: Do you have an objection?
MR. PUTMAN: No, Your Honor, I have no objection. I simply have another matter that I want to take up with the Court at this juncture.
(Out of hearing of jurors:)
Comes now the defendant, Charles Harris, and renews his motion for a severance earlier made before this Court, which was of course taken down by the court reporter, for the reason that in his voir dire interrogation of the jurors, Mr. Carlisle has referred to the conse-

quences and possible reactions of the jurors in the event that the defendant or a defendant did not take the stand. We have the option, of course — Mr. Harris is entitled to the opition of mentioning or not mentioning this to the jury, just as is given to him the option of having the Court mention or not mention the fact that he did or did not take the stand. This deprives us of this option because it has already been brought to the jurors' attention. Their attention has already been drawn to the fact that the defendants or a defendant may not testify. We feel this deprives Mr. Harris of his option to leave this totally unmentioned throughout the trial, and consequently calls for severance.

THE COURT: Overruled.
MR. PUTMAN: Note our exceptions.
THE COURT: Please stand Mrs. Canup, Mrs. Collins and Mr. Fennell. (Emphasis supplied.)

As to the first part of the appellant's assignment under point I-A, no objection was made to the voir dire at the time it was made and the appellant accepted the jurors without challenge. The appellant has demonstrated no adverse or antagonistic interest between himself and his codefendant that would have demanded a severance. See *Lewis and Wren* v. *State,* 220 Ark. 914, 251 S.W. 2d 490. We conclude that under the state of the record before us, the trial court did not abuse its discretion in refusing to grant the appellant's motion for a severance because of the questions propounded by McGuire's attorney on voir dire. To hold otherwise would make it possible to force a severance in every case, as a matter of trial strategy, where codefendants are represented by separate attorneys.

The second portion of appellant's point I-A pertaining to the remarks of the trial court related back to the voir dire of the three prospective jurors. The record is not clear as to whether the entire jury panel was in the courtroom when these jurors were being questioned on voir dire. It would appear, however, that the entire panel was in the jury room and were being called three at a time for voir dire. In any event, it appears to us that when the trial court held attorney Carlisle's interrogation as argumentative and directed him to rephrase his inquiry by asking a direct question, the trial court was eminently correct. We are of the opinion, however,

that after attorney Carlisle did rephrase his inquiry as above set out, the question, as rephrased, should have been sufficient. After the prospective jurors to whom the question was propounded had indicated a negative answer, the trial court inquired in a different manner as above set out.

It might appear at first glance that the phrase "or if he is the defendant and takes the stand," would not be a prejudicial comment on the appellant's failure to testify in the context of all that was said; but, this statement could have planted in the minds of the jury that the testimony of federal narcotic agents was exactly of the quality and verity as that of the accused; and, that although they should not arbitrarily believe or disbelieve either witness because he is a defendant or a police officer, if the police officer testified and the defendant did not, they would be left with no discretion in not believing the police officer and that to do so would not be arbitrary.

This phrase "or if he is the defendant and takes the stand" might be considered nonprejudicial when considered in the context it was given if it were standing alone but such was not the case. During the testimony of the appellant's mother who testified at some length as to appellant's family background; as to his work with underprivileged children; as to adjustment problems he encountered following the death of his father, and as to her own efforts to assist this 25 year old appellant in solving his problems by sending him to visit a friend in Brazil; the record then appears as follows:

> Q. Living with you in Houston, did he have an opportunity to see some of the Mexican-American children who were poor and had to live under deprived and—?
> MR. GIBSON: Your Honor, I am going to have to object. He's leading the witness. It's second-hand knowledge—.
> THE COURT: I think what he saw *is for him to say,* rather than what she knows about what he did.
> MR. PUTMAN: I'm going to take exception to the Court's remarks. (Emphasis supplied.)

The trial court apparently felt that the attorney was going rather far afield in questioning appellant's mother about the opportunity the appellant had to see poor and deprived

Mexican-American children while living with her in Houston and certainly we are of the opinion the trial court had no intention to suggest to the jury that the appellant should testify. But when the two statements, "if he is the defendant and takes the stand," and, "what he saw is for him to say," are considered together, we cannot say they were not prejudicial to the appellant. We must remember that this was the trial court speaking for the benefit of the jury.

The state's witnesses had very definitely connected the appellant with the wholesale delivery of contraband but it is entirely possible that the jury may have considered the evidence, pertaining to the poor and deprived Mexican-American children the appellant may have seen in Houston, very material in assessing the penalty in this case. The court's two statements could have left the impression with the jury that even though the appellant was not *required* to testify in his defense, and even though that fact should not be held against him; if the appellant did desire to take the witness stand and testify his testimony, under the law as stated by the court, would be just as valid and carry as much weight as the testimony of anyone who testified against him and that it was incumbent upon him to testify rather than depend upon someone else's knowledge and testimony as to what he did. We conclude that the judgment must be reversed and the cause remanded for a new trial.

We deem it unnecessary to discuss appellant's point I-B because it is not likely to arise again on retrial and we find no merit to the appellant's point II. That portion of the closing argument of the prosecuting attorney, as set out in the appellant's argument under his point II, appears as follows:

> Possession? You heard the three agents get on this stand and say that the hundred pounds of substance was taken from these two defendants out there on Cato Springs Road on April 29th, 1974. *There has been absolutely no testimony to contradict that.* I don't think that is even an issue at this point. They possessed it; a hundred pounds — Approximately one hundred pounds—.

The appellant argues that that portion of the prosecuting attorney's argument, as above italicized, constituted prejudicial

comment upon appellant's failure to testify, but we disagree with the appellant. See: *Edens* v. *State,* 235 Ark. 996, 363 S.W. 2d 923; *Moore* v. *State,* 244 Ark. 1197, 429 S.W. 2d 122 and compare with *Curtis* v. *State,* 89 Ark. 394, 117 S.W. 521.

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

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

JOHN A. FOGLEMAN, Justice, dissenting. It seems to me that the majority, in reversing the trial court has lost sight of appellant's point for reversal. It seems to me that the reversal is based upon the trial court's comments, either as comments on the evidence or as comments on the defendant's failure to testify, rather than upon the court's failure to grant a severance. The majority properly finds no error in the voir dire examination by counsel for appellant's co-defendant, as it related to the right of a defendant to refrain from testifying.

No objection was made by appellant to the court's remarks relating to the credibility of witnesses. The court's remarks were not specifically made the basis of the renewal of appellant's motion for severance, which came after appellant had failed to challenge any juror so interrogated and had found two of them acceptable. When the court inquired of appellant's attorney, he stated that he had no objection. I do not interpret the motion as having been directed to the court's remarks. The motion, as I see it, was based on the interrogation by McGuire's attorney, not about the police officer's testimony, but about the effect of a defendant's failure to testify. I am simply unable to follow the majority's statement of possible prejudice, its speculation that somehow the trial judge told the jury that the testimony of the federal narcotics agent was exactly of the same quality and verity as that of the accused, or the premise that the judge's remarks in any respect related to the credit to be given an officer's testimony if defendant did not testify or that "they would be left with no discretion in not believing the police officer and that to do so would not be arbitrary," whatever that means.

It is also difficult for me to relate the remarks of the trial judge made during the voir dire to his remarks in later ruling

on the prosecuting attorney's objection that appellant's mother was attempting to communicate "second-hand knowledge" to the jury. When the trial judge said "what he saw is for him to say," appellant did not renew his motion for severance. He simply took exceptions to the court's remarks. There was no motion for admonition or mistrial. Therefore, I find no basis for reversal.

Appellant's point 1B is not a basis for reversal either. It is based upon testimony of Federal Narcotics Agent Adkins that after he had met appellant and his co-defendant at a Gulf service station, and arranged for their delivery of 100 pounds of marijuana to him, he met the two defendants and another person and was taken in an automobile driven by McGuire to a place where they met appellant Harris and, during this trip McGuire identified a vehicle they passed, saying that "that was Harris, and that he would follow." Adkins stated that his conversation in planning the delivery was primarily with Harris and this trip was a part of the plan. It later developed, according to Adkins, that the vehicle identified by McGuire stopped and that Harris alighted from it. Putting aside the question of admissibility of the statement as that of a co-conspirator, there was nothing prejudicial about it and McGuire did not, as appellant contends, become a witness against him.

I would affirm the judgment.

I am authorized to state that the Chief Justice joins in this opinion.

# Deborah Fay RAPP *v.* Bernice L. KIZER

76-136 543 S.W. 2d 458

Opinion delivered November 15, 1976
(In Banc)
[Rehearing denied December 20, 1976.]

*Douglas N. Parker,* for petitioner.

*William Crane Smith, Jr.,* for respondent.

CONLEY BYRD, Justice. By this proceeding, Petitioner Deborah Fay Rapp, the mother of an illegitimate child, questions the jurisdiction of Respondent, Bernice L. Kizer, Chancellor of the Sebastian County Chancery Court, to entertain a petition by the putative father of the illegitimate child to obtain visitation rights and to fix an amount of support which he should pay for support of said child.

The complaint filed by the putative father shows that prior to the rendition of a divorce on October 30, 1973, he and the petitioner were husband and wife. Subsequent to the rendition of the divorce decree the putative father and petitioner cohabited together and as a result of that cohabitation an illegitimate child was born to the petitioner on September 12, 1974. Paragraph #3 of the complaint alleged that petitioner has acknowledged the putative father in

writing. The last paragraph of the complaint alleges:

> "The Plaintiff, Fred Eugene Rapp, acknowledges the paternity of said child, acknowledges that he is the father of said child and requests that the Court vest the Plaintiff with visitation of said child, requests that the Court vest the Plaintiff with custody of said child and in the alternative, should custody be denied, Plaintiff affirmatively states that he is willing and able to pay child support as ordered by the Court commensurate the Child Family Support Chart as utilized by this Court."

As can be seen from the complaint, the only issues before the respondent were the rights between the mother and the putative father to an illegitimate child. In that situation we must consult Art. 7, § 28 of the Constitution of Arkansas which provides: "The county courts shall have exclusive original jurisdiction in all matters relating to . . . bastardy. . . ."

Webster's New International Dictionary, 2nd Edition, defines bastardy as:

> "1. State or quality of being a bastard; illegitimacy.
>
> 2. The procreation of a bastard child."

The term "relating to" has generally been defined as meaning "in respect to; in reference to; in regard to," *Snowden* v. *Kittitas County School Dist. No. 401,* 38 Wash. 2d 691, 231 P. 2d 621 (1951). Can it be said that the action instituted in the chancery court by the putative father is not a "matter relating to . . . bastardy?" To ask the question is but to answer the question for the issues presented for determination obviously flow from and are involved only with the procreation of a bastard or illegitimate child.

The respondent to support the jurisdiction assumed relies upon:

1. The fact that paternity is admitted and not a disputed fact;

2. The definition of bastardy proceedings set out in *Higgs* v. *Higgs,* 227 Ark. 572, 299 S.W. 2d 837 (1957); and

3. The rights of parents in general to children born to a marriage as set out in *Kirby* v. *Kirby,* 189 Ark. 937, 75 S.W. 2d 817 (1934).

The fact that paternity is admitted does not give the chancery court jurisdiction, *Higgs* v. *Higgs, supra.* Our Constitution, Art. 7, § 28, *supra,* does not limit the original jurisdiction of the county court to "bastardy proceedings" but specifically gives the county court "exclusive original jurisdiction in all matters relating to . . . bastardy . . . ." Furthermore, the custody rights between a father and a mother to children born in wedlock are far different from the custody rights between the putative father and the mother of an illegitimate child. See *Lipsey* v. *Battle,* 80 Ark. 287, 97 S.W. 49 (1906).

Having determined that the action filed by the putative father was one involving only "matters relating to . . . bastardy," it follows that the chancery court was without jurisdiction. As pointed out in *Higgs* v. *Higgs, supra,* the reason for placing jurisdiction of bastardy matters in the county court may no longer exist but, nevertheless, the Constitution has not been changed and the county court still has exclusive original jurisdiction in such matters.

Writ granted.

We agree. HARRIS, C.J., and HOLT and ROY, JJ.

# SOUTHERN FARM BUREAU CASUALTY INSURANCE COMPANY *v.* Forrest W. WILLIAMS

76-68 543 S.W. 2d 467

Opinion delivered November 15, 1976

*Hardin, Jesson & Dawson,* for appellant.

*Turner & Clift* and *Yates & Yates,* for appellee.

FRANK HOLT, Justice. This appeal arises from a judgment in favor of appellee in a suit involving the extent of the coverage of an automobile insurance policy issued by appellant to appellee. During the time appellee's insured vehicle was being repaired, it became necessary for him to borrow his daughter's and her husband's car. The daughter was staying with her parents during the time her husband was stationed overseas in the military service. When appellee drove the borrowed car, he struck a pedestrian. As a result a suit was filed by the pedestrian for damages against appellee. Appellee made demand upon appellant to defend the suit pursuant to the terms of his insurance policy. Appellant refused stating that the borrowed automobile was not an insured vehicle under the "TEMPORARY USE OF SUBSTITUTE AUTOMOBILE" clause, since the automobile was owned by and furnished for the regular use of appellee's daughter who was a member of the appellee's household. After appellee's successful defense of the personal injury suit against him, he brought this action to collect his attorney's fees, expenses and a penalty against appellant for its refusal to defend the suit. At trial the court denied appellant's motions for a directed verdict. For reversal of the judgment, based on a jury verdict in appellee's favor, appellant asserts that the evidence is insufficient to support the verdict.

In determining whether a verdict is supported by substantial evidence, we review the evidence in that light which is most favorable to the appellee and indulge all reasonable inferences favoring the support of the jury's findings. *Ark. State Highway Comm.* v. *Cook,* 257 Ark. 98, 514 S.W. 2d 215 (1974); and *Fields* v. *Sugar,* 251 Ark. 1062, 476 S.W. 2d 814 (1972). Here appellant argues that no substantial evidence exists from which the jury could have found that the automobile driven by appellee at the time of the accident was a temporary substitute automobile within the meaning of the policy. The relevant provision of the insurance contract provides:

> VII TEMPORARY USE OF SUBSTITUTE AUTOMOBILE While a described automobile is withdrawn from use, such insurance as is afforded by this policy applies to another automobile not owned by

> or furnished for the regular use of the named insured or spouse, or members of the same household, while temporarily used as a substitute for such automobile. This insuring agreement does not cover as an insured the owner of the substitute automobile or any employee of such owner.

It is undisputed that appellee's daughter and her husband were co-owners of the automobile. The issue then is narrowed to a determination of whether there was sufficient evidence to sustain the jury's implied finding that appellee's daughter was not a member of his household.

Appellee's daughter, Brenda, was eighteen years of age and living with her parents when she was married to her husband in June, 1968. The couple first lived with his grandmother approximately one month until he was inducted into the military service. Brenda returned "to my mother's and father's house." Before her husband left for overseas duty, he had a three weeks' furlough during which time they resided with his grandmother. Then in October or November, 1968, she again moved back with her parents and lived with them until July, 1969. At that time, her husband came home for about a one month's furlough during which time they visited relatives. After that furlough, he returned overseas. Brenda then "went again to live with [her] mother and father" where she was residing in September, 1969, when her father borrowed her and her husband's car which was involved in the accident. It appears that Brenda did not drive. During the approximate one year that Brenda lived with her parents, she would occasionally visit relatives. Her parents exercised no control over her. She contributed no money to her maintenance, although she occasionally did some cooking and cleaning. Her parents did not expect her to contribute anything. She had no outside employment and "re[lied] upon [her] father to feed and clothe" her. She received a government allotment check, which originally was $100 a month and eventually raised "to a hundred thirty sometimes or a hundred and forty," and from which she made the $81 car payment using the balance for her spending money. She testified that her and her husband's income "was not enough" to require the filing of a tax return. For the taxable year 1969, the appellee father claimed Brenda as a dependent

on his income tax return.

We turn now to the law applicable to the recited facts. In *American Homestead Ins. Co.* v. *Denny,* 238 Ark. 749, 384 S.W. 2d 492 (1964), we reiterated:

> 'It is the duty of the Courts to construe the language [in an insurance contract] used by the parties and such construction is performed by considering the sense and meaning of the terms which the parties have used as they are taken and understood in their plain ordinary and popular sense."

In the case at bar the policy provision is referred to by the courts as a restricted "drive other cars" clause which is found in liability insurance policies. It does not appear that we have previously construed this particular provision. Here, as indicated, we must determine if there is any substantial evidence that appellee's daughter was not a member of his "household." If she was a member, then the policy excludes coverage. We have had occasion to interpret the term "household" in a theft insurance policy which excluded coverage if it was found that the plaintiff's son, serving in the military, was not a "household" member. In affirming a finding that he was a member, we said in *Central Manufacturer's Mut. Ins. Co.* v. *Friedman,* 213 Ark. 9, 209 S.W. 2d 102 (1948), in pertinent part:

> We think the word 'household' as used in this section of the policy, *supra,* meant domicile, residence or place of abode. 'Household' is defined in Bouvier's Law Dictionary, Rawle's Third Revision, vol. 2., page 1462, as follows: 'Those who dwell under the same roof and constitute a family.'

In *Lontkowski* v. *Ignarski,* 95 N.W. 2d 230 (Wis. 1959), the court defined the word "household" as follows:

> 'Household' is defined by Webster as 'those who dwell under the same roof and constitute a family.' That definition corresponds with the common and approved usage of the term and is supported by judicial authority.

> 'Persons who dwell together as a family constitute a household.'

See also *Fleming* v. *Traveler's Ins.*, 39 So. 2d 885 (Miss. 1949); *Aler* v. *Travelers Indemnity Co.*, 92 F. Supp. 620 (D. Maryland 1950); *Leteff* v. *Maryland Casualty Co.*, 91 So. 2d 123 (La. App. 1956); *Simon* v. *Milwaukee Automobile Mut. Ins. Co.*, 115 N.W. 2d 40 (Wis. 1962); *Giese* v. *Karstedt*, 141 N.W. 2d 886 (Wis. 1966); *Tomlyanovich* v. *Tomlyanovich*, 58 N.W. 2d 855 (Minn. 1953); *Alabama Farm Bureau Mut. Ins. Co.* v. *Preston*, 253 So. 2d 4 (Ala. 1971). The appellee has cited us no authority to the contrary.

In *Alabama Farm Bureau Mut. Ins. Co.* v. *Preston, supra,* the insured's daughter lived with her parents during the time her husband was overseas in the armed service. Her father was involved in a collision while driving her and her husband's car. The court addressed itself to the question as to "whether Carol [the daughter] was a resident of Preston's [the father] household at the time of the collision within the exclusion provision of his policies with the insurer." In holding that she was a resident of the insured's household at the time of the collision within the meaning of the policy and denying coverage, the court said:

> Under the undisputed facts, Carol came to 'stay' with her parents while her husband was overseas. While she did not intend to stay permanently with her parents, nevertheless her stay was to extend for an indefinite time. She was not a mere temporary visitor. Actually, she did remain in her parents' home for over a year. It was during this time that Mr. Preston had the collision while driving the Dodge automobile. We hold that under the undisputed facts the conclusion is dictated that Carol was residing in her father's home at the time of the collision. The language of the policy here involved is not legally ambiguous. Such language excludes liability of the insurer under the facts shown.

The rationale expressed there is applicable in the case at bar.

The justification of the exclusionary clause here, which is characterized as the "drive other cars" provision, is well

stated in *Fleming* v. *Traveler's Ins., supra:*

> We are dealing with a contract of insurance. We must inquire what the parties thereto meant. Practical consideration must be given play, interpreted in the light of the purpose of the policy provision. This provision has repeatedly held to reveal an obvious purpose to avoid a multiple coverage of several vehicles owned by members of the same family, who, by their close intimacy may be expected to use the car of each other without hindrance and without permission, thus increasing the liability of the insurer who has a right to expect each owner to contract for his own coverage.

Appellee argues that the exclusion clause here is ambiguous and should, therefore, be construed most strongly against the insurer. *Life and Casualty Ins. Co. of Tennessee* v. *Gilkey,* 255 Ark. 1060, 505 S.W. 2d 200 (1974). We are of the view that the exclusionary provision of the policy is clear and legally unambiguous. It is unnecessary to resort to rules of construction in order to ascertain the meaning of an insurance policy when no ambiguity exists. *McKinnon, Admx.* v. *Southern Farm Bureau Casualty Ins. Co.,* 232 Ark. 282, 335 S.W. 2d 709 (1960). The terms of an insurance contract are not to be rewritten under the rule of strict construction against the company issuing it so as to bind the insurer to a risk which is plainly excluded and for which it was not paid.

In the case at bar, we hold that the evidence, when viewed most favorably to the appellee, is not substantially sufficient to support the jury's finding that appellee's daughter was not a member of his household at the time he borrowed and was driving her automobile.

Reversed and dismissed.

Delorn HARMON *v.* STATE of Arkansas

CR 76-78 543 S.W. 2d 43

Opinion delivered November 15, 1976
(In Banc)

*Gary R. Cottrell,* for appellant.

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

FRANK HOLT, Justice. Appellant was convicted by a jury of battery in the second degree in violation of Ark. Stat. Ann. § 41-1602 (1) (d) (Criminal Code 1976). His punishment was assessed at three years in the Arkansas Department of Correction. The prosecution of appellant resulted from his driving a car, which left the road, entered a three foot deep roadside ditch and struck a thirteen year old boy who was playing in the ditch. The victim suffered a broken leg, fractured toe, and a bruised heel and pelvis. Appellant first contends that § 41-1602 (1) (d) is unconstitutional. Appellant argues that the provisions of the statute are patently vague and overbroad, resulting in inadequate guidance to the individual whose conduct is sought to be regulated and is insufficient guidance to a jury in their application of the law to the facts before them. We cannot agree.

§ 41-1602 (1) (d) provides:

> (1) A person commits battery in the second degree if: (d) he recklessly causes serious physical injury to another person by means of a deadly weapon.

Appellant argues that the statute "sets no clear standard for the regulation and enforcement of 'reckless' conduct." He reasons that since the severity of the punishment for a battery is controlled by the degree of harm to the individual, an individual cannot know the consequences of his actions in terms of "liability until after the conduct is over and the amount of harm has been established." He further asserts that the statute "is so overbroad in its possible application by a jury, as to deny the defendant fair adjudication and due process. The Statute requires that a jury find that the defendant: 1) was 'reckless,' 2) caused 'serious physical injury,' and 3) used a deadly weapon. This Statute, by its overbroad language, may be wrongly applied, as it was in this case, and unfairly used against individuals." He argues that "[E]very accident is a potential Battery in the Second Degree by the construction of Statute as used here."

The statute involved here does not fit such a broad application. The statute requires, as appellant avers, that a jury find the appellant was reckless, caused serious physical injury and used a deadly weapon. In *Neal* v. *State,* 259 Ark. 27, 531 S.W. 2d 17 (1975), we applied the standard of specificity as defined in *U.S.* v. *Petrillo,* 332 U.S. 1 (1946):

> The Constitution has erected procedural safeguards to protect against conviction for crime except for violation of law 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.

See also *Weston* v. *State,* 258 Ark. 707, 528 S.W. 2d 412 (1975).

In our new Code batteries are scaled in degrees, i.e., first, second and third, with the severity of punishment based

not only on the result of the battery in terms of harm done to the victim, but also on the conjunction of a culpable mental state; i.e., recklessly, negligently, or extreme indifference to the value of human life. See Commentary following § 41-1603. Appellant's argument that only the degree of injury dictates the liability is based on erroneous interpretation of the battery statutes. The new Arkansas Criminal Code provides a detailed definition for each of the required elements of battery in the second degree; i.e., recklessly, serious physical injury and deadly weapon:

> (1) 'Recklessly.' A person acts recklessly with respect to attendant circumstances or a result of his conduct when he consciously disregards a substantial and unjustifiable risk that the circumstances exist or the result will occur. The risk must be of a nature and degree that disregard thereof constitutes a gross deviation from the standard of care that a reasonable person would observe in the actor's situation. § 41-203 (3)
>
> (2) 'Serious physical injury' means physical injury that creates a substantial risk of death or that causes protracted disfigurement, protracted impairment of health, or loss or protracted impairment of the function of any bodily member or organ. § 41-115 (19)
>
> (3) 'Deadly weapons' means:
> (a) a firearm or anything manifestly designed, made or adapted for the purpose of inflicting death or serious physical injury; or
> (b) anything that in the manner of its use or intended use is capable of causing death or serious physical injury. § 41-115 (a) (b)

These definitions were included in the instructions given to the jury. Obviously, as defined in the Code, "recklessly" involves an awareness and "conscious" disregard of a "substantial and unjustifiable risk" that certain attendant circumstances exist or that prohibited consequences will occur. Further, the disregard of the risk "constitutes a gross deviation from the standard of care" of a reasonable person in appellant's "situation." There must also be "serious physical injury" to the victim by means of a "deadly weapon" to

justify a conviction of a battery in the second degree. The felony liability of second degree battery manifestly would not attach to mere negligent conduct. Cf. *Phillips* v. *State,* 204 Ark. 205, 161 S.W. 2d 747 (1942). It is also pointed out in the Commentary following § 41-1603 that for even the misdemeanor battery statute to apply it requires a showing of negligence greater than that in civil negligence citing § 41-203 (4).

In our view the terminology of § 41-1602 (1) (d) is not vague nor overbroad. The provisions of the statute are of such "common understanding and practice" that it cannot be said that an ordinary individual or juror would have to speculate as to its meaning. *Neal* v. *State, supra.*

Appellant next contends that the trial court erred in overruling appellant's motion for a directed verdict. He argues that the state failed to adduce substantial evidence to sustain all of the elements of battery in the second degree. It is well established that a directed verdict is only proper where there are no factual issues to be determined by the jury and on appeal, the evidence will be reviewed in the light most favorable to the appellee and the judgment will be affirmed if there is any substantial evidence to support it. *Munn* v. *State,* 257 Ark. 1057, 521 S.W. 2d 535 (1975).

Here appellant first asserts that the evidence was insufficient to establish one of the required elements of § 41-1602 (1) (d); i.e., recklessness. We disagree. One witness testified that preceding the accident, he saw appellant's car traveling "pretty fast" in front of his home. The car then returned and he heard screeching of the tires and saw appellant's car hit the victim. The squealing of the tires "sounded like losing control of it, or squealing around a curve." The arresting officer testified that appellant had an unobstructed view of the ditch where the victim was playing. Appellant's car left "quite a few feet" of skid marks on the road. Two other witnesses testified that appellant attempted to remove his car from the three foot ditch when the victim was still underneath the car. Witnesses testified that they smelled alcohol on appellant immediately after the accident and the arresting officer testified that appellant "was in kind of a stupor" at the time of his arrest after he had left the scene. We are of the

view the state adduced ample substantial evidence to sustain the jury's finding on the element of recklessness.

Appellant next asserts that the injuries here are not of such a nature to constitute a serious physical injury as contemplated by the drafters of the Code or battery statute. § 41-115 (19), *supra.* We cannot agree. The victim suffered a broken leg, a fractured toe, bruised heel and pelvis. He was hospitalized for about a month and was in a leg case and traction for two or three weeks during this time. He was walking with crutches at the time of the trial which was about a month and a half after the alleged offense. Even though it be said there is insubstantial evidence that the physical injuries suffered by the victim did not result in or create "a substantial risk of death," we cannot say, as a matter of law, that a fact question did not exist as to whether the victim's injuries constituted a "protracted impairment of the function of any bodily member or organ." Webster's Third New International Dictionary defines "protract" as "to continue, prolong, lengthen in time." It was for the jury to resolve the issue as to whether the injuries constituted a temporary or protracted impairment.

Appellant next contends that here an automobile is not a deadly weapon within the purview of the battery statute. Therefore, he argues the third element or prerequisite of the statute is not established. Suffice it to say that in the Commentary following § 41-1603 it is stated "under § 115 (4) [definition of a deadly weapon] a 'vehicle' might constitute such a weapon." Certainly, it must be said that there is substantial evidence for the jury's finding that the automobile constituted such a weapon. In accord are *People* v. *Anderson,* 229 Ill. App. 315 (1923); *Williamson* v. *State,* 111 So. 124 (Fla. 1926); *State* v. *Hollis,* 273 P. 2d 459 (Okla. Cr. 1954); and *People* v. *Benson,* 152 N.E. 514 (Ill. 1926).

Appellant next asserts that the trial court erred in refusing to give instructions on assault in the first degree and assault in the second degree. Appellant argues that under Ark. Stat. Ann. § 41-105 (2) (b) and (c) (Criminal Code 1976) he was entitled to his proffered instructions on assault in the first and second degrees as lesser included offenses. The provisions relied upon read:

> (2) A defendant may be convicted of one offense included in another offense with which he is charged. An offense is so included if:
> (b) it consists of an attempt to commit the offense charged or to commit an offense otherwise included within it; or
> (c) it differs from the offense charged only in the respect that a less serious injury or risk of injury to the same person, property, or public interest or a lesser kind of culpable mental state suffices to establish its commission.

The gist of appellant's argument is that assault is an attempt to commit a battery and the only difference between battery and assault is that "the former requires a reckless 'causing' of a substantial risk of death or serious physical injury and the latter requires a reckless 'creation' of a substantial risk of death or serious physical injury." Ark. Stat. Ann. § 41-1605 (Criminal Code 1976) provides:

> (1) a person commits assault in the first degree if he recklessly engages in conduct which creates a substantial risk of death or serious physical injury to another person.
> (2) Assault in the first degree is a class A misdemeanor.

Ark. Stat. Ann. § 41-1606 (Criminal Code 1976) provides:

> (1) A person commits assault in the second degree if he recklessly engages in conduct which creates a substantial risk of physical injury to another person.
> (2) Assault in the second degree is a class B misdemeanor.

It is apparent that the assault provisions apply to a situation which creates risk of death or physical injury while a battery and its penalties are directed towards the situation where actual injury is suffered. In the Commentary following § 41-1602, it is succinctly stated:

> In some jurisdictions, 'battery' has ceased to exist as a separate offense, its elements having been assimilated into assault provisions. The Commission, however, felt

> that assaults and batteries were worthy of treatment as *separate offenses* having distinct criminal sanctions. Accordingly, the Code preserves the conceptual distinction drawn between 'assaults" and 'batteries' by present law. **** Under the Code, conduct is denominated a 'battery' or 'assault' depending on whether or not physical injury results. (italics supplied.)

Further, § 41-105 (3) provides that "[T]he court shall not be obligated to charge the jury with respect to an included offense unless there is a rational basis for a verdict acquitting the defendant of the offense charged and convicting him of the included offense." See also *Caton* v. *State,* 252 Ark. 420, 479 S.W. 2d 537 (1972); and *Frederick* v. *State,* 258 Ark. 553, 528 S.W. 2d 362 (1975). Here, in view of the evidence, the court was not obligated to give instructions on assault. Furthermore the Commentary following § 41-105 clearly shows that subsection (2) (c), *supra,* is intended to apply to a situation where battery in the third degree is a lesser included offense within battery in the second degree. Here, the court instructed the jury on third degree battery and, also, at appellant's request, on reckless driving.

Finally appellant asserts the trial court's admission of testimony relating to appellant's actions subsequent to the alleged battery was irrelevant and prejudicial. The testimony objected to was with respect to appellant's activities in moving his car and leaving the scene. The evidence is clearly relevant to the issue of whether appellant's conduct was "reckless," a prerequisite or an element of the offense charged and, further, was close enough in time to the occurrence to be part of the *res gestae,* manifesting appellant's state of mind at the time of the accident.

Affirmed.

Marie DUPREE *v.* WORTHEN BANK & TRUST CO., N.A., as Executor of the Estate of Dollie Vivian CarlLee, Dec'd, and as Trustee of the Dollie Vivian Revocable Trust

76-74 543 S.W. 2d 465

Opinion delivered November 15, 1976

*Johnson, Calhoun & Lewis, Ltd.*, by: *Fletcher C. Lewis*, for appellant.

*Wright, Lindsey & Jennings*, by: *William D. Haught*, for appellee.

ELSIJANE T. ROY, Justice. On January 4, 1972, Dollie Vivian CarlLee entered into a lease agreement with appellant Marie Dupree for a term of five years. The lease term was to run from January 2, 1972, until December 31, 1976. Appellant took possession of the leased premises pursuant to the lease and performed her obligations under the lease until she was evicted from the premises.

At the time the lease was executed, Mrs. CarlLee had only a life estate in the leased property, the remainder in-

terest having been conveyed to Gene Wirt by warranty deed recorded on February 10, 1966. However, the lease made no mention of the fact that Mrs. CarlLee's interest was only that of a life tenant.

On August 27, 1974, approximately sixteen months before the lease term expired, the lessor, Mrs. CarlLee, died. Wirt thereafter canceled appellant's lease agreement effective January 1, 1975. This suit followed against Mrs. CarlLee's estate in order to obtain compensation for breach of the lessor's covenant of quiet enjoyment. The case was submitted to the court upon stipulation of facts. Both parties moved for a summary judgment, and appellee's motion was granted. This appeal followed.

Appellant argues that she was entitled as a matter of law to a cause of action against the estate of appellee-lessor for breach of the lessee's covenant of quiet enjoyment. The trial court relied on *Edwards* v. *Griffin,* 228 Ark. 844, 310 S.W. 2d 798 (1958), as dispositive of the issue because *Edwards* held that upon the death of a tenant for life all interest of his lessee ceases. However, the *Edwards* case deals only with the rights of the evicted lessee and the remainderman of the life tenant. It establishes that the lessee cannot compel the remainderman to carry out the terms of the lease and that the remainderman can evict the lessee. It does not involve an action by the lessee against the estate of the lessor after eviction.

*In Re O'Donnell,* 240 N.Y. 99, 147 N.E. 541 (1925)[1] is a case in which an action was brought by a lessee against the estate of the lessor-life tenant for a breach of the covenant of quiet enjoyment. The court held the action was proper and the lessee was entitled to recover damages for the breach from the estate of the deceased lessor. *In Re O'Donnell* is not necessarily contra to *Edwards, supra,* since *Edwards* treats only the rights between the lessee and the remainderman; any other comments beyond that point are dicta and not controlling on the issue here.

6 A.L.R. 1506, a pertinent annotation, states:

[1]This case is cited with approval in *Dave Herstein Co.* v. *Columbia Pictures Corp.,* 4 N.Y. 2d 117, 172 N.Y.S. 2d 808, 149 N.E. 2d 328 (1958).

> A lease made by a tenant for life terminates "eo instante" on his death, and if there is a covenant, express or implied, for quiet enjoyment, the estate of the lessor is liable for a breach thereof. *Duker* v. *Kaelin* (1906) 28 Ky. L. Rep. 900, 90 S.W. 959; *Hamilton* v. *Wright* (1895) 28 Mo. 199; *Snedecker* v. *Thompson* (1899) 26 Misc. 160, 56 N.Y. Supp. 775; *McIntyre* v. *Clark* (1894) 6 Misc. 377, 26 N.Y. Supp. 744.

Another annotation to the same effect is found in 171 A.L.R. 489.

See also § 27 of 41 A.L.R. 2d 1448, which in part states:

> * * * *The following cases appear to approve, either expressly or impliedly, the rule that an eviction of the lessee by the holder of a paramount title, or by the lessee yielding to such a title, constitutes a breach of the covenant for quiet enjoyment.* (Italics supplied). (Citing cases).

*In Re Hunt's Estate,* 120 Misc. 174, 197 N.Y.S. 633 (1923), the court stated:

> * * * If Hunt, or his attorney, had said nothing to the lessee regarding the character of his ownership, and the eviction had taken place upon his death prior to the termination of the term of the lease, compensatory damages would arise, because the withholding of the knowledge of the life tenancy of the lessor was such lack of good faith in law as to approximate fraud on the part of the lessor, and the execution of the lease by the lessor without disclosing the quality of his estate would be held to have misled the lessee.

In *Petroleum Collections Incorporated* v. *Swords,* 48 Cal. App. 3d 841, App., 122 Cal. Rptr. 114 (1975), it was held that in the absence of language to the contrary, every lease contains an implied covenant of quiet enjoyment. There was no language to the contrary in the case at bar. The agreement described the property and stated it was leased to lessee:

II.

To have and to hold the said premises unto the LESSEE

> for the term of five (5) years, from the 2nd day of January, 1972, until and including the 31st day of December, 1976.

After establishing the terms of payment the lease continued:

> VII.
>
> LESSOR covenants with LESSEE that LESSEE shall and may peaceably and quietly enjoy, have and hold the leased premises during the term aforesaid.

Appellee contends that appellant has no cause of action because the warranty deed executed by Mrs. CarlLee had been recorded in 1966 prior to leasing the property in 1972 and appellant had constructive notice that Mrs. CarlLee's estate was limited. We do not agree. Mrs. CarlLee knew her interest was limited because of the previously executed deed, but she made no mention of it in the lease contract. Under these circumstances we find appellant has a cause of action against Mrs. CarlLee's estate for breach of the covenant of quiet enjoyment. The court should have denied appellee's motion for summary judgment.

Reversed and remanded.

We agree. HARRIS, C.J., and BYRD and HOLT, JJ.

# BANK of GLENWOOD *v.* ARKANSAS STATE BANKING BOARD et al

76-157 543 S.W. 2d 761

Opinion delivered November 22, 1976
(In Banc)
[Rehearing denied December 20, 1976.]

*Wright, Lindsey & Jennings,* for appellant.

*Jim Guy Tucker,* Atty. Gen., by: *Fred Frawley,* Asst. Atty. Gen., and *Harry E. Meek,* for appellees.

*Stubblefield & Matthews,* for Intervenor, Caddo State Bank.

GEORGE ROSE SMITH, Justice. In July of 1975 an application was filed with the State Bank Commissioner for a charter for a new bank, to be named Caddo State Bank and to be located in the city of Glenwood. The application was resisted by the Bank of Glenwood, the only bank in the city. After the submission of extensive proof by both parties the State Banking Board entered an order granting the application upon the basis of detailed findings of fact. The Board's action was sustained by the circuit court. Four points for reversal are argued here.

We find no merit in the appellant's first argument, that the Bank Commissioner arbitrarily and capriciously limited the appellant's pre-hearing discovery. To begin with, the appellant succeeded in obtaining access to almost everything that it sought to examine. It was particularly interested in loans made by two escrow banks to subscribers to stock in the proposed bank. Eventually all those subscribers agreed to the appellant's request to see their individual files. There remained one master filed to which the appellant was at first denied access. The Bank Commissioner later ruled, we think correctly, that certain information in that file, with respect to proposed officers of the new bank, was confidential, and that the release of certain other data would give the Bank of Glenwood an unfair competitive advantage over the new bank. The Commissioner directed that information pertinent to those two matters be removed from the file, with the remaining contents of the file being made available to the appellant. We are not convinced either that the Commissioner created a "banker's privilege," as the appellant argues, or that any information relevant to the basic application was arbitrarily or capriciously withheld. No abuse of discretion is shown.

The appellant also argues that the limitation upon dis-

covery prevented its attorney from adequately preparing to cross-examine an adverse expert witness, James Becknell. *Rickett* v. *Hayes,* 251 Ark. 395, 473 S.W. 2d 446 (1971). It is asserted that Becknell testified that "the bank would be economically feasible and would show a profit after two years." It is then asserted that Becknell's projections were based upon expense figures supplied by Twin City Bank and that the appellant's inability to obtain those figures "severely restricted appellant's ability to cross-examine" Becknell.

The proof simply does not sustain this argument. If Becknell made any projections involving expenses over a two-year period or any other period, it must have been in a discovery deposition that is not in the record before us. In actuality, Becknell's testimony had to do with such matters as population growth in the Glenwood area, the influx of new business enterprises, dissatisfaction on the part of some people with the Bank of Glenwood, the "leakage" of potential deposits from the Glenwood area, and similar statistics that were offered to buttress Becknell's conclusion that the overall situation would support another bank in Glenwood. Becknell's direct examination included no projections about the new bank's income or expenses, nor was he cross-examined on that subject. Moreover, the Board relied primarily upon the Federal Deposit Insurance Corporation's computations in finding that the proposed bank's future earning prospects were favorable. We find no basis in the record for the appellant's argument that its ability to cross-examine Becknell was restricted.

As its second point for reversal the appellant argues that the Bank Commissioner acted unlawfully in assuming the supervision and enforcement of the Arkansas Securities Act with respect to the stock in the proposed bank. If so, the only persons who might be hurt would be the subscribers to the stock. We cannot see how the appellant has any standing to complain about this matter, even if it be assumed that its assertions are correct.

Thirdly, the appellant argues that the circuit court denied the appellant's constitutional and statutory right to judicial review. This argument is based upon Section 13 of the Administrative Procedure Act, which contains this

provision: "The [circuit] court shall, upon request, hear oral argument and receive written briefs." Ark. Stat. Ann. § 5-713 (g) (Repl. 1976).

Perhaps the appellant has a basis for complaint, but we are unwilling to remand the cause upon this ground. At the outset, we are not certain that the point was brought to the trial court's attention. The appellant first filed in the circuit court its "Notice of Appeal and Petition for Judicial Review," a two-page typewritten pleading. The prayer for relief asked the court to hear additional evidence, to hear oral argument and receive written briefs, and to reverse the decision of the Board. After several other pleadings had been filed by the parties the court entered its order, "being well and sufficiently advised," affirming the action of the Board. There is no indication that any request for oral argument or for the submission of briefs was actually presented to the court or that any such objection was made after the entry of the court's order, if we assume that it was made without notice to counsel. In the absence of any such request or objection, we are unwilling to say that the court should have invited oral argument or written briefs merely because those matters were included in the appellant's first pleading. (We note that no complaint is made about the trial court's failure to hear additional evidence, which was also mentioned in the same pleading.) Moreover, the appellant has had the opportunity to file written briefs and to ask for oral argument in our court. We do not imply that in no instance would we remand a case to the circuit court upon the ground now argued, but that action is not appropriate here.

The appellant's final contention is that the Board's decision to grant the new charter is not supported by substantial evidence. We find no merit in this contention, especially in the light of the supplemental abstract of the record, submitted by counsel for the applicants. The Board made unusually detailed and specific findings of fact and conclusions of law. We are convinced that the applicants' testimony, especially that of H. J. Ligon, John E. Cook, and Becknell, supports the Board's decision. Nothing would be accomplished by a narration of the evidence.

Affirmed.

BYRD, J., not participating.

JONES, J., dissents.

JOHN A. FOGLEMAN, Justice, dissenting to denial of petition for rehearing. I would grant the petition for rehearing because of denial of discovery of Twin City Bank's calculation of estimated operating expenses.

John Henry KAY *v.* STATE of Arkansas

CR 76-131 543 S.W. 2d 479

Opinion delivered November 22, 1976

*Harold L. Hall,* Public Defender, by: *William R. Simpson,* Dep. Public Defender, for appellant.

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

GEORGE ROSE SMITH, Justice. John Henry Kay appeals from a verdict and judgment sentencing him to five years' imprisonment for robbery and to two additional years for committing the offense with a firearm. We find no merit in the two points for reversal that are presented.

The victim of the robbery, Khachia Muradain, who was employed in his son's liquor store, speaks Armenian but not English. The son, who was not present when the robbery occurred and who did not testify, acted as the interpreter when his father testified for the State. Defense counsel objected to that procedure, on the ground that the son was biased, and also asked for a mistrial.

No prejudicial error is shown. The son had had some earlier experience as an interpreter, but he was evidently not skilled in that role. Occasionally he interposed remarks of his own instead of confining himself to the attorneys' questions and to the witness's answers. His remarks, however, had no direct bearing on the merits of the case. Any impropriety in the procedure could readily have been corrected by an admonition to the jury, but the court was not asked to take that action. In the circumstances the request for a mistrial was properly denied. *Back* v. *Duncan,* 246 Ark. 494, 438 S.W. 2d 690 (1969). Moreover the questions and answers were recorded on tape so that the son's accuracy as an interpreter could have been checked later on, but that step does not appear to have been thought necessary.

It is also argued that the accused was denied his right to a speedy trial. Kay was in prison in Louisiana when the information was filed, but eventually he waived extradition and consented to being brought to Arkansas for trial. Having waived extradition he is not in a position to, and does not, question the extradition procedure. He does assert, however, that the State was required to exercise good faith in seeking his return to Arkansas. *Smith* v. *Hooey,* 393 U.S. 374 (1969). From that premise he argues that the State's good faith is rebutted by its use of certain "pre-notarized" documents in the extradition proceedings and that therefore he was denied a speedy trial. This argument is not sound. We cannot approve the use of such documents, but we fail to see how their use implies a lack of good faith as far as a speedy trial is concerned. To the contrary, presumably the documents were used to hasten Kay's return to Arkansas rather than to retard it. Consequently no prejudice from their use appears.

Affirmed.

We agree. HARRIS, C.J., and FOGLEMAN and JONES, JJ.

Adolph BATTLE *v.* Charles DANIELS et al

76-158 543 S.W. 2d 477

Opinion delivered November 22, 1976

*Walker, Kaplan & Mays, P.A.*, by: *Henry L. Jones, Jr.*, for appellant.

*Herrn Northcutt* and *Thelma Lorenzo*, for appellees.

CONLEY BYRD, Justice. The issue on this appeal is whether the Appeals Tribunal and the Board of Review correctly dismissed the appeal of appellant Adolph Battle because it was not filed within the time prescribed by Ark. Stat. Ann. § 81-1107-d-2 (Supp. 1975).

The record shows that on May 13, 1975, the Director of the Department of Labor mailed a notice to appellant showing that his claim for unemployment had been denied. Appellant did not receive the notice of denial of the claim until June 11, 1975. On June 12, 1975, he filed his notice of appeal. In ruling that the appeal was filed too late the Appeal Tribunal Referee quoted from Ark. Stat. Ann. § 81-1107-d-2 (Repl. 1960), as it existed prior to Acts 1975, No. 609 which became effective on March 28, 1975. The law as it existed

before March 28, 1975 provided:

> ". . . The claimant, the Commissioner, or any other party entitled to notice, may file an appeal from a determination made by the agency with an appeal tribunal or with any office of the Arkansas State Employment Service within 15 days after the date of mailing of the notice to his last known address, or if such notice is not mailed, within 15 days after the date of delivery of such notice. . . ."

After March 28, 1975, the time for taking an appeal is as follows:

> ". . . The claimant, the Director of Labor, or any other party entitled to notice, may file an appeal from a determination made by the Agency with an appeal tribunal or with any office of the Employment Security Division within fifteen (15) days after the date of mailing of the notice to his last known address, or if such notice is not mailed, within fifteen (15) days after the date of delivery of such notice. If mailed, an appeal shall be considered to have been filed as of the date of the postmark on the envelope. Provided, that if it is determined by an Appeals Tribunal or the Board of Review that the appeal is not perfected within the fifteen (15) day period as a result of circumstances beyond the appellant's control, such appeal may be considered as having been filed timely."

The circuit court presumed from the record that the Board of Review and the Appeals Tribunal had taken into consideration the 1975 amendment to Ark. Stat. Ann. § 81-1107-d-2, but in view of the fact that the old law referred to "...the Commissioner," and the 1975 amendment refers to "...the Director of Labor," we have concluded that since the law recited by the administrative tribunals used the term "the Commissioner" the circuit court erred in assuming that the Appeals Tribunal and the Board of Review had made a determination pursuant to the 1975 amendment.

Without discussing or passing upon the other points raised, we are reversing and remanding the matter to the cir-

cuit court with directions to remand to the appropriate administrative tribunal for a reconsideration of the jurisdictional dispute pursuant to the 1975 amendment and for such further proceedings as may become necessary.

Reversed and remanded.

We agree: HARRIS, C.J. and HOLT and ROY, JJ.

B. E. MILLER *v.* Gary SCROGGINS, d/b/a GREENBRIER GROCERY

76-142 543 S.W. 2d 476

Opinion delivered November 22, 1976
(In Banc)

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

*Francis T. Donovan,* for appellee.

FRANK HOLT, Justice. A jury awarded the appellee $1,051.04 together with costs in his action against appellant on an open account. The trial court taxed as costs the compensation of eighteen jurors who were sworn for the trial of the

cause and paid $7.50 each for their services. The only issue on appeal is whether the trial court exceeded its authority in taxing jurors' fees as costs. Appellant argues there is no authority, statutory or otherwise, for the imposition of these costs. Appellee, however, cites as authority Ark. Stat. Ann. § 39-302 (Repl. 1962). The first sentence and only pertinent part reads:

> Jurors' compensation shall be taxed as cost and paid by the unsuccessful party.

Appellee's reliance on this statute is misplaced.

Obviously, this sentence of the annotated act is derived from the concluding provision of Act 89 of 1911, § 1, which provides:

> Section 1. Hereafter jurors shall receive compensation as follows: Each grand or petit juror in the circuit court per day, three ($3.00) dollars; each juror attending a view, inquest or on the execution of a writ ad quad damnum per day, one ($1.00) dollar; each juror in a justice court, for each day's service, or fractional part thereof, whether rendering a verdict or not, fifty (50¢) cents; each juror in either the county or the probate court, for each day's service in either court, one ($1.00) dollar to be taxed as cost and paid by the unsuccessful party.

Appellee argues that the concluding words "to be taxed as cost and paid for by the unsuccessful party" modify each of the preceding sentences since they are separated by semicolons. In other words the modification is not limited to the concluding portion or sentence which relates only to county or probate courts. We cannot agree with appellee's interpretation of the Act.

Further, a study of the historical background of Act 89 of 1911 clearly shows that the legislative intent is to restrict the imposition of jurors' fees as costs to the county and probate courts. Gantt's Digest, § 2015 (1874); Act 185 of 1875, § 38; Act 121 of 1885; Kirby's Digest, § 3519 (1904). These preceding acts provide in a separate and distinct sentence or section compensation (by the county court) for petit jurors in

circuit court. Significantly, there was never a provision that the jurors' fees be taxes there as costs. To the contrary, in a separate and distinct sentence or provision compensation for jurors' services in "either county or probate courts [is] to be taxed as other costs and paid by the unsuccessful party." Act 291 of 1905, § 1, which amended Kirby's Digest, § 3519, consolidated the provisions for compensation for jurors in the various forums, which included the circuit, county and probate courts. There, again, compensation for jurors in each forum is provided for in a separate and distinct sentence. The only authority for taxing jurors' services as costs is in the provision relating to county or probate court where the cost is "paid by the unsuccessful party." Act 314 of 1909, § 1, increased the compensation of jurors. In doing so semicolons were used there for the first time rather than separate and distinct sentences or sections with respect to the separate forums. Again the only provision for the tax to be paid as costs by the unsuccessful party was in the county or probate court whenever a jury was used. Act 89 of 1911 (Ark. Stat. Ann. § 39-302) amended § 5, which is not pertinent here. However, § 1 of the 1911 Act reenacted verbatim § 1 of the 1909 Act relating to the provisions for jurors' compensation.

Consequently, it is manifest from the legislative history that no statutory authority exists for jurors' services to be taxed as court costs against the appellant in the case at bar. See *Independence County* v. *Dunkin, et al,* 40 Ark. 329 (1883). Further, there is a sound basis for taxing the cost against the unsuccessful party in county or probate proceedings since it is most infrequent that jurors' services are ever utilized there.

The appellee insists, however, that if no statutory authority exists then a rule of the local circuit court provides that the costs of a jury are to be assessed against the losing party whenever a jury is requested in a controversy when the amount involved is less than $2,500 in value. The rules are not abstracted and neither do we find them on file, as is required, with the clerk of this court. Therefore, we do not consider the local rule. Rule 12 of Uniform Rules for Circuit and Chancery Courts, Ark. Stat. Ann. Vol. 3A (Supp. 1975); *Washington National Insurance Co.* v. *Meeks,* 249 Ark. 73, 458 S.W. 2d 135 (1970). See also *St. L., I.M. & S. Ry.* v. *Williams,* 49 Ark. 492, 5 S.W. 883 (1887). Ark. Constitution (1874),

Art. 7, § 13.

Judgment for jurors' fees as costs is reversed.

Reversed.

Willie BURTON Jr. *v.* STATE of Arkansas

CR 76-126 543 S.W. 2d 760

Opinion delivered November 22, 1976

*Woodward & Kinard, Ltd.*, by: *Michael G. Epley*, for appellant.

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

FRANK HOLT, Justice. Appellant represented himself before a jury which found him guilty of forgery and uttering and assessed his punishment, as a habitual criminal, at ten years' imprisonment on each charge. The court ordered the sentences to be served concurrently.

Appellant contends through court appointed appellate counsel that the trial court erred in refusing to appoint another trial attorney after appellant and his court appointed counsel, Mr. Black, were unable to agree on defense strategy and, further, the court erred by failing to adequately warn appellant of the risks involved in conducting his own defense. Mr. Black had recommended before trial that appellant plead guilty in view of the state's evidence and the prosecutor's offer of a five year sentence on a guilty plea to the present and additional charges. Appellant rejected the plea bargain. At trial the appellant insisted on his right to represent himself if he could not have another court appointed attorney. Mr. Black told the court "I did not inform this defendant that I would not try the case or that I could not represent him in court." The appellant stated that although his court appointed counsel "was willing to fight the case," he preferred to represent himself in view of Mr. Black's recommendation of a plea of guilty. The court explained to appellant that appointment of counsel was done on a rotation basis and he considered Mr. Black a competent and capable attorney. Therefore, the court would not appoint another attorney. Mr. Black, as directed by the court, sat at the counsel table in an advisory capacity to appellant during the trial.

The right to counsel is a personal right and the accused

may knowingly and intelligently waive counsel either at a pretrial stage or at trial. *Slaughter* v. *State*, 240 Ark. 471, 400 S.W. 2d 267 (1966); *Faretta* v. *California*, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975); *Barnes* v. *State*, 258 Ark. 565, 528 S.W. 2d 370 (1975); and *Williams* v. *State*, 153 Ark. 289, 239 S.W. 1065 (1922). Here the record indicates that the court thoroughly acquainted appellant with his rights and the nature of the charges against him. Further, the trial court went to considerable lengths, including appointment of standby counsel, to insure that appellant had the greatest latitude in his efforts to represent himself. Appellant was no stranger to court room procedures since he admittedly was previously convicted of forgery and uttering. There is no contention that appellant was mentally incompetent. The record discloses that he presented and questioned his witnesses, conducted cross-examination of the state's witnesses, objected to evidence and consulted with his standby appointed attorney. A defendant's technical legal knowledge is irrelevant to the assessment of a knowing exercise of his constitutional right to represent himself. *Faretta* v. *California, supra.* In the case at bar, we hold that appellant knowingly and intelligently elected to voluntarily represent himself.

Appellant next asserts error by the trial court in allowing the state to interrogate appellant about the revocation of a previous suspended sentence for forgery and uttering because of a subsequent conviction. He argues that such a question was improper as a violation of Rule 609 (a) of the Uniform Rules of Evidence. However, the effective date of the Rules is July 1, 1976. Appellant was tried on January 14, 1976. Therefore, Rule 609 (a) is inapplicable. It follows that appellant's conviction of a misdemeanor was admissible as going to the credibility of the witness. *Hays* v. *State*, 219 Ark. 301, 241 S.W. 2d 266 (1951); and Ark. Stat. Ann. § 28-605 (Repl. 1962). Another answer here is that the appellant, during his redirect testimony, discussed the subject of his previous conviction. We find no merit in this assertion.

Appellant's final point is that "[t]he court erred in admitting into evidence during application of the habitual criminal statute, a copy of a penitentiary commitment showing that appellant's suspended sentence was revoked for conviction of a misdemeanor in municipal court." The peniten-

tiary commitment makes no reference to a conviction of a misdemeanor. Further, the subject of his felony conviction was previously discussed by the appellant himself as a witness and during which time he referred to the misdemeanor charge as a "little confusion" which resulted in the revocation of his suspended sentence. The jury found that the appellant had only one previous felony conviction which appellant had freely admitted. In the circumstances we hold that appellant has demonstrated no prejudicial error by the trial court's action.

Affirmed.

We agree: HARRIS, C.J., and BYRD and ROY, JJ.

Rodney LEWIS *v.* Suzanne LEWIS

76-144 543 S.W. 2d 222

Opinion delivered November 22, 1976

*James C. Cole*, for appellant.

*Monroe L. Bethea*, for appellee.

ELSIJANE T. ROY, Justice. Appellee prevailed in this action for divorce on the grounds of appellant's willful failure to support her and their two children. The parties were married in 1966 and separated February 5, 1975. After a hearing on September 30, 1975, the court entered an order granting the divorce, providing for custody, support, reasonable visitation and restraining the parties from bothering each other.

The decree to this effect was filed on November 21, 1975. On February 24, 1976, appellant was again in court on a contempt citation for refusal to comply with the court's order. At the hearing the court announced:

> * * * I am going to suspend your visitation rights with your children from this day forward until such time you can appear before this Court and assure this Court that you will not go down there and espouse religion unto your ex-wife or child. * * *

The order pursuant to the hearing provided *inter alia* as follows:

> . . . that the corrected decree should be and is hereby modified and the defendant's right of reasonable visitation should be and is hereby cancelled and terminated until such time as the defendant may be able to show the court that visitation can be exercised without defendant's espousing and discussing religion with the plaintiff or the children.

On appeal appellant first contends the court erred in failing to deny the divorce under the evidence. We find no merit in this contention. The record reflects that appellant was a college graduate with a degree in accounting, and that he later passed the Certified Public Accountant's examination. Thus, appellant was qualified by education to hold employment with better than average earning potential and had a number of job opportunities. However, for various reasons he either worked for employers only a short period of

time, or would not accept employment at all. Appellee testified that to her knowledge he had not been gainfully employed from December, 1974, until the time of the hearing on October 28, 1975. Prior to that time he worked only sporadically. It is not necessary to detail all the evidence on this point, but on review we find the chancellor's decree granting the divorce for nonsupport is not against the preponderance of the evidence.

Appellant next contends the court erred in denying visitation rights based upon religious grounds. We agree that visitation rights cannot be denied appellant for espousing his religious beliefs. However, this does not mean that the trial court could not deny visitation rights for some valid reason such as deliberate nonsupport, violence or possible harm to the children. Also there is some evidence in the record, although not fully developed, that appellant was teaching the children disrespect for their mother and encouraging disobedience to her. This would be very detrimental to raising the children properly, and the court might want to consider such action in determining visitation rights.

We have considered also appellant's other allegations of error and find no merit in them.

Accordingly the decree is affirmed as to the granting of the divorce, custody and support, but remanded to the chancellor for determination of appellant's visitation rights.

We agree. HARRIS, C.J., and BYRD and HOLT, JJ.

# Coy THOMAS *v.* SOUTHSIDE CONTRACTORS, INC. et al

76-165 543 S.W. 2d 917

Opinion delivered November 29, 1976
(Division I)
[Rehearing denied January 10, 1977.]

*Keith Rutledge,* for appellant.

*Bennett & Purtle,* for Southside Contractors, Inc., Walters Construction Co. and Miller Mutual Ins. Co.; and *Laser, Sharp, Haley, Young & Boswell,* for Norhhwestern National Ins. Co., appellees.

GEORGE ROSE SMITH, Justice. The appellant, Coy Thomas, is the claimant in this workmen's compensation case. At the time of his injury he was drilling rock with a

jackhammer, in the process of excavating a trench for the installation of a sewer line to serve a residence that was being built. Walters Construction Company was the prime contractor for the residential project. Southside Contractors, Inc., the appellant's employer, was the subcontractor for the installation of the sewer line. Thomas's claim for compensation is asserted both against the prime contractor and its insurance carrier and against the subcontractor and its insurance carrier. The Commission denied the claim altogether, finding *(a)* that the subcontractor's insurer had canceled its policy before the accident, and *(b)* that the claimant is estopped to assert liability on the part of the prime contractor. Upon this appeal Thomas challenges both findings.

There is substantial evidence to support the Commission's finding that the subcontractor's coverage had been canceled before the claimant was injured. The risk had been assigned to the subcontractor's insurer pursuant to Ark. Stat. Ann. § 81-1309 (Repl. 1960). That insurer, owing to its inability to obtain an audit of the subcontractor's payroll, applied to the Commission for cancellation of the policy. The Commission, acting under Section 81-1309 (d), notified the subcontractor that its policy would be canceled if the Commission "does not hear from you within ten days from the date of this letter." There was no reply to that letter. Despite some uncertainty about the date of cancellation, the Commission was justified in finding that the policy had been canceled. Upon this point the subcontractor's local insurance agent testified that he discussed the proposed cancellation with the president of the subcontractor, a corporation, who said: "I guess we will have to get along without it."

A more difficult question is presented with respect to the liability of the prime contractor and its insurer. The statute provides that when a subcontractor fails to obtain compensation insurance, the prime contractor shall be liable for compensation to the employees of the subcontractor. Section 81-1306. Despite that section of the statute the Commission denied Thomas's claim, on the ground that he had dealt with the prime contractor, Walters Construction Company, as an independent contractor and that he was estopped to say that he had no part in the cancellation of Southside's compensation coverage.

We state the facts most favorably to the Commission's decision. For some time before the claimant Thomas joined the concern there had been a partnership of three or four men engaged in work involving excavations. Thomas bought out one of the partners by contributing a truck for which Thomas had paid $1,000. In January, 1971, when there were three partners, the business was incorporated upon a lawyer's recommendation and under his supervision.

Paul James was the president of the company, with Thomas being designated as vice-president. The three principals, manifestly in good faith, continued to conduct the business pretty much as a partnership, though some corporate records were kept. Excavation contracts were made orally, without formality. Here is an excerpt from the testimony of Paul James:

> Q. Dealing with the decision-making process, is it not true, Paul, that the three members of the Board of Directors, yourself and Gary and Coy, somebody approaches you or Cary or Coy about doing a job, you all meet and say all right here is the job whose [sic] is going to handle it — how much are we going to get for it — right?
>
> A. Right.
>
> Q. And you all say, well, Coy why don't you handle this one, and the next one, Paul, you take this one — it was a joint decision by the members of the Board of Directors?
>
> A. That is right.

James, as president of the company, was responsible for keeping the records and for obtaining workmen's compensation insurance. His home was the company's only office. Coy Thomas received take-home pay of $115 a week, paid by the company's check. Taxes and Social Security contributions were withheld. The company furnished the tools and materials that Thomas and his crew used in their work. Apparently the company never made enough money to distribute any profits before Thomas was injured.

Southside's compensation coverage was canceled as of May 6, 1973. At about that same time Henry Walters, the

owner of the prime contracting company, approached Thomas about the sewer-line subcontract, because Thomas had been highly recommended to Walters as a very competent person in that field. The oral contract was made according to Southside's usual practice. Thomas discussed it with his associates, who approved the job for the proposed price of $1,100. Walters testified that he thought he was dealing solely with Thomas. Thomas brought his own crew to the job and worked with them, as foreman, until he was hurt. Walters said he knew nothing about Southside Contractors until Paul James came up to finish the job after Thomas's injury.

When the oral contract was made, Walters asked Thomas if he had workmen's compensation insurance. Thomas replied that he did have it and, at Walters's request, promised to furnish the policy number. Walters testified that he discussed Thomas's coverage because his own insurance carrier had told him very specifically that "subcontractors either had to be covered or we had to furnish coverage." Thomas did not in fact supply the policy information. Walters testified that he would have insisted upon having that information before he paid the contract price, because if Thomas did not have coverage "we would have to pay the premium for the work that they had done, for the coverage of those employees." In actuality, Walters paid the agreed contract price to Southside without deducting any amount for the premium and without inquiring about the coverage. Of course, by then Thomas had been seriously injured on the job, and a deduction of the premium from the final settlement would have carried an inplication of liability on the part of the prime contractor and its insurer.

We can find no substantial evidence to support the Commission's denial of Thomas's claim. The Commission found, first, that Thomas dealt with Walters as an independent contractor rather than as an employee of Southside. The true issue, however, is not whether Thomas was an independent contractor, for that is ordinarily the status of any subcontractor. Rather, the issue is whether Walters's contract was with Thomas individually or with the Southside corporation. There is no proof that Thomas held himself out as acting on his own. Apparently the matter was simply not mentioned,

which is not unusual. A customer of a small grocery store may believe that he is dealing with a sole proprietor, but that belief makes no difference if the store is actually owned, say, by a family corporation. A corporate entity is to be disregarded only if the corporate structure is illegally or fraudulently abused to the detriment of a third person. *Rounds & Porter Lbr. Co.* v. *Burns,* 216 Ark. 288, 225 S.W. 2d 1 (1949). Here there is no evidence that the Southside corporate entity was so used. The Workmen's Compensation Commission of course has final authority upon disputed issues of fact, but here the Commission made an error of law in its interpretation of an undisputed fact situation. The corporate entity should not have been disregarded.

Neither can we sustain the Commission's conclusion that Thomas is estopped to deny that he knew that the compensation policy had been canceled. The testimony is not definite, but the cancellation must have occurred not very long before or not very long after the oral subcontract was made. Walters testified that he asked Thomas about the coverage and was told that it existed. Thomas testified that he did not remember such a conversation, but he stated candidly that if the question had been asked he would have said that there was coverage. He testified, without contradiction, that he knew nothing whatever about the cancellation; that was Paul James's responsibility. The only disinterested witness with regard to this issue was the insurance agent, who said that he discussed the cancellation with James.

Even though there is no testimony that Thomas knew that the policy had been canceled, the Commission made this finding: "The president of this corporation . . . had great power to direct the activities of the corporation, but allowing this policy to lapse . . . and then not afford the claimant protection coverage without some consultation with his vice-president-employee is . . . inconceivable." Thus the Commission attributed to Paul James a precise knowledge of law when it concluded that James would not have allowed the coverage of his "vice-president-employee" to lapse without some consultation between the two men. Even the members of this court have disagreed about a corporate officer's right to compensation coverage as an employee. *Brooks* v. *Claywell,* 215 Ark. 913, 224 S.W. 2d 37 (1949). It is extremely unlikely

that either James or Thomas could have realized that Thomas, an officer of the company, might be protected by the policy while he was engaged in physical labor as an employee.

Thomas established a prima facie case by proving that he was injured while working as an employee of an uninsured subcontractor. The prime contractor and its insurer assert the defense of estoppel, arguing that Thomas knowingly misrepresented the fact of compensation coverage. One who asserts an estoppel must prove it strictly; the facts cannot be supplied by inference. *Wheeless* v. *Eudora Bank,* 256 Ark. 644, 509 S.W. 2d 532 (1974). That burden of proof has not been met. To the contrary, the Commission's conclusion rests upon evidence that presents a mere choice of possibilities and is therefore not substantial. *Ellsworth Bros. Truck Lines* v. *Canady,* 245 Ark. 1055, 437 S.W. 2d 243 :1969); *Ark. Power & Light Co.* v. *Cash,* 245 Ark. 459, 432 S.W. 2d 853 (1968). We are unwilling to sustain a denial of compensation that rests merely upon speculation.

Reversed.

We agree. HARRIS, C.J., and FOGLEMAN and JONES, JJ.

## ALUMINUM COMPANY OF AMERICA
## *v.* Henry A. HENNING

76-170 543 S.W. 2d 480

Opinion delivered November 29, 1976
(Division I)

*Rose, Nash, Williamson, Carroll, Clay & Giroir, P.A.*, for appellant.

*Hardin & Rickard*, by: *Robert N. Hardin*, for appellee.

JOHN A. FOGLEMAN, Justice. Appellant-employer contends that appellee-claimant's workmen's compensation claim cannot be considered as having been controverted under the terms of the Workmen's Compensation Act and, for that reason, it has no liability for fees for appellee Henning's attorney. The basis for this contention is that appellant, within the time allowed it after the claim was filed with the commission, advised the secretary of the Workmen's Compensation Commission the claim would not be controverted. We hold that the evidence was sufficient to support the commission's finding that the claim was controverted.

Henry A. Henning had suffered a heart attack on November 6, 1974. Initially, appellant took the position that the heart attack was not causally related to Henning's duties

and he was afforded medical care and disability benefits under an insurance program provided by appellant under a contract with an insurance company. On February 25, 1975, Henning was advised the company considered the heart attack to be "personal." The next day he consulted attorney Robert N. Hardin, who wrote the Workmen's Compensation Commission, asserting a claim for workmen's compensation benefits and asking that appellant be requested to make its position known. The commission sent a copy of Hardin's letter to appellant, asking it to state its position. On March 31, 1975, appellant advised the commission that it would not controvert the claim. This was within the allotted time, as extended upon appellant's request. In the letter confirming its acceptance of responsibility for the claim, appellant stated that it was sending a copy of the letter to Hardin, so he would know that appellant did not intend to controvert the claim.

Henning had been called to meet with Charles R. King, Jr., administrator of Alcoa's self-insured workmen's compensation program on February 25, 1975. It was at that meeting that Henning was told that appellant had "ruled" that his heart attack, suffered when he lifted a fellow employee of Alcoa from an ambulance at the emergency room of the Saline County Hospital, was personal. The next day he advised Hardin what had happened. He spent about 15 minutes in Hardin's office. He did not return there before he learned that Alcoa was going to treat his claim as compensable. He required no further legal assistance in connection with his claim.

King testified substantially as follows:

> I did the preliminary workup on the case. Henning was called out on an ambulance run when a mechanic was injured in one of our buildings. Henning drove the ambulance to the hospital. I understand that while Henning was in the emergency room he collapsed. The doctors and nurses suspected that it might be a heart attack and they began to treat him, putting him in intensive care. I discussed the case with our personnel manager, our company physician and the people in our corporate workmen's compensation department. We finally made a determination that it was not compensable and we

> would not pay workmen's compensation. With the personnel manager's approval, I apprised Henning of this fact. I would not take issue that the date was February 25, 1975. I explained that we had investigated the case and we had taken the position that we would not pay workmen's compensation and that, if he disagreed, he had certain rights under the Workmen's Compensation Law. The matter was closed until the claim was filed. No one on behalf of Alcoa ever filed a notice of injury. On review, after the claim was filed, we felt that it was not a workmen's compensation case, but that we could not successfully defend our position in court. We did not discover any additional evidence that changed our mind or our position.

Appellant contends that under the provisions of Ark. Stat. Ann. §§ 81-1317 and 81-1319 (Repl. 1960) a claim cannot be considered as controverted until after a claim has been filed by an injured employee with the commission and the employer has either filed a notice of controversion or failed to timely state its position. We cannot agree with such a narrow construction of these sections. We must construe and apply the statutory provisions of the Workmen's Compensation Act liberally in favor of the claimant in the light of its beneficent and humane purposes, resolving all doubtful cases in favor of the claimant. *International Paper Co.* v. *Tidwell,* 250 Ark. 623, 466 S.W. 2d 488.

The sections of the act upon which appellant relies are as follows:

> 81-1317. Notice of injury or death. - (a) Time for giving. Notice of injury or death for which compensation is payable shall be given within sixty [60] days after the date of such injury or death (1) to the Commission and (2) to the employer.
>
> (b) Form. Such notice shall be in writing and shall contain the name and address of the employee and employer, a statement of the time, place, nature and cause of the injury or death, and shall be signed by the person claiming compensation, or by someone in his behalf.
>
> (c) Failure to give notice. Failure to give such notice

shall not bar any claim (1) if the employer had knowledge of the injury or death, (2) if the Commission determines that the employer has not been prejudiced by failure to give such notice, (3) if the Commission excuses such failure on the ground that for some satisfactory reason such notice could not be given. Objection to failure to give notice must be made at or before the first hearing on the claim.

81-1319. Payment of compensation. - (a) Payment. *Compensation shall be paid directly* to the person entitled thereto *without an award, except in those cases where liability has been controverted by the employer.* If the compensation beneficiary is a mental incompetent or a minor of tender years or immature judgment, the Commission may in the exercise of its discretion direct that payment shall be made to a legally appointed guardian of the estate of such incompetent or minor.

(d) Right to compensation controverted. 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. [Emphasis ours.]

The significance of appellant's contention lies in the terms of Ark. Stat. Ann. § 81-1332 (Repl. 1960). That section follows:

81-1332. Fees for legal services. - Fees for legal services rendered in respect of a claim shall not be valid unless approved by the Commission, and such fees shall not exceed thirty per centum (30%) on the first one thousand dollars ($1,000.00) of compensation, or part thereof, twenty per centum (20%) on all sums in excess of one thousand dollars ($1,000.00), but less than two thou-

> sand dollars ($2,000.00) of compensation, and ten per centum (10%) on all sums of two thousand dollars ($2,000.00) or more of compensation. 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. In any case where attorneys' fees are allowed by the Commission, the limitations expressed in the first sentence herein shall apply. In determining the amount of fees, the Commission shall take into consideration the nature, length and complexity of the services performed, and the benefits resulting therefrom to the compensation beneficiaries. [Emphasis ours.]

Appellant relies principally upon *Horseshoe Bend Builders* v. *Sosa,* 259 Ark. 267, 532 S.W. 2d 182. But this case is neither controlling nor persuasive, even though we reversed the Workmen's Compensation Commission's finding that the claim in that case was controverted. There we simply held that neither failure to pay nor dilatory payment of compensation benefits amounts to controversion *per se.* Although we held that, under the facts in that case there was no controversion, the holding certainly implies that the determination whether a claim was controverted may be a question of fact, and not one determined mechanically upon ascertaining whether, after the employee has complied with § 81-1317 by filing written notice with the commission and the employer, the employer responds by accepting the claim as compensable or filing a statement of controversion. See also, *Garner* v. *American Can Company,* 246 Ark. 746, 440 S.W. 2d 210. Use of the mechanical approach in determining whether a claim was controverted by resort to the pleadings was actually rejected in *International Paper Co.* v. *Remley,* 256 Ark. 7, 505 S.W. 2d 219.

A principal, if not the primary, purpose of determining

whether or not a claim is controverted is for the purpose of determining who is liable for the claimant's attorney's fees. Making an employer liable for the attorney's fees of the employee serves legitimate social purposes. Among them are discouraging oppressive delay in recognition of liability,[1] deterring arbitrary or capricious denial of claims, and insuring the ability of necessitous claimants to obtain adequate and competent legal representation. See 3 Larson, Workmen's Compensation Law, 15-584 through 15-611, §§ 83.10 — 83.13 (1976); Note, Workmen's Compensation — Attorneys' Fees and Amount of Recovery, 8 Ark. L. Rev. 195. These fundamental purposes are not unlike those served by the statutes governing allowance of attorney's fees in litigation between an insured and an insurer.[2]

Just as is the case with insurance policy holders, an employee in a covered employment is entitled to rely upon his employer to promptly and honestly comply with its obligations, the payment of which is of very great importance to him, in respect both of amount and promptness, and the police power of the state is appropriately utilized to protect the employee for expenses incurred due to what may sometimes be heartbreaking delays, to encourage reasonably prompt settlement of all proper claims, and to deter refusal to settle just claims and to compensate the employee for trouble and expense of legal action which unwarranted delay and refusal make necessary. See discussion of authorities in *Arkansas Insurance Co.* v. *McManus,* 86 Ark. 115, 110 S.W. 797. The social needs addressed are sufficient basis for use of the state's police power in aid of these purposes. See, *Life and Casualty Co.* v. *McCray,* 291 U.S. 566, 54 S. Ct. 482, 78 L. Ed. 987. See also, *American Liberty Mutual Insurance Co.* v. *Washington,* 183 Ark. 497, 36 S.W. 963. Permitting recovery of such fees in insurance cases was intended to prevent defenses for the purpose of delay or other vexatious litigation. *John Hancock Mutual Life Ins. Co.* v. *Magers,* 199 Ark. 104, 132 S.W. 2d 841.

If the fundamental purposes of such statutes are to be

[1]We tacitly recognized the significance of a prompt assumption of liability by a carrier in *Wallace* v. *Jewell,* 210 Ark. 274, 195 S.W. 2d 340.

[2]For an excellent discussion of this subject, see Trammell, One State's experience With the Statutory Remedy for Insurer's Delays — A problem in Payment, 10 Ark. L. Rev. 439.

achieved, it must be considered that their real object is to place the burden of litigation expense upon the party which made it necessary. See *Globe & Rutgers Fire Ins. Co.* v. *Batton,* 178 Ark. 378, 10 S.W. 2d 859; *Commercial Union Assurance Co.* v. *Leftwich,* 191 Ark. 656, 87 S.W. 2d 55. It has been implied that this particular statutory provision is one, among others, inspired by a disproportionate ability of the parties to conduct the litigation or as a legislative "penalty" for the wrongful conduct of the party held liable. See Note, Taxability of Attorneys' Fees as Costs, 9 Ark. L. Rev. 70, where it was suggested that softening the impact of litigation upon certain classes who are typically caught in a disadvantageous position is desirable.

These factors were not articulated but, beyond a doubt they induced our holding that the commission did not err in finding that a claim was controverted in part, when there was justification for a claimant's employing an attorney because payments had been stopped, even though the employer had previously accepted the injury as compensable, and she was still undergoing medical treatment. *Pike County Poultry Co.* v. *Kelley,* 243 Ark. 460, 420 S.W. 2d 523. There it appears that no claim had been actually filed with the commission until after medical payments and payments for the healing period had been terminated by the employer on the assumption that the healing period had ended upon its physician's discharge of the claimant. It also appears from this opinion that the issues hinged upon the question whether the commission's finding that the claim was controverted was supported by substantial evidence. This was also the basis of our affirmance of the allowance of attorney's fees on that part of an award which appellant offered to pay by a check bearing the notation "Final Settlement," before appellee employed an attorney, in *International Paper Company* v. *Remley,* supra, 256 Ark. 7. There we said that the facts constituted substantial evidence that the employer was using its control of the purse strings as a coercive means of controverting the claim, in fact, if not by its formal pleadings. Such an inference is certainly justifiable here, because appellant finally accepted the claim as compensable without any evidence having been brought to its attention that was not known to it when it rejected the claim. If appellee had not then employed an attorney, he would have been in a rather helpless situation. It may well be

that there is no basis for allowance of attorney's fees where the attorney has not performed any substantial service. See *Wallace* v. *Jewell,* 210 Ark. 274, 195 S.W. 2d 340. But in this case the conclusion that Henning would never have been compensated had he not employed Hardin is certainly not unreasonable if not inescapable.

In *Littlejohn* v. *Earle Industries, Inc.,* 239 Ark. 439, 389 S.W. 2d 898, after a claim had been filed, the employer and insurance carrier stated they were not controverting the claimant's right to compensation and payment of medical expenses. We held that the legislature had entrusted to the Workmen's Compensation Commission the right to determine the *necessity* of a claimant's securing the services of an attorney to *preserve* his benefits. We also said that the courts should not question the discretionary power of the commission in the matter of an attorney's fee unless the determination is clearly wrong or unless there is a gross abuse of discretion. In that case the only question requiring adjudication by the commission was that pertaining to the end of the claimant's healing period. The evidence was held to be sufficiently substantial to support the commission's finding that the claim was controverted. From this case it would seem, and logically so, that if there is substantial evidence to support a finding that a claim is controverted, there is no abuse of the commission's discretion to award attorney's fees, and that this court cannot reverse the commission's finding in the absence of a gross abuse of discretion. See also, *Garner* v. *American Can Co.,* supra, 246 Ark. 746.

We reject the mechanistic construction of the act that would permit an employer, or carrier, to refuse compensation until after the employee has been forced to employ an attorney and then escape liability for the attorney's fees by formally advising the commission that it will not controvert the claim asserted by that attorney. To do so would put form above substance. It would also be inconsistent with our treatment of the statutes governing allowance of attorney's fees in actions against insurance companies. In such cases, the statutes do require that suit be brought. But when this has been done, it is only necessary, in order to invoke the statute, to show facts from which it can reasonably be inferred that the company understood that payment was demanded and

that it refused to make it. *Metropolitan Life Ins. Co.* v. *Shane,* 98 Ark. 132, 135 S.W. 836. It is not necessary that the demand be formal if there is a clear refusal to pay. *Phoenix Insurance Co. of Hartford* v. *Fleenor,* 104 Ark. 119, 148 S.W. 650. When the denial of liability is clear and the claimant is compelled to employ an attorney to enforce his claim, the statute is applicable. *Globe & Rutgers Fire Ins. Co.* v. *Batton,* supra, 178 Ark. 378; *Commercial Union Assurance Co.* v. *Leftwich,* supra, 191 Ark. 656. This rule applies even if no specific demand has been made when the insurance company informs the claimant in no uncertain terms that it will not make payments and that it denies liability. *Continental Casualty Co.* v. *Vardaman,* 232 Ark. 733, 340 S.W. 2d 277. Liability for attorney's fees attaches wherever an insured is required to file suit, even though the insurer confesses judgment before trial. *Federal Life & Casualty Co.* v. *Weyer,* 239 Ark. 663, 391 S.W. 2d 22.

A liberal construction favoring the claimant mandates a holding that the question whether a claim is controverted be one of fact to be determined from the circumstances of the particular case, only one of which is the status of the formal proceedings before the commission, and that, as in other such determinations, the commission's finding should not be reversed if there is substantial evidence to support it, or it is clear that there has been a gross abuse of discretion.

Appellant argues, in the alternative, that the award of the maximum allowable fee in this case was an abuse of discretion. The Workmen's Compensation Commission has a great deal of discretion in fixing and approving the amount of attorneys' fees. *Sisk* v. *Philpot,* 244 Ark. 79, 423 S.W. 2d 871. The statutory limitation on the amount is that the fees "shall not exceed" a percentage of the compensation awarded. Ark. Stat. Ann. § 81-1332. The very words "shall not exceed" indicate that the maximum allowance should not be made in every controverted case. We have said that there is no requirement that the maximum attorneys' fees be given. *Garner* v. *American Can Co.,* supra. We have likewise said that the statute is in the nature of a restrictive one in that the commission must observe fixed limitations. *Norsworthy* v. *Georgia Pacific Corp.,* 249 Ark. 159, 458 S.W. 2d 401. The statute is a *limitation* on the amount that may be paid. *Wallace* v. *Jewell,* supra. The importance of hearing testimony regarding the fee

has been noted. *Lundell* v. *Walker,* 204 Ark. 871, 165 S.W. 2d 600.

On May 22, 1975, the Administrative Law Judge took evidence on the issue of whether the claim was controverted, and whether appellant's attorney was entitled to a fee. The Administrative Law Judge requested that claimant's attorney testify as to his services so that a fee might be determined in the event the judge decided that the claim was controverted. Claimant's attorney declined on the ground that it would be a moot question if the judge held for Alcoa. The judge agreed with this position but promised, if both parties agreed to the procedure, that there would be an additional hearing on the matter of fees if he decided the claim was controverted. After the judge decided that the claim was controverted, he awarded the maximum fee without any additional hearing. The commission also held that the claimant's attorney was entitled to the maximum fee and the Circuit Court affirmed the decision.

The appellant observed that as of August 1, 1976, the claimant's attorney had been paid $1,171.46; and, if the claimant lives out his average life expectancy of thirteen years, his attorney would also be entitled to $4,495.40 plus ten percent commission on additional medical and hospital services. Except for proceedings relating to allowance of attorney's fees, the record discloses no services except those rendered prior to acceptance of the claim, consisting of one client interview of 15 minutes' duration and one letter. The claimant states that he knows of no other case where the commission has awarded less than the maximum fee in a controverted case. He argues that he is entitled to the fee because Alcoa exercised bad faith in denying the claim and handled the claim in a haphazard manner. He asserts that maximum fees should be imposed so that employers will carefully investigate and sparingly deny cases in order to avoid the extra expense. But the imposition of attorney's fees is not purely punitive. To make them so would not be consistent with the lack of statutory requirement that the refusal to pay be unreasonable or arbitrary and with the requirement that an attorney's services be necessary and substantial. See *Pike County Poultry Co.* v. *Kelley,* supra, 243 Ark. 460; *Wallace* v. *Jewell,* supra, 210 Ark. 274. See also, 3 Larson, supra, at § 82.12, p. 15-591.

In fixing the amount of the fee the statute requires the commission to take into consideration the nature, length and complexity of the services performed as well as the benefits resulting to the claimant. *Sisk* v. *Philpot,* supra, 244 Ark. 79. When judgments are recovered against insurance companies, we have said that attorney's fees allowed should be commensurate not only with time and work required but also with the ability present and necessary to meet the issues that arise and that, to be reasonable, they should not be so small or low that well prepared attorneys would avoid that class of litigation or fail in the employment of sufficient time for thorough preparation but should be sufficient to compensate for the engagement of counsel thoroughly competent to protect the interests of the claimant. *John Hancock Mutual Life Ins. Co.* v. *Magers,* supra, 199 Ark. 104. These considerations are also important in workmen's compensation cases.

It may not be necessary in every case for the commission or Administrative Law Judge to take evidence to be considered in addition to the trial record, because the record itself speaks to these issues, and in some cases the maximum fee would be so clearly indicated that no evidence could justify a lesser amount. In *Union Central Life Ins. Co.* v. *Mendenhall,* 183 Ark. 25, 34 S.W. 2d 1078, it was held that the court erred in fixing the amount of attorney's fees without a hearing on the motion for them and without hearing evidence tending to establish the proper amount. Where, as here, the record indicates that a bare minimum of services was rendered, it was an abuse of discretion to award the maximum fee without additional evidence that this fee was justified.

The judgment is affirmed insofar as the question of controversion is concerned, but reversed as to the amount of attorney's fees allowed and remanded with directions to the circuit court to remand the case to the commission for further proceedings not inconsistent with this opinion.

We agree. HARRIS, C.J., and GEORGE ROSE SMITH and JONES, JJ.

# Steven BURROWS *v.* CITY OF FORREST CITY

CR 76-110 543 S.W. 2d 488

Opinion delivered November 29, 1976
(In Banc)

*Sharpe & Morledge, P.A.,* for appellant.

*Kinney & Easley,* by: *B. Michael Easley,* for appellee.

J. FRED JONES, Justice. The appellant Steven Burrows was convicted in municipal court for the misdemeanor possession of marijuana. He was fined $250 and sentenced to ten days in jail. Upon appeal to the circuit court he was, on February 27, 1975, fined $250 and sentenced to one year in the county jail but the jail sentence was suspended during good behavior. This is an appeal by Burrows from a circuit court judgment revoking the suspension of the sentence, and the precise and only question on appeal is whether the trial

judge abused his discretion in refusing to recuse himself from hearing and passing on the motion to revoke.

On July 22, 1975, the appellant was arrested on a traffic violation for making an improper "U-turn." The arrest was not without additional incident and resulted in municipal court fines of $5.00 for the traffic violation; $25 for disturbing the peace; $500 with six months in the county jail for assaulting an officer; $500 and six months for obstructing justice, and $25 on additional charge of disturbing the peace at the police station. The appellant appealed to the circuit court and while the cases were pending in circuit court on appeal, the city filed a motion to revoke suspension of the sentence previously imposed on marijuana conviction. The motion to revoke was based upon the municipal court convictions growing out of the traffic incident.

On November 6, 1975, the appellant filed a motion for continuance of a hearing on the motion for revocation of suspended sentence on the ground that the municipal court convictions upon which the motion to revoke was based, were still pending before the circuit court on appeal. The appellant also filed a motion to quash the jury panel for trial of the appeal cases because it was not representative of the appellant's age group.

An unfortunate situation developed between the very reputable attorneys representing the appellant and the very competent and conscientious trial judge during their discussions of the motions. The trial judge apparently considered the motions dilatory in an effort to extend the hearing on motion to revoke beyond the one year suspended sentence but, apparently in the light of *Parkerson* v. *State,* 230 Ark. 118, 321 S.W. 2d 207 (1959), the trial court did extend the hearing from November 12 as originally set, to November 18, 1975. This new date as extended was well within the one year suspended sentence, but prior to a possible trial date for the municipal convictions on appeal.

In the meantime, apparently chafing under the trial court's accusations of dilatory tactics, the attorneys for the appellant concluded from their conversations with the trial judge, that he had already concluded before hearing, that the

suspension would be revoked; so, on November 13, 1975, the appellant filed a motion for the trial judge to recuse himself from hearing on the motion for revocation on the ground that the judge had told one of the attorneys of record to tell the appellant "to bring his toothbrush with him," and had made other statements indicating bias and prejudice against the appellant. In response to the motion to recuse, the appellee-city contended that the full statement of the circuit judge was "that Defendant should bring his toothbrush with him because if he is found guilty, he is going straight to jail," and that the statement was made to one of the attorneys for the appellant but was not made in a professional capacity, as affecting the rights of the defendant. The trial judge refused to recuse himself and on November 18, 1975, hearing was had on the motion to revoke. Following the hearing at which the peace officers and also the appellant testified, the suspension was revoked and the appellant was sentenced to serve the remaining 99 days of his original one year sentence in the county jail.

On appeal to this court the appellant contends that the trial court erred in denying his motion for the judge to recuse himself.

The record on the motion to recuse was made at a hearing on November 6. At that hearing both attorneys for the appellant and the attorney for the appellee-city testified. The record as to attorney Sharpe's testimony, in pertinent part, appears as follows:

> I talked with Judge Hargraves about an hour about this matter [date for hearing], and tried to explain to him the prior commitments that both Mr. Morledge and I had, and on one or more occasions Judge Hargraves told me that the motion to strike the Jury Panel and that the the motion for the continuance on the hearing set for the motion for revocation of the suspended sentence were dilatory pleas, and that if said motions were granted it would be impossible to empanel the jury or set a date for the hearing on motion of revocation of the suspended sentence prior to a date subsequent to the expiration of the suspension, that being February 24, 1976, inasmuch as Steven Burrows secured a one-year suspended sentence that was pronounced on February 24, 1975.

Judge Hargraves told me, I told Judge Hargraves that Attorney Knox Kinney had stated to me that the law was that the date of the filing of the revocation was applicable. He told me that in the car coming from the Rotary Club, and I had not had a chance to check it out.

Judge Hargraves told me if that was the law that he would grant the continuance for the motion, that he would grant the continuance on the motion for the continuance relating to the motion for the revocation of suspended sentence. However, Judge Hargraves told me—

THE COURT: Until the following week.

* * *

In an effort to show the Judge further that there was no reason to press forward at this particular term, or at this particular date, the next day I tried to explain to him that the case or cases, five cases against Steven Burrows that were on appeal, had their inception with an alleged violation of making a U-turn on Highway 1 in Forrest City, and that maybe the officers had used a little bit too much force.

Judge Hargraves told me that we would not try the officer, that Steven Burrows was on trial, that the officer was not on trial, the arresting officer, and that the arresting officer did what he was supposed to do according to the books, pointing to a set of Arkansas Supreme Court cases in Judge Hargraves' office.

In addition, Judge Hargraves told me that when Steven Burrows received his suspended sentence of one year on February 24, 1975, that Steven Burrows had made a contract with the Judge, and that Judge Hargraves was going to see that the contract was carried out on the part of Steven Burrows.

After about an hour conversation, unable to agree on a date of continuance, Judge Hargraves suggested that I contact Judge John Anderson, he was not trying any cases at all during this week, and mind you, all of the conversation that I had had with Judge Hargraves

related to the continuance on the motion for the revocation of suspended sentence.
* * *

A few minutes after I got to my office Judge Hargraves called me and stated that, to be sure that there would be no misunderstanding, that the only thing that Judge Anderson would hear, if I were able to secure him during the week of the 17th, would be the five appeal cases, that he, Judge Hargraves, was going to hear the motion for revocation the next day, Wednesday morning, November 14, and during that conversation on the telephone Judge Hargraves again questioned our motives as attorneys for Steven Burrows in filing motions to strike the Jury Panel, and our motion for a continuance on the hearing of motion for revocation.
* * *

A quick examination of the authorities reflected that the Supreme Court of Arkansas, in *Parkerson* v. *State,* 230 Ark. 118, 231 S.W. 2d 207 had held that a petition to revoke a suspended sentence prior to the end of the suspension gave the Court jurisdiction to revoke a suspended sentence, and jurisdiction was not lost when the Court, on defendant's motion for a continuance, passed the matter until the date subsequent to the expiration of the sentence.

I immediately dictated a written motion for continuance, relating to the motion for revocation, because Judge Hargraves had told me that if this was the law, or if I would agree that this was the law, that he would continue the case.
THE COURT: Until the following week.
* * *

After analyzing the conversation that had taken place between Judge Hargraves and myself, and his statement made on three or four occasions about the ulterior motives in filing motion to strike the Jury Panel, and continuance, to deprive this Court of jurisdiction, the fact that he had pointed to the books and said that the officer did what he was supposed to do, the fact that I

> would not be able to try the officer, the other matters set forth in the motion for continuance, I felt as though Judge Hargraves had made his decision in the matter prior to hearing any evidence, and for that reason my partner and I filed a motion asking the Judge to recuse himself in this case. I was not present. I was not present on or about November 6 when the original motion for continuance of the revocation was filed, or matters set forth in the motion for the Judge to recuse himself pertaining to that, and since I was not present I believe Mr. Morledge ought to testify to that.

Mr. Morledge, the appellant's co-counsel, testified that he and attorney Sharpe prepared a motion to strike the jury panel in the trial of the cases pending against the appellant on appeal, and that they presented the motion to the trial judge in chambers. The pertinent portion of the record pertaining to attorney Morledge's testimony then appears as follows:

> On my delivering the motion [to strike the jury panel] to the Court Judge Hargraves said that I was to bring our client, Mr. Burrows, to court on November 12, 1975, and that he was to bring his toothbrush with him at that time.
> * * *
>
> I remember specifically that I raised some question with the Court at that time about statements as to whether both the motion for revocation and the trial on the five appeals on misdemeanor cases would be held at the same time. The Court stated that that was not the case, that it may take some two to four days to get to the motion to strike the Jury Panel, and that I should, or we, Mr. Sharpe and I, have our client in Court on the 12th and have him bring his toothbrush with him.

Mr. Easley, the attorney for the appellee-city, testified in part as follows:

> . . . I was present at the time Mr. Morledge has just alluded to with reference to the statement by the Court that the defendant should bring his toothbrush. I, too,

> well remember the statement, but I think that there is more than one inference that may be drawn from that, and it seems to me that the inference which could logically be drawn was that, reading between the lines, the Court had once been lenient to Steven Burrows, and that in the event he was found guilty on this particular occasion, that he would go to jail rather than be granted any further leniency.
>
> Now, granted, I don't recall any direct quote on this point. I cannot say what the exact words of the Court were, but I'm telling the Court what my interpretation of that statement was, and I think that the statement is not necessarily and for all purposes indicative of any prejudicial feeling or bias of the Court towards this individual. In fact, I have not at any time during the course of these proceedings seen any indication of any personal bias or prejudice on the part of Judge Hargraves against this individual.
>
> I have, on the other hand, witnesses that this Court has shown a determination that its orders be carried out.
>
> I have noted that Judge Hargraves, in handing down his suspended sentence, and then telling Steven Burrows what was expected of him on February 14, 1975, has shown a determination that people who are given chances, and who breach that trust, and that contract that is made, not only with the Court but what the Jury, can expect to have their sentence revoked, and may not expect the leniency and may not expect to hit the streets again, in common language.

We deem it a matter of common courtesy and accommodation for a trial judge to consider the convenience of attorneys in setting cases for trial and motions for hearing, but when an attorney and the trial judge cannot agree on a mutually convenient date, the convenience of the attorney must give way to the convenience of the trial court in setting a trial or hearing docket. The fact that the trial judge in the case at bar participated in "about an hour conversation" in attempting "to agree on a date of continuance," in our opinion, negates evidence of arbitrariness on the part of the trial judge in setting the matter for hearing.

We conclude, however, that the judgment must be reversed because of the trial court's request that the attorneys have the appellant bring his toothbrush with him when he appeared for the hearing on the petition to revoke the suspended sentence, when this remark is considered together with the other remarks made. The city attorney agreed with the appellant's attorney that the toothbrush remark was made by the trial judge, and the attorneys only differed in their interpretation of what the trial judge meant by the remark. When the remark concerning the toothbrush is considered together with the remarks relating to the police officers having done what they were supposed to do, and the enforcement of a contract between the judge and the appellant, it is apparent that the remarks could be interpreted to mean that the trial judge's impartiality in the exercise of his judicial discretion was impaired.

Of course, a suspended sentence and also its revocation lie within the sound discretion of the trial court, Ark. Stat. Ann. §§ 43-2314 and 43-2326 (Repl. 1964). *Gross* v. *State,* 240 Ark. 926, 403 S.W. 2d 75. In *Gerard* v. *State,* 235 Ark. 1015, 363 S.W. 2d 916, a suspended sentence was revoked on ample testimony in support of the motion to revoke, but we reversed because the trial court refused to hear testimony offered in behalf of the accused and refused to hear the accused's own statement.

In the case at bar the testimony of police officers in support of the city's motion to revoke and also the appellant's own testimony were heard by the trial court, but we are not concerned on this appeal with whether the trial court abused its discretion in revoking the suspended sentence. We are concerned here with whether the trial judge should have recused himself under the circumstances in this case and we are of the opinion that he should have done so.

Certainly we are of the opinion the trial judge did not consider himself prejudiced or biased against the appellant in this case because we are convinced that if he had felt he was prejudiced or biased, he would have recused himself even without a motion that he do so. We think the language we employed in the civil case of *Farley* v. *Jester,* 257 Ark. 686, 520 S.W. 2d 200 (1975), is applicable to the case at bar. In *Farley*

we said:

> We think under all the circumstances, the chancellor should have disqualified himself to hear this case. In so finding, we do not mean to say, nor even to imply, that the chancellor had preconceived ideas or that his friendship with the Reverend Park prejudiced his findings. To the contrary, we consider this chancellor a capable jurist and a man of integrity, a reputation that he bears over the state. * * *
>
> However, court proceedings must not only be fair and impartial — they must also appear to be fair and impartial. This factor is mentioned in a Comment found in 71 Michigan Law Review 538, entitled "Disqualification for Interest of Lower Federal Court Judges," 28 U.S.C. § 455.

Since the trial judge's remarks in the case at bar could be considered subject to more than one interpretation, we feel the better procedure, where the trial judge sits as a fact finder, would be to resolve the difference in favor of the appearance of fairness and remand this case for hearing on appellee's motion to revoke before a different judge. See *Gerard* v. *State, supra.*

Reversed and remanded.

Robert COURTNEY *v.* STATE of Arkansas

CR 76-146 543 S.W. 2d 493

Opinion delivered November 29, 1976
(Division I)

*Ralph E. Wilson Jr.*, for appellant.

*Jim Guy Tucker*, Atty. Gen., by: *B. J. McCoy*, Asst. Atty. Gen., for appellee.

CONLEY BYRD, Justice. Following the reversal of appellant Robert Courtney's conviction in *Courtney* v. *State*, 252 Ark. 620, 480 S.W. 2d 351 (1972), appellant was again put to trial in Poinsett County. At that trial appellant represented himself with the assistance of Attorney John R. Henry whom the court appointed to help in an advisory capacity. When the jury was unable to agree, the court declared a mistrial. Thereafter, a motion for change of venue was made and granted. When the matter came up for trial in the Osceola District of Mississippi County, a negotiated plea of 25 years suspended sentence was accepted by appellant on May 8, 1973. After appellant was arrested on some charges in Crittenden County, the State moved to revoke the suspended Mississippi County sentence. Appellant was represented at the revocation by Mr. Dana Davis of the law firm of Skillman, Durrett and Davis of West Memphis, Arkansas. The trial court on March 28, 1974, granted the State's motion to revoke and sentenced appellant to 15 years in the Department of Correction. On April 29, 1974, appellant filed a *pro se* "Notice of Appeal and Motion for Appointment of Counsel."

On May 9, 1974, the trial court wrote to appellant the following:

> "Robert Courtney 62558
> Box 500
> Grady, Arkansas 71644
>
> Dear Robert Courtney:
>
> I am mailing your Notice of Appeal to the Circuit Court Clerk at Osceola, Arkansas, for filing.
>
> It will be necessary for you to direct all of your future correspondence in regard to this matter to your attorney, Mr. Dana R. Davis, Skillman, Durrett and Davis, Lawyers, West Memphis, Arkansas, and I am sure he will do whatever is necessary from that point on.
>
> Yours very truly,
>
> Todd Harrison"

On August 6, 1974, Mr. Dana R. Davis of the law firm of Skillman, Durrett and Davis wrote to appellant:

> "Dear Mr. Courtney:
>
> I have not been appointed by any State or Federal Court to represent you in your pending appeal and I will not voluntarily represent you further.
>
> Your entire file is enclosed for your inspection or that of any Attorney you might have in the future.
>
> Please do not contact me again.
>
> Yours very truly,
>
> Dana R. Davis"

On August 29, 1974, our Criminal Justice Coordinator wrote to appellant the following:

"Dear Mr. Courtney:

This will acknowledge receipt of your letter dated August 9, 1974, and received by this office on August 15, 1974, in which you inquire as to whether a Notice of Appeal has been received by this Court.

You are advised that we have been notified that your Notice of Appeal has been filed with the Mississippi County Circuit Court but we have no record of any transcript having been filed with this court for purposes of appeal. Of course, the appellate process does take some time to complete. In view of Mr. Davis' letter of August 6, 1974, I would advise that you contact the circuit court authorities for a clarification of whom has been appointed to represent you on appeal.

Trusting this information is of value, I am

Very truly yours,

Steven N. Carlson
Criminal Justice Coordinator"

On October 28, 1975, appellant filed a *pro se* petition for post-conviction relief which was heard by the trial court on February 6 and February 11, 1976. Appellant represented himself at the hearings held on those dates. The record of those hearings shows that the trial court had at some time appointed Dana R. Davis of the law firm of Skillman, Durrett and Davis to represent appellant on his appeal from the March 28, 1974, revocation but the record does not show why the appeal has not been perfected in this court.

The record of the post-conviction hearing also shows that appellant is 41 or 42 years of age and has spent 20 of those years in the State's penal institutions for crimes committed. After the conclusion of the testimony the trial court asked appellant "What action are you asking the court to take here today?" The record then shows the following:

"DEFENDANT: I would ask the Court to set aside the conviction or either reduce the sentence to the lowest

term of grand larceny, and to completely, how do you say it? Set aside the habitual offender on the grounds that I've been placed twice in jeopardy on these charges that's been set aside. They used six convictions, and the only — Four of these convictions were set aside, according to testimony, this lawyer, Mr. Henry, was set aside by the Circuit Court, and the State Court elected not to retry me on that, so therefore I would be innocent of the charges. They could not be used as habitual criminal, and I would ask the Court to set aside the conviction, and would be no reason for a new trial.

Like the Court said: I would have to stay in jail probably, unless a reasonable bond, or maybe I could be released on my own *reconnaissance,* and I could get the proper treatment and go through another trial.

THE COURT: All right. I'll tell you what I am going to do: I am going to deny your petition for relief under Criminal Procedure Rule Number I. I am going to grant your motion for credit for your time in jail and in the penitentiary awaiting trial, and you will be given credit for 19 months jail time on that."

For reversal of the trial court's decree in the post-conviction hearing the appellant contends:

"Appellant was denied his right to appeal from the revocation hearing due to his indigency, and through no fault of his own, but due to some misunderstanding between appellant's retained trial counsel and the circuit judge, which denied him appellate counsel and thus violated his constitutional right of due process of law."

Since the record does not show the status of appellant's appeal from the revocation of his suspended sentence nor why it has not been perfected in this court, we need not speculate as to what relief could have been granted him here had he requested such relief in the trial court. The Criminal Justice Coordinator recognized in August of 1974, that some communication gap existed in connection with the appeal and suggested to appellant that he contact the trial court for a clarification as to who had been appointed to represent him. The record does not show that appellant accepted this advice. In the absence of a showing that the failure to perfect the

appeal was the fault of either the trial court or the conduct of his court appointed attorney, we cannot say that the trial court erred in refusing to set aside his conviction or to reduce it to the lowest term for grand larceny.

Affirmed.

We agree: HARRIS, C.J., and HOLT and ROY, JJ.

Donna KEY *v.* WORTHEN BANK & TRUST COMPANY, N.A.

76-112 543 S.W. 2d 496

Opinion delivered November 29, 1976
(In Banc)

*McHenry, Bryant & Polk,* for appellant.

*Wright, Lindsey & Jennings,* for appellee.

ELSIJANE T. ROY, Justice. Appellant Donna Key brought this action to void, as usurious, contracts entered with Worthen Bank & Trust Company, N.A. (Worthen) in conjunction with the issuance of BankAmericard and Master Charge bank cards. Appellant agreed to pay an annual membership fee of $12 in each credit plan and to be responsible for credit extended for purchases made on the basis of authorized use of the cards. She agreed to pay for such purchases currently or in installments on which interest would be charged.

Thereafter appellant charged certain items on her Master Charge account, for which she later paid Worthen although she refused to pay the annual membership fee. On her BankAmericard account she charged certain items amounting to $95.42 which she refused to pay. She also refused to pay the $12.00 membership fee added to the account, contending that the entire account was tainted with usury because of assessment of the membership fee. Worthen denied the membership fees were interest, but admitted that if the chancellor determined otherwise then interest on appellant's accounts exceeded the Arkansas maximum. In addition, Worthen counterclaimed for the balance of both accounts, including the membership fees.

The chancellor heard the case on the pleadings and a stipulation of facts. He found the membership fees were not imposed as a condition of a loan or extension of credit, but as a valid condition of membership in the bank card plan and not as a cloak for usury. The trial court also awarded Worthen judgment on its counterclaim for the balance on

each account. From that decree Mrs. Key has brought this appeal.

The application forms of both cards are almost identical, and the one signed by appellant for the BankAmericard credit plan reads as follows:

> I have applied for membership in Worthen Bank & Trust Company's BankAmericard credit plan. If my application is approved, I agree to pay an annual fee of $12.00 for membership in the plan and for issuance of a bank card for use in conjunction with the plan. *I understand that the payment of the fee is required as a condition of membership in the plan, whether or not I use the bank card for the purpose of obtaining credit,* and I agree that the fee may be charged to my BankAmericard account. (Italics supplied.)

The following portions of the stipulation are pertinent to the issue:

> 1. * * * Credit applications are taken from applicants and a card or cards will be issued if the applicant meets certain predetermined credit standards established by Worthen. The decision of whether or not to issue a card or cards is made by Worthen. The applicant states the credit limit desired and, if the issuance of the card is approved, Worthen then determines whether the requested credit limit should be granted.
>
> 2. * * * The card-issuing bank has contracts with merchants under which the merchants agree to accept charges on bank cards in payment for goods or services. The card-issuing bank agrees to pay the merchants cash for the charge slips generated by the use of the card or cards issued by the bank. * * * By participating in a bank card plan, a merchant is relieved of the necessity of providing charge accounts for his customers and of the risk of accepting checks from customers. If the merchant complies with his contract governing acceptance of bank card charges, he receives cash for the charge slip and the card-issuing bank takes on the risk of collecting from the cardholder and carries the receivables generated by the

use of the card. This is the manner in which all card plans operate generally, and it is the manner in which Worthen operated its BankAmericard and Master Charge plans at all times relevant hereto.

The issuer ordinarily waits a period of time, something less than a month, before rendering its statement. If the cardholder pays within 25 days of the billing date then no finance charge is added, but if not, ten percent (10%) interest is added as a finance charge.

The parties also stipulated as to what D. E. Fortson, senior vice prssident of First Arkansas Bankstock Corporation, who is knowledgeable in the bank card industry, would testify if called as a witness. His testimony *inter alia* would be:

> . . . ; that a bank card is proof of the holder's favorable credit rating and it is not unusual for a bank card to be used and accepted as a credit reference, particularly when a cardholder is in a city other than the city of his residence, and that merchants and innkeepers will cash checks for travelers who are holders of bank cards, relying on the generally known fact that such cards are issued to persons of financial responsibility and proven creditworthiness; that a bank card is a valuable convenience, because travelers can charge airline tickets, hotel bills, restaurant bills, and purchases from merchants on bank cards, obviating the necessity of carrying large amounts of cash on trips, and cardholders can pay the card-issuing bank for all charges at one time, without incurring a finance charge if paid within 25 days of billing, . . . ; that a membership fee is identical to the type of fee charged by companies issuing travel and entertainment cards, such as the American Express card; that the annual fee for an American Express card is $15.00.
>
> * * *
>
> That it is Worthen's position that membership in a bank card plan is a valuable banking commodity because it affords a cardholder services and conveniences, entirely apart from and in addition to the extension of credit,

> that would not otherwise be available to the member/cardholder; that member/cardholders would be willing to pay for these incidents of membership; that a membership fee properly may be charged on an annual basis; and that a fee for membership may be made even though each member may not avail himself of all available features of membership.

Appellant if called as a witness for rebuttal would testify:

> . . . that she used her bank cards for the extension of credit only, and not for any of the other purposes described in the stipulated testimony of Mr. Fortson.

Appellant contends whether termed a "membership fee," a "service charge," or whatever terminology is used, the annual fees charged by BankAmericard and Master Charge constitute "interest" and the transactions in question are violative of Article 19, § 13 of the Arkansas Constitution, which prohibits a greater rate of interest than 10% per annum.

Appellant also cites as authority for her position Arkansas cases which hold as usurious laws having "hidden items" and/or "multiple transactions" designed to allow the lender to charge more than 10%. We agree with the legal principles enunciated in these cases but do not find them to be appropos here since the membership fees are not hidden items and do not fall within the "multiple transactions" prohibitions.

The burden of proof is on appellant to prove that the contracts are usurious. An intention to charge a usurious rate of interest will never be presumed, imputed or inferred where the opposite result can fairly and reasonably be reached. *Brown* v. *Central Arkansas Production Credit Assn.*, 256 Ark. 804, 510 S.W. 2d 571 (1974); *Davidson* v. *Commercial Credit Equipment Corp.*, 255 Ark. 127, 499 S.W. 2d 68 (1973).

Here the membership fee was not imposed in connection with receiving a loan from Worthen or with any specific extension of credit. Mrs. Key came to the bank voluntarily seeking membership in specific bank plans. Appellant's applications for the cards stated she understood the membership

fee was required whether or not she used "the bank card for the purpose of obtaining credit."

Mrs. Key was not a necessitous borrower who as a prerequisite to a loan was forced to buy something which she did not want. On the contrary, the bank card is a convenience to the cardholder, and the extension of credit is only one of several features of the card.

It serves as a credit reference similar to a letter of credit enabling the holder to cash checks or otherwise trade upon the recognition of credit worthiness which the card affords. Since merchandise and services can be secured without the necessity of writing checks it is very much like a check writing service. However, when the cardholder finds it necessary to cash checks while out of town the card is particularly helpful because it may solve credit worthiness and identification problems which often arise. It also obviates the necessity of carrying large amounts of cash with all the attendant risks. The value of the security feature of an instrument permitting only the bearer thereof to use it to obtain cash, goods or services has long been recognized by the issuance of traveler's checks, for which a charge is validly made.

We have previously held that contracts or fees collateral to the lending or borrowing of money, if in themselves lawful and made in good faith, do not infect the "borrowing transaction" with usury, although their effect may be to increase the sum payable from the borrower to the lender. See *Leavitt* v. *Marathon Oil Co.*, 186 Ark. 1077, 57 S.W. 2d 814 (1933); *Commercial Credit Plan* v. *Chandler*, 218 Ark. 966, 239 S.W. 2d 1009 (1951).

We find the agreement here was openly made in good faith and the membership fee is collateral to any interest imposed in connection with a loan or the extension of credit. Our decision is not to be interpreted as withdrawal by this Court from its long established position that we will not permit evasion of the constitutional prohibition against interest charges in excess of 10%. See *Winston* v. *Personal Finance Company of Pine Bluff, Inc.*, 220 Ark. 580, 249 S.W. 2d 315 (1952), where we held the loan usurious and stated: " . . . here the 'service charge' is a mere shell to conceal the kernel of usury."

However, in the case at bar we agree with the chancellor that the membership fee is not a cloak for usury, but that it is valid consideration paid for the many services available to members in the bank card plans. It is immaterial that Mrs. Key chose not to use the privileges attendant to ownership of the bank cards as these privileges were available to her and furnished valuable consideration for the membership cards.

Affirmed.

Ernest B. MATKIN, Jr., Administrator *v.*
Samuel E. JONES, Individually and as
Father and Next Friend

76-175 543 S.W. 2d 764

Opinion delivered December 6, 1976
(Division I)

*Bailey, Trimble & Holt,* by: *Jack Holt, Jr., John F. Forster, Jr.*, and *McHenry, Bryant & Polk,* by: *James M. Bryant II,* for appellant.

*Laser, Sharp, Haley, Young & Boswell, P.A.*, and *Ike Allen Laws Jr.*, for appellee.

GEORGE ROSE SMITH, Justice. A head-on highway collision gave rise to the appellee Jones's complaint for personal injuries sustained by his minor son and to the appellant Matkin's counterclaim for the wrongful death of his son and for property damage. The jury did not award damages to either party. Matkin's two points for reversal relate to an inconsistent out-of-court statement shown to have been made by John DeBlock, a passenger in the Matkin car.

The critical question of fact was: Which driver caused the collision by driving into the other's lane of traffic? Young Jones testified that as he drove over the crest of a hill he saw the Matkin car coming toward him, in Jones's traffic lane. Jones tried, but failed, to avoid a collision by first going to his left and then trying to get back to his side of the road.

DeBlock, who was riding with young Matkin, testified on direct examination that the Matkin car was continuously on its own side of the highway until the collision took place. On cross-examination DeBlock admitted that right after the accident he talked to a Mrs. Linton at the scene, but he denied having told Mrs. Linton that Matkin, in trying to avoid an animal in the road, had driven on the wrong side of the road. In rebuttal Mrs. Linton testified that when she asked DeBlock what had happened, he said: "We swerved to keep from hitting a 'possum or something."

It is first argued that Jones made DeBlock his own witness by asking about a matter not mentioned on direct examination and that therefore Jones could not contradict

DeBlock. That argument is unsound, because the cross-examination was a permissible method of impeachment. Ordinarily matters of impeachment, such as inconsistent out-of-court statements or criminal convictions, are not mentioned on direct examination. Hence the rule is "that cross-examination to impeach is not, in general, limited to matters brought out in the direct examination." McCormick on Evidence, § 22 (2d ed., 1972).

To avoid a multiplicity of issues, the cross-examiner is bound by the witness's answer with respect to a collateral matter. A fact is not collateral if the cross-examining party would be entitled to prove it as part of his case or defense. *McAlister* v. *State,* 99 Ark. 604, 139 S.W. 684 (1911). Upon that premise the appellant argues that DeBlock's statement to Mrs. Linton was collateral, because, being hearsay, it could not have been proved by Jones as part of his case.

That argument is also unsound. What is or is not collateral is the basic fact, not the means of proving it. Here that fact is: The driver of the Matkin car drove on the wrong side of the road to keep from hitting an animal. If DeBlock had been willing to testify to that fact, Jones could have called him as a witness to make that proof. Consequently the issue raised by the cross-examination was not a collateral one. If the appellant's argument were accepted, an inconsistent out-of-court statement could never be proved, because it would always be hearsay and therefore collateral. That is not the law.

As a second argument Matkin contends that the trial judge should, on his own motion, have instructed the jury to consider DeBlock's statement to Mrs. Linton only as bearing upon his credibility. The burden, however, was on counsel to request such a limiting instruction. When testimony is admissible for one purpose but not for another, a general objection, as here, is not sufficient; a limiting admonition must be requested. *City of Springdale* v. *Weathers,* 241 Ark. 772, 410 S.W. 2d 754 (1967). No such request was made in the court below.

Affirmed.

We agree. HARRIS, C.J., and FOGLEMAN and JONES, JJ.

## Re: JUDICIAL PLANNING COMMITTEE

December 6, 1976

PER CURIAM

In accordance with the resolution adopted by the Arkansas Judicial Council on October 9, 1976, whereby the Council requested that the Supreme Court establish a permanent Judicial Planning Committee to improve the administration of justice in Arkansas, the Judicial Planning Committee of Arkansas is hereby established.

1. The name of the Committee shall be the "Judicial Planning Committee". It shall meet regularly to perform research and make recommendations on a long-range basis to improve the administration of justice in the Courts of Arkansas. The Committee shall prepare an annual master plan and a multi-year plan for improving the state court system and shall incorporate into its plans special provisions pertaining to criminal justice in the Courts. The Committee may establish advisory committees to assist it in its deliberations and promote involvement of the public, the executive and legislative branches of government, and other interested parties, in its efforts to upgrade the state court system. The Committee shall be empowered to review applications to the Law Enforcement Assistance Administration for assistance in court projects, to establish priorities for improving the state court system, and to develop and coordinate programs for improving the courts.

2. The Committee shall consist of twelve members as follows: One Supreme Court Justice to serve as chairman, three Circuit Judges, three Chancery Judges, three Municipal Judges, one Prosecuting Attorney, and one criminal defense attorney or public defender, to serve terms of two years' duration. A majority shall constitute a quorum. The Arkansas Judicial Department shall assist the Committee, administer its operations, and provide necessary staff subject to the approval of the Committee and this Court.

3. This Court may request recommendations of persons to serve on the Committee from the Arkansas Judicial Coun-

cil, the Arkansas Municipal Judges' Association, the Arkansas Prosecuting Attorneys' Association, and the Arkansas Bar Association.

4. This order shall be effective on December 13, 1976.

BYRD, J., not participating.

FARMERS COOPERATIVE ASSOCIATION, Inc., An Arkansas Corporation *v.* W. F. STEVENS

76-172 543 S.W. 2d 920

Opinion delivered December 13, 1976
(In Banc)

*J. L. Hendren,* for appellant.

*Burrows & Sawyer,* for appellee.

CARLETON HARRIS, Chief Justice. This litigation relates to the nature of a homestead exemption claimed by W. F. Stevens relative to land located within the limits of the incorporated town of Little Flock. Stevens contended, and the trial court held, that the land qualified for a rural homestead exemption under Article 9, Section 4, of the State Constitution. Appellant, Farmers Cooperative Association, Inc., asserts that said land qualifies only for an urban homestead exemption under Article 9, Section 5 of the Constitution. Appellant recovered a judgment against appellee in the amount of $10,-800.85 plus interest and, in the face of an execution, appellee contended that his 20 acres of real property were entirely exempt from execution because of being a rural homestead. Appellant asserted that Stevens was only entitled to the urban homestead exemption, constituting no more than one acre. From the judgment entered by the trial court comes this appeal.

The proof establishes that the 20-acre tract claimed to be exempt is used as defendant's home and exclusively for agricultural purposes. Stevens is engaged in the business of selling eggs, boarding horses, and hiring himself out to other farmers to operate tractors and other farm work. Little Flock, though incorporated, contains no schools, no service stations, no industry, no motels, and the town property is zoned as agricultural. The record does not reflect that any municipal services are afforded except water, which is provided by a rural cooperative. The property was in an unincorporated area when acquired by appellee, and actually it appears that the incorporation was effected to prevent the cities of Rogers and Bentonville from annexing it.

It is apparent from our cases, though facts are different in all, that in doubtful cases, the use made of the property is very much pertinent to the question of whether a homestead is urban or rural; actually it would appear that each case

stands on its own facts. In *Spaulding* v. *Haley,* 101 Ark. 296, 142 S.W. 172, the court said:

> The testimony in the case establishes the fact that Kingsville was a small village, probably within the meaning of the constitutional provision with reference to homesteads. But it also shows that the whole of the property which the court allotted to the widow as a homestead was farm property, and that it jutted into the outskirts of the village. Some of the witnesses testify that it was not a town or village but merely an aggregation of houses occupied by a few families as a part of their several farms under circumstances like unto the facts with reference to the property of Spaulding. The chancellor found that this property was used entirely for agricultural purposes, and that it therefore constituted a rural, and not an urban, homestead. We can not say that this finding is against the preponderance of the testimony.

In *Orr* v. *Doughty,* 51 Ark. 527, 11 S.W. 875, we said:

> The tract had never been surveyed into blocks and lots or dedicated to village uses. It has been and is now used for agricultural purposes in connection with defendant's contiguous farm, and is therefore a country homestead within the meaning of the constitution, notwithstanding the land upon which the defendant's residence is situated juts into the village.

In *Stuckey* v. *Horn,* 132 Ark. 357, 200 S.W. 1025, the testimony reflected that the land in question was situated adjacent to a village (never incorporated) once known as Perrysmith, but later known as Bauxite. It was the site of a school with an enrollment of about 600 pupils, and there were two churches,[1] a bank, a drugstore, two mercantile houses, a barbershop, a butcher shop, and a number of residences. About 3,000 people lived on various parts of the lands in the community and principal employment was labor performed for the Bauxite Company. The court said:

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[1]There are two churches in Little Flock.

"The case of *Spaulding* v. *Haley,* 101 Ark. 296, presented a very similar question under the facts of that case, and in the syllabus there it is said:

> 'Where land jutted into the outskirts of a village, but was used entirely for agricultural purposes, although part of it had been divided into lots by a prior owner, without making a plat or subdivision of it, a finding of the chancellor that it constituted a rural, and not an urban, homestead, will not be set aside.'

The land in this litigation had not even been divided into lots. Under this test, we think the land a rural homestead, and not an urban one, and the widow and minor children are not, therefore, limited to a claim of one acre, but may claim the entire eighty-acre tract as a homestead."

It is thus evident that in determining whether a homestead should be classed as urban or rural, the court has carefully observed the use being made of the property and has considered such use of great weight in deciding the issue. Appellant points out that Little Flock was an incorporated town and it is argued that this is a significant fact. It is true that in the only case before this court that involved property within an incorporated town, *First National Bank of Owatonna* v. *Wilson,* (1896) 62 Ark. 140, 34 S.W. 544, we held the property to be an urban homestead, but facts which we deem very pertinent to making a determination (whether the property is urban or rural) are not shown. The town was Brinkley, which had been incorporated before Wilson had even purchased his property. The opinion is short and does not reflect what municipal services were provided. In fact, the case was submitted upon an agreed statement of facts which apparently only stipulated that Wilson's homestead was in the town of Brinkley. The opinion also states, "We do not hold that the fact that one dwells within the limits of a municipal corporation will in all cases prevent him from holding as exempt a homestead of more than one acre."

We do not consider the fact that Little Flock was incorporated to be controlling in this litigation. In the first place, the Constitution itself never used the word "incorporated," but only uses the words "any city, town of village," such con-

stitutional language apparently being used in the popular sense. In *Southeast Ark. Levee Dist.* v. *Turner,* 184 Ark. 1147, 45 S.W. 2d 512, this court had occasion to discuss the meaning of the word "town." While the case did not involve the Homestead Exemption Act, it is informative on the question of how the word "town" has been construed. There, appellees were landowners in the Southeast Arkansas Levee District, just outside the incorporated limits of McGehee, and they instituted suit to enjoin the collection of an alleged excessive assessment against their property, asserting that they were not within the incorporated limits of McGehee. This court pointed out that the legislation involved did not make any distinction between incorporated and unincorporated towns and cited two previous cases clearly indicating that where the only word used is "town" it is to be taken in the popular sense. In holding that the appellees were subject to the tax, though not actually residents of McGehee, the court pointed out that these citizens had all conveniences which proximity to the city afforded. See also *King* v. *Sweatt,* 115 F. Supp. 215 (W. D. Ark. 1953) where Judge John E. Miller pointed out that there was no precise legal definition of the words "city, town or village," in our Arkansas constitutional provisions relating to homestead and, that it must be presumed that such words were used in their popular sense.[2] In the case before us, since the constitutional provision does not use the words "incorporated town," we attach no significance to the fact that Little Flock is incorporated.

Summarizing, the subject property in the present litigation was used exclusively for agricultural purposes. Little Flock, with the exception of two churches, does not possess the characteristics of a town as it is generally considered, i.e., no schools, service stations, industry, motels nor, as far as the record goes, services normally furnished by a town.

For the reasons herein set out, we are unable to say that there was no substantial evidence to support the findings of the circuit court.

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[2]The court also commented that whether property occupied by the owner and claimed as a homestead is a rural or urban homestead is to be determined on the facts of each case, and further commented, citing *Gainus* v. *Cannon,* 42 Ark. 503 (1884) that homestead laws are to be liberally construed.

Affirmed.

Phillip Leon RASTLE *v.* MARION COUNTY RURAL SCHOOL DISTRICT NO. 1 et al

76-153 543 S.W. 2d 923

Opinion delivered December 13, 1976
(In Banc)

*Frank H. Bailey* and *Richard S. Paden,* for appellant.

*Donald J. Adams* of *Adams & Covington,* for appellees.

GEORGE ROSE SMITH, Justice. The appellant Rastle, a school teacher, was employed by the Marion County Rural School District to teach during the school year running from September, 1974, to May, 1975. At the end of the school year

the district apparently decided not to renew Rastle's contract, but the district failed to give the required notice that the contract was being terminated. *Newton* v. *Calhoun County Sch. Dist.*, 232 Ark. 943, 341 S.W. 2d 30 (1960). During the following summer the district was divided into two new districts, comprising the same territory as that of the original district.

When the new districts refused to recognize Rastle's contractual right to teach during the ensuing school year, he brought this suit, in equity, asking that the districts be compelled by a writ of mandamus to execute a voucher in the amount of his salary or, alternatively, that he have judgment for that amount. Without objection the case was transferred to the circuit court. In the course of a trial without a jury, Rastle testified that between the beginning of the 1975-1976 school year and the date of trial, February 13, 1976, he had earned $2,185 in other employment. The trial judge dismissed the complaint, finding that Rastle did not have a clear right to a writ of mandamus, that the court did not have jurisdiction to award a money judgment in a mandamus proceeding, and that the plaintiff had an adequate remedy at law.

The court was undoubtedly right in denying the request for a writ of mandamus to compel the districts to issue a voucher for the amount of the plaintiff's agreed salary. The testimony presented an issue of fact as to the amount to be credited in mitigation of damages. The writ of mandamus will not be issued when there is a question of fact to be decided. *Mothershead* v. *Ponder*, 220 Ark. 816, 250 S.W. 2d 121 (1952). Moreover, at the time of trial the school year still had several months to run, during which Rastle might have earned additional mitigating income.

Rastle argues, however, that the trial court was wrong in holding that it did not have jurisdiction to award money damages in a mandamus proceeding. That question depends upon whether the two causes of action can be joined in the same proceeding.

Act 73 of 1967 enlarged the classes of actions that may be joined, but that act does require that the causes of action

"be prosecuted by the same kind of proceedings." Ark. Stat. Ann. § 27-1301 (Supp. 1975). A suit for breach of contract is a common-law action, triable by jury. By contrast, an action for mandamus is a special proceeding, to be tried by the court. Ark. Stat. Ann. § 33-108 (Repl. 1962). Such a petition "shall have precedence over all other actions and proceedings and shall be heard and determined summarily." Section 33-104. It is to be heard within seven days, § 33-106, but in a common-law action the defendant need not file his answer until 20 days after the service of summons. Ark. Stat. Ann. § 27-1135 (Repl. 1962).

We think it clear that the two actions are so procedurally incompatible as to prevent their joinder. That seems to be the implication of our decision in *School Dist. No. 3* v. *Bodenhamer,* 43 Ark. 140 (1884), which was also an action for the recovery of a teacher's wages. In rejecting the school district's contention that the teacher should have sought a writ of mandamus, we said: "The writ of mandamus is frequently employed to compel public corporations to perform their duties towards their creditors. But there must first be a judgment to establish the validity and amount of the debt." That decision was adhered to in *Huie* v. *Barkman,* 179 Ark. 772, 18 S.W. 2d 334 (1929), although the existence of a statute expressly providing a remedy by mandamus led to a different result.

If the suggested joinder were permitted, two separate trials in a single lawsuit would frequently be necessary — one with a jury and the other without a jury. Under the statute the mandamus action would take precedence and should be tried first, but under the *Bodenhamer* opinion disputed questions of fact should first be settled by the trial of the common-law action. Such multiple possibilities of confusion are readily avoided by simply holding, as we do, that the two causes of action cannot be joined and that the plaintiff, as is true in many situations, must make an election between two remedies.

Affirmed.

James Edward DILLARD *v.* STATE of Arkansas

CR 76-140 543 S.W. 2d 925

Opinion delivered December 13, 1976
(Division I)

*Lee Ward,* for appellant.

*Jim Guy Tucker,* Atty. Gen., by: *B. J. McCoy,* Asst. Atty. Gen., for appellee.

JOHN A. FOGLEMAN, Justice. Appellant James E. Dillard was found guilty of the crimes of inciting to riot, attempting to escape from custody of an officer while he was under lawful restraint, and assault and battery upon the person of the officer. He asserts multiple grounds for reversal, divided into classes under three stated points for reversal. We find reversible error in certain of the grounds argued under the point relating to refusal of, and failure to give, certain instructions. We will forego discussion of any of these numerous grounds, except for those which constituted reversible error and those which will likely arise on retrial.

We find reversible error in the trial judge's refusal to give appellant's requested instructions Nos. 6, 7 and 8. Each of these instructions would have advised the jury of the elements of one of the three offenses with which appellant was charged and that it would have to find appellant guilty of each element of that offense, beyond a reasonable doubt, before it could find him guilty of that offense. Appellant objected to the court's failure to give these instructions because the jury had not otherwise been instructed that each of the elements of the offense covered must be proved beyond a reasonable doubt before appellant could be found guilty of that offense.

The jury was only instructed that "[t]he defendant is presumed to be innocent until proven guilty, and if upon the whole case you have a reasonable doubt of the defendant's guilt, you will acquit him" and "[t]he burden of proof, as you have been instructed, is on the State to make out or establish its case to your satisfaction, beyond a reasonable doubt." Those instructions are correct, as far as they go. Even though the court had defined the elements of each of the offenses, nothing in the instructions given could possibly be construed as requiring that each element of each such offense must be proven beyond a reasonable doubt. In this respect the proffered instructions were proper even though it is not necessary that the state prove each fact or circumstance beyond a reasonable doubt, but it is required that the state so prove each material element of each crime charged. *State* v. *Green,* 126 Vt. 311, 228 A. 2d 792 (1967); *Spear* v. *U.S.,* 142 CCA 67, 228 F. 485 (8 Cir. ED. Ark., 1915), cert. den. 246 U.S. 667, 38 S. Ct. 335, 62 L. Ed. 929; *State* v. *Ottley,* 147 Iowa 329, 126 N.W. 334 (1910); *State* v. *Kimes,* 145 Iowa 346, 124 N.W. 164 (1910). See also, *Heard* v. *U.S.,* 142 CCA 85, 228 F. 503 (8 Cir. ED. Ark., 1915); *State* v. *Long,* 30 Del. 397, 108 A. 36 (1919). Cf. *Ferrell* v. *State,* 165 Ark. 541, 265 S.W. 62. The failure to give instructions similar to those requested by appellant is reversible error unless the matter is fully covered by other instructions. *McAfee* v. *U.S.,* 105 F. 2d 21 (D.C. Cir. 1939). Instructions going no further than those given here have been held deficient when an objection is based upon the failure of the court to instruct the jury that it must find the appellant guilty of each element of the offense charged beyond a reasonable doubt or that the state bears the burden of proving each element of the offense beyond a reasonable

doubt. See *Heard* v. *U.S.*, supra; *Spear* v. *U.S.*, supra; *State* v. *Ottley*, supra; *State* v. *Kimes*, supra. The Court of Appeals of the District of Columbia spoke lucidly upon the matter in *McAfee*. Speaking through Justice Stephens, it said:

> *** The purpose of such an instruction is to impress upon the mind of the triers of fact the proposition that guilt depends upon demonstration beyond a reasonable doubt of the existence of each of the several elements which, as a matter of law, constitute the crime charged, rather than upon some vague general notion that the defendant did some sort of wrongful act. Such an instruction is to be contrasted with those which tell a jury that they may not convict if they have a reasonable doubt "upon the whole evidence" or that they may convict if "upon the whole evidence" they are convinced beyond a reasonable doubt of guilt. The charge actually given to the jury in the instant case belongs to the latter type of instructions. ***

Apparently, we have not reversed any judgment on account of failure of the trial court to give such an instruction but we have tacitly recognized the necessity for so instructing the jury. In *Humphrey* v. *State*, 168 Ark. 163, 269 S.W. 988, we held that the court correctly charged the jury that:

> If any fact in the case or any element necessary to constitute the crime has been established to your satisfaction beyond a reasonable doubt by either direct or circumstantial evidence, or by both kinds, then such fact or element has been sufficiently proved, and if the jury believe beyond a reasonable doubt from either or both direct and circumstantial evidence that the defendant is guilty, it is your duty to so find.

In *Jones* v. *State*, 159 Ark. 215, 251 S.W. 690, we held that it was reversible error to refuse a request to charge a jury that the intent to kill must be proven beyond a reasonable doubt when the charge is assault with intent to kill.

Since no instruction given, or any combination of them, adequately stated the state's burden or the findings requisite to a conviction, the judgment must be reversed.

Appellant complains of the court's failure to give other instructions. By his requested instruction No. 1, he sought to have the jury instructed that, if he did not know or have reasonable grounds to believe that Galen Hutcheson (who arrested appellant) was, at the time of apprehending appellant, a duly authorized law officer, appellant violated no law in using whatever force was necessary to break away from him and run into the nearby woods. The instruction requested was certainly not in keeping with the spirit of our Per Curiam order entered April 19, 1965, adopting Arkansas Model Jury Instructions, in that it is not wholly impartial and free from argument. Certainly, it would be desirable to eliminate references to running into the nearby woods. The instruction as to the permissible amount of force probably should have been qualified. Even though one has the right to resist an illegal arrest, the force that may be used is limited to that *reasonably* necessary. *Jett* v. *State,* 151 Ark. 439, 236 S.W. 621. See also, *Baxter* v. *State,* 225 Ark. 239, 281 S.W. 2d 931.[1] The circuit judge refused to give it on the basis that the facts did not justify doing so. We find no error, because of appellant's own testimony. He "presumed" that Hutcheson was an officer at the time Hutcheson got out of an automobile occupied by the Sheriff of Clay County, whom appellant knew, and Deputy Sheriff Stow, whom appellant recognized, and called appellant over to the automobile where the arrest was made. This testimony certainly eliminated any question of fact as to appellant's having reasonable grounds to believe that Hutcheson was an officer of the law.

Appellant also requested an alternative instruction that an officer making an arrest must inform the person about to be arrested of the intention to arrest him and the offense for which he is being arrested. Appellant included in his requested instruction a prefatory statement that he had undertaken to show that, at the time of the arrest, he did not know that Hutcheson was a law officer and that Hutcheson did not tell appellant he was being arrested. Appellant's objection to the court's failure to give this instruction is based solely on

[1]The statement in *Edgin* v. *Talley,* 169 Ark. 662, 276 S.W. 591, that even though the person arrested might have believed that he was being illegally arrested, it was his duty to have submitted to the officers, is much too broad and comprehensive and *Coats* v. *State,* 101 Ark. 51, 141 S.W. 197, cited as authority for the statement, does not support it.

the ground that Hutcheson's official capacity was not made known to appellant. Because of the introductory language and appellant's own testimony, it was not error to refuse the instruction over the objection made by appellant.

Dillard testified that Hutcheson never advised him that he was under arrest. There is contradictory testimony by Hutcheson that he did in fact advise appellant that he was under arrest for inciting a riot. Nevertheless, there was a disputed question of fact on this point. In *Minton* v. *State,* 198 Ark. 875, 131 S.W. 2d 948, we said:

> The law of this subject is correctly stated in the chapter on Arrest in 6 CJS, p. 602 [now 6A CJS § 48], as follows:
>
> > "It is, ordinarily, incumbent on an officer, seeking to make an arrest without a warrant, to inform the accused of his authority or official character, of his intention to arrest him, and of the offense for which he is being arrested, otherwise the person whose arrest is sought is under no duty to submit; although circumstances surrounding the arrest may, in a proper case, dispense with one or more of these requirements. In accordance with this exception to the rule, an officer need not inform a person who is committing an offense in his presence, or who is pursued immediately after the offense, of the cause of his arrest; and, where an officer is met with a demonstration of force at the outset, he need not go through the formality of informing the person of his intention to arrest him or of the cause of his arrest."

It is true that the statute, Ark. Stat. Ann. § 43-416 (Repl. 1964), does not apply when the offense is committed in the presence of the officer. *Minton* v. *State,* supra; *Bookout* v. *Hanshaw,* 235 Ark. 924, 363 S.W. 2d 125. But, in this case the principal issue was whether the appellant had committed any offense. In such a case, a proper instruction would qualify the recitation of the statute by stating when it is, and when it is not, applicable. We do not agree with the trial court's holding that merely instructing the jury that it must find that appellant was lawfully taken into custody covered the re-

quests made by appellant, because neither a lawful arrest nor lawful custody was defined for the jury.

We might well agree with appellant that the attitude, demeanor and acts of the officers, both before and after his being arrested, may be relevant to the issues on the charge of attempting to escape while in lawful custody or to the weight to be accorded the testimony of the officers. This would not justify, however, his requested instruction advising the jury relative to his right to the assistance of counsel and his privilege against self-incrimination. No custodial statement was offered in evidence and no contention is made that appellant was not properly advised of his constitutional rights prior to any custodial interrogation.

We find no reversible error in the circuit judge's refusal of a request that he instruct the jury that Arkansas law requires that one arrested without a warrant be forthwith taken before a magistrate for the fixing of bail or discharge and that admission to bail is an order from a competent court or magistrate that defendant be discharged from custody on bail. The instruction offered begins with a recitation of proof the appellant "has undertaken to develop" and is argumentative in form. It was also abstract. The provisions of Ark. Stat. Ann. §§ 43-601 — 43-603 (Repl. 1964) have always been held directory, not mandatory. Appellant was not seeking freedom from pretrial incarceration, having been admitted to bail. He went to trial on a plea of not guilty, without raising any questions about pretrial procedures. We note that appellant's objection to the denial of this request is that the time passing between his arrest and the formal filing of the charges against him was pertinent to the jury's consideration of the weight to be given to the testimony of the officers. Even if this is so, under the factual situation of this case, the instruction would not have so advised the jury, therefore, was not required.

There would have been no error in the giving of an instruction requested by appellant emphasizing the fact that the three charges upon which appellant was tried were separate and that, on each charge the state had the burden of proving defendant's guilt beyond a reasonable doubt and that it might find him to be not guilty on any charge and guilty on

others if it found that one or more offenses were not so proved and one or more were proved as required by law. Even though it seems to us that the instructions given covered the matter, the giving of this instruction, or one similar to it, in a case where multiple charges are tried jointly, is advisable.

Appellant requested an instruction that it is incumbent upon a law enforcement officer dressed in plain clothes without any official badge or insignia worn in plain sight to inform the person arrested that he is an officer of the law and to show his credentials and that any plain clothes officer failing to take these precautions acts at his own peril. This instruction might well have been proper if the officer was on trial on criminal charges growing out of the arrest or in a civil action between the officer and the person arrested, but there was no error in refusing it in this case. It must be recalled that at the time of the arrest, appellant "presumed" that Hutcheson was an officer of the law.

So much for requested jury instructions. We now pass to allegations that the circuit court deprived appellant of a fair and impartial trial by undue restriction of his cross-examination and by the words and actions of the trial judge in ruling on admissibility of evidence. At the outset, we will say that we have reviewed all appellant's contentions about the trial court's remarks and find no reversible error.

In considering arguments that appellant's right of cross-examination was unduly restricted it must be kept in mind that the trial judge is vested with some discretion in the limitation of the scope and extent of cross-examination. *Nelson* v. *State,* 257 Ark. 1, 513 S.W. 2d 496; *Baldwin* v. *State,* 119 Ark. 518, 178 S.W. 409. See also, *Tullis* v. *State,* 162 Ark. 116, 257 S.W. 380. Such examination may be restricted to matters that are material and relevant, either to the issues of the case or to the credibility of a witness or the weight to be accorded his testimony. *Baldwin* v. *State,* supra; *Pleasant* v. *State,* 15 Ark. 624; *Atkins* v. *State,* 16 Ark. 568; *Self* v. *Dye,* 257 Ark. 360, 516 S.W. 2d 397; *Murchison* v. *State,* 153 Ark. 300, 240 S.W. 402; *Kelley* v. *State,* 133 Ark. 261, 202 S.W. 49. See also, *Tullis* v. *State,* supra; *Williams* v. *State,* 258 Ark. 207, 523 S.W. 2d 377; *Clark* v. *State,* 246 Ark. 1151, 442 S.W. 2d 225. A witness should not be allowed to state his impressions, con-

clusions, inferences, supposition or understanding unless his answer is equivalent to a statement of the fact asked for. *Darrough* v. *State,* 252 Ark. 198, 478 S.W. 2d 50; *Covey* v. *State,* 232 Ark. 79, 334 S.W. 2d 648; *Self* v. *Dye,* supra. See also, *Vaughn* v. *State,* 252 Ark. 260, 478 S.W. 2d 759; *Clift* v. *State,* 155 Ark. 37, 243 S.W. 955; *Decker* v. *State,* 85 Ark. 64, 107 S.W. 182. Questions on cross-examination should not be conjectural, speculative or argumentative. *Watson* v. *State,* 257 Ark. 876, 521 S.W. 2d 205; *Self* v. *Dye,* supra; *Fort* v. *State,* 52 Ark. 180, 11 S.W. 959, 20 Am. St. Rep. 163.

Appellant's first complaint about undue restriction of cross-examination relates to questions of Hutcheson about appellant's belief or reason to believe that Hutcheson was a police officer after Hutcheson, who had been bearded, attired in blue jeans, a green T-shirt and suede cowboy boots, had attempted to pass himself off as a Missouri visitor at the Blue Grass Festival near Piggott, where the incidents in question occurred. The questions were argumentative and called for the witness to state a conclusion as to appellant's belief. Answers, of course, would necessarily be speculative. See *Darrough* v. *State,* supra. This line of examination was pursued even after the witness stated that, judging from appellant's actions, the defendant did not believe the witness's disguise. Appellant also complains about the sustaining of an objection to the form of a question, but the court immediately granted appellant's attorney permission to rephrase the question. It does not appear that appellant attempted to do so.

After Hutcheson had stated that he didn't know whether people some 15 feet distant from him and appellant could have heard what Hutcheson had said, the court sustained the state's objection to a question whether the witness had a reasonable knowledge of how far away normal people heard. The judge ruled that the witness might testify as to the circumstances. The question tended to be argumentative and called for an opinion not based upon what the witness had observed. See *Fort* v. *State,* supra.

During the testimony of Randy Brookman, also a narcotics investigator for the Arkansas State Police, who accompanied Hutcheson to the Blue Grass Festival, appellant's attorney questioned the witness about his practices with

reference to smoking marijuana, or appearing to do so, while attempting to infiltrate a culture suspected of trafficking in drugs. He then asked if the witness did not occasionally pull a "joint" out of his pocket and offer it to a youngster. After the witness denied having done this, the prosecuting attorney objected and asked that the court instruct the jury that this line of inquiry was limited to purposes of credibility. When appellant's attorney insisted that the testimony was not offered on the question of credibility alone, but for the purpose of showing his method of operation, the court sustained the prosecuting attorney's objection. See *Murchison* v. *State,* supra. Appellant, however, now argues that his attorney should have been permitted to ask this type of question to point up possible prejudices, improper motives and lack of credibility of the witness. He did not pursue the matter for those purposes in the trial court.

Appellant also complains that he was not permitted to ask Hutcheson how long it was after the episode that resulted in appellant's arrest that the witness was served with a summons as a defendant in a damage suit by appellant. When objection was made, the court held an in camera hearing during which it was stipulated that the information on which appellant was being tried was filed on July 22, 1975, more than five weeks after the arrest. Appellant's counsel said that the purpose of the examination was to show that the filing of criminal charges was motivated by the fact that summons in a civil suit against Hutcheson and other officers had been served upon the witness and others before the information was filed. He stated that he wanted to argue to the jury that it was reasonable to suspect that criminal charges would never have been filed if the civil suit had not first been filed. The record discloses that appellant had been released on bail on these charges before the information was filed by the prosecuting attorney and the circuit judge ruled that, for the purposes of the objection, the officer had probable cause to make an arrest. The objection was sustained as to the examination for the limited reasons stated by appellant's attorney, but the judge ruled that the testimony would be admitted for the purpose of testing the credibility of the witness or determining the weight to be given his testimony, with an admonition to the jury that it was permitted for no other purpose. The judge stated that the attorney would be permitted

to repeat the question for these purposes only. The jury was instructed to disregard any reference to a pending civil suit and the question was not repeated.

When Sheriff Cloyce Pierce was being cross-examined, he was asked what undercover men normally did when they had been recognized. An objection was sustained insofar as normal procedure was concerned. See *Murchison* v. *State,* supra. Appellant now argues that he had every reason to believe that the undercover agents in this case violated instructions to withdraw after they had been recognized as narcotics officers. No foundation had ever been laid for this, because it had not been shown that this officer was familiar with normal procedures under these circumstances.

Deputy Sheriff Stow, after testifying that neither he nor Sheriff Pierce had ever seen Hutcheson before he climbed into the back seat of the sheriff's car, was asked if it would not be customary for an experienced law officer to demand identification from some plain clothes man claiming to be an officer. The trial judge interrupted the answer to state that, "We are not concerned here with what is customary." See *Murchison* v. *State,* supra. Appellant's objection to the ruling was that whether this officer followed normal procedure was pertinent for the jury's consideration in weighing the testimony of the witness.

During the cross-examination of Deputy Sheriff Stow, the witness started to state his personal feelings about a knife being carried by appellant when the prosecuting attorney's objection was sustained on the basis that the attempted answer was an assumption. The judge stated that the witness might testify to facts observed, but that conclusions to be drawn from them were for the jury.

We find no abuse of discretion in the trial judge's rulings on cross-examination of the state's witnesses by his attorney. We will not reverse the trial court on such rulings unless there is a clear abuse of discretion. *Bartley* v. *State,* 210 Ark. 1061, 199 S.W. 2d 965; *Clift* v. *State,* supra.

Appellant also argues that there were four instances in which the trial court erred to his prejudice by rulings which

deprived him of pertinent and relevant evidence which was favorable to him. In one instance appellant made no objection to the court's voluntary ruling that a witness for appellant was stating conclusions and opinions and admonishing her to state facts as to appellant's appearance. She had said that when appellant was brought out of a wooded area into which he had fled, he couldn't have walked on his own. See *Nelson* v. *State,* supra. In another instance the judge overruled an objection to the prosecuting attorney's asking a defendant's witness, "You knew the pigs were there, didn't you?" There had been a great deal of testimony in the case in which the officers had been referred to as "pigs." There had been no objections to these references. We find no error.

On the other hand, we think that the trial judge did exclude admissible testimony. There had been testimony by an officer that Dillard had refused to give his name and had made threats and remarks derogatory to the officers when he was being interrogated by the officers in the sheriff's office after having been taken to jail. Dillard had testified that, during a 20 or 25 minute "session" in the sheriff's office, he had been physically abused by the officers and that he didn't answer when he was asked his name. He testified that, before leaving the jail, when he was being taken to the sheriff's office, a city police officer had said to him, "You're Pat Mouton, aren't you?", but that he did not respond. The court sustained an objection to this testimony as hearsay, but we do not agree. The testimony was not offered to show the truth of the remark, but to show that it was made. The error was probably harmless, but, nevertheless the action was erroneous.

The trial judge also excluded certain testimony of Steve Parker, who was arrested for drunkenness after Dillard's arrest and transported to the jail along with Dillard. He would have testified that Hutcheson had tightened the handcuffs on Dillard after Dillard had said they were tight enough; that Dillard's request to telephone either his mother or his attorney was refused; that Dillard was taken downstairs and after about 40 minutes was returned to the jail, gasping and bearing welts and red spots over his whole torso. Appellant contended that the conduct of the officers following Dillard's arrest and during his incarceration was a

proper element for the jury's consideration in determining the weight to be given their testimony. In view of the nature of the charges, Dillard's version of his encounters with Hutcheson, and the obvious efforts of his counsel to show that the officer acted maliciously in the arrest of Dillard, the conduct of the officers after the arrest was the proper subject of inquiry. Parker's testimony tended to corroborate that of appellant and should have been admitted.

For the errors indicated, the judgment is reversed and the cause remanded.

We agree. HARRIS, C.J., and GEORGE ROSE SMITH and JONES, JJ.

August SYNOGROUND *v.* STATE of Arkansas

CR 76-162 543 S.W. 2d 935

Opinion delivered December 13, 1976
(Division I)

*Floyd G. Rogers*, for appellant.

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

JOHN A. FOGLEMAN, Justice. Appellant was convicted of attempted burglary on jury trial. His several points for reversal are combined under two arguments: that circumstances surrounding appellant's pretrial identification by a witness for the state were so impermissibly suggestive as to give rise to a substantial likelihood of irreparable misidentification and that evidence of other crimes was improperly admitted.

The pretrial identification was made by James Uselton. Evidence submitted at a pretrial hearing on appellant's motion to suppress the identification revealed:

> On August 19, 1975, in Barling, Arkansas, at approximately 9:30 p.m., as James Uselton was walking home from his mother's house he heard a noise that he described as glass breaking. He then saw a person run from behind the Medi-Sav Drug Store. He called a local police officer, Dale Lairamore, who investigated the area and later discovered that an air conditioning vent had been pried loose from the drug store. Lairamore testified that it was dark when the incident happened. Uselton described the suspect as a male wearing black or dark clothing, with medium-length, or collar-length hair. Lairamore had seen Synoground seated on a bench about a hundred yards from the drug store after the incident was reported, and had a good look at him and ascertained his identity.

After the appellant was arrested, charged, and had retained counsel, Lairamore went to the home of Uselton and showed him pictures of five subjects. Uselton was standing beside Lairamore's police car when he examined these photographs. Four of them showed both front and profile views of male faces. The other showed only a front view of a male face. The picture of the accused was in color and bore the numbers 8 22 75. The others were black and white and bore the numbers 11 27 73, 8 29 73, 2 15 74 and 4 14 73. Lairamore testified that Uselton looked through the pictures several times and said, "Well, it's kinda hard to tell" because all he saw that night was the side of the person. Lairamore

stated that he then told Uselton to look at the part that shows the side view and to imagine "the person as he was dressed that night;" that Uselton then covered part of the picture with his hand and went through them a couple of times. He stated that Uselton told him that one of the photographs was "kind of close" but another looked more like the man he saw, and the hair was about the same. The latter was the photo of the appellant. It took about five or six minutes for Uselton to pick out the appellant's picture. Lairamore testified that the pictures were not arranged in any particular order and that he did not say or do anything that would indicate which picture represented the suspect.

Uselton testified at the hearing that when the incident happened that it was "about dark," and the street lights were on and he only got a glimpse of the subject, seeing only a part of one side of his face. He further testified that when he looked at the photographs that Lairamore told him to remember about the black pants and shirt. He covered the profile views in the photographs so that little beside the hair was showing. He stated that he looked through the pictures, and that they did not help him much in looking at the face, but he identified the "guy with blond hair with a white shirt," that there were no other pictures that looked like the subject he saw that night. The prosecuting attorney asked, "Do you know this gentleman sitting here at the defense table, the one in the middle?" Uselton answered, "No, sir, I sure don't." The prosecuting attorney then asked, "You don't ever recall seeing him before?" "No, sir, I don't." "Do you recall a Preliminary Hearing which you testified in before?" "He was blond, blond hair." Uselton insisted that the person he saw that night had blond hair and said that he made his identification of the picture by the light blond hair, but admitted that the person at the defense table, who was identified for the record as the appellant, did not have blond hair. The witness identified correctly the photograph he had previously picked out and stated that it looked like the appellant and that the person in the picture did not have blond hair, but again stated that he saw a blond-haired subject that night. Uselton recalled having identified someone at a preliminary hearing, but said that this person had blond hair.

Uselton stated that he identified the picture as being of

the man he saw on August 19 only by placing his hand over a portion of the profile view so that he could see only the portion of the head from the eyes on back, and that the identification was made primarily by looking at the hair and the side of the face. He said that he did not see any other pictures that resembled the man he saw on August 19.

On redirect examination Uselton suddenly remembered that as he waited for Lairamore to investigate, that the man in black clothes had "came back around . . . and that's when I, when I seen his whole face then . . . He dropped something. He bent over and I still noticed the blond hair, he had light blond hair." In spite of this, he said he had difficulty in identifying any photograph until he covered the profile view in the manner he had described. He did not identify a frontal view.

Uselton testified that he had only gone through the eighth grade and could not remember when he moved from Barling to Ft. Smith. The motion to suppress was denied. When testifying at the trial, which was three days later, Uselton insisted that the man he saw running out of the alley had hair that was blondish brown, brown, and dark. The motion was again made and denied at the trial on the merits, after Uselton had testified.

The unreliability of eyewitness identifications has often been noted. See Note 6, *U.S.* v. *Wade,* 388 U.S. 218, 228, 87 S. Ct. 1926, 18 L. Ed. 2d 1149 (1967) where the following authorities are cited: Borchard, *Convicting the Innocent;* Frank & Frank, *Not Guilty;* Wall, *Eye-Witness Identification in Criminal Cases (1965);* 3 Wigmore, *Evidence* § 786a 3d Ed. (1940); Rolph, *Personal Identity;* Cross, *Criminal Investigation* 47-54 (Jackson Ed. 1962); Williams, *Proof of Guilt* 83-98 (1955); Wills, *Circumstantial Evidence* 192-205 (7th Ed. 1937); Wigmore, *The Science of Judicial Proof* §§ 250-253 (3d Ed. 1937). This factor was of prime importance in the Supreme Court decision that an accused has a constitutional right to the assistance of counsel at a lineup identification. *United States* v. *Wade,* 388 U.S. 218, 87 S. Ct. 1926, 18 L. Ed. 2d 1149 (1967). The Supreme Court declined to extend the right to counsel to photographic showups, *U.S.* v. *Ash,* 413 U.S. 300, 93 S. Ct. 2568, 37 L. Ed. 2d 619 (1973) but did recognize that pretrial identification procedures could be so suggestive as to

create a substantial possibility of irreparable misidentification. *Stovall* v. *Denno,* 388 U.S. 293, 87 S. Ct. 1967, 18 L. Ed. 2d 1199 (1967); *Simmons* v. *U.S.,* 390 U.S. 377, 88 S. Ct. 967, 19 L. Ed. 2d 1247 (1968).

Normally the reliability of eyewitness identification of a defendant is a question for the jury. But, when the procedures leading to the identification are so defective as to undermine its reliability, the identification is inadmissible as a matter of law. "[C]onvictions based on eyewitness identification at trial following a pretrial identification by photograph will be set aside on that ground only if the photographic identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification." *Simmons* v. *U.S.,* supra; *Foster* v. *California,* 394 U.S. 440, 22 L. Ed. 2d 402, 89 S. Ct. 1127 (1968). In addition, we have held that identity cannot ordinarily be established by evidence of an extrajudicial identification as original evidence. *Trimble* v. *State,* 227 Ark. 867, 302 S.W. 2d 83. To determine whether such an error had occurred we view the totality of the circumstances. *Simmons* v. *U.S.,* supra; *Foster* v. *California,* supra; *Stovall* v. *Denno,* supra.

Other than the dissimilarities between the photographs already noted there was no direct evidence that the witness was influenced by any suspicious pretrial procedures. However, the witness's confusion as to the color of the hair of the accused at the time the crime was allegedly committed, his statements that he didn't know the defendant (in the room where the in camera hearing was held) and had never seen him before, together with his complete failure at the hearing to state that it was the defendant who ran out from between the buildings, casts a thick cloud of doubt over the identification and the procedure relating to the identification of appellant as the would-be robber. At the hearing, it was demonstrated that all the witness identified was the hair, which, considering variation in color, might have been a wig. The conclusion that Uselton's courtroom identification was suggested only by viewing a color photograph bearing a current date and by the developments at the suppression hearing seems inescapable, when considered along with the grave uncertainty about Uselton's ability to otherwise identify appellant. An identification as patently unreliable as this

one should have been suppressed because of the substantial possibility of irreparable misidentification. *King* v. *State,* 253 Ark. 614, 487 S.W. 2d 596; *West* v. *State,* 255 Ark. 668, 501 S.W. 2d 771.

Appellant's second argument will likely arise on retrial therefore must be considered. At the trial Jeanne Teague testified that she had dated the appellant and had lived with him for a while. The prosecuting attorney asked her why she terminated the relationship. She answered, "He was shooting drugs and I —." The defense thereupon moved for a mistrial. The motion was denied. When the prosecutor continued that line of questioning the witness stated that appellant was taking amphetamines. Defense objections were overruled.

Evidence of other crimes is properly excluded because Anglo-American notions of fair play require that a defendant be convicted for the offense charged, not because he had done other illegal acts. But evidence of other crimes is not always excluded.

> "If other conduct on the part of the accused is independently relevant to the main issue — relevant in the sense of tending to prove some material point rather than merely to prove that the defendant is a criminal — then evidence of that conduct may be admissible, with a proper cautionary instruction by the court." *Alford* v. *State,* 223 Ark. 330, 266 S.W. 2d 804.

The defendant was convicted of attempted burglary. This crime is defined in Ark. Stat. Ann. § 41-1007 as "[t]he unlawful attempt to break or enter a house, tenement, railroad car, automobile, airplane or any other building . . . by day or night, with the intent to commit any felony or larceny . . . " The intent to commit any felony or larceny is an element of this crime. It is incumbent on the state to present evidence of this intent, although a larcenous intent may be inferred under certain circumstances, *Scates* v. *State,* 244 Ark. 333, 424 S.W. 2d 876. See, *Graham* v. *State,* 224 Ark. 25, 271 S.W. 2d 614; *Pope* v. *State,* 216 Ark. 314, 225 S.W. 2d 8.

The *Alford* case is the only authority cited by the defendant to support his position. That case was reversed, not because the evidence of the other crime was not relevant, but

because the evidence was not needed by the state as the facts in that case were developed. The court explained:

> "Thus our cases very plainly support the common-sense conclusion that proof of other offenses is competent when it actually sheds light on the defendant's intent; otherwise it must be excluded. In the case at bar it seems to us idle to contend that there was any real question about Alford's intent, concerning which the jury needed further enlightenment."

Jeanne Teague's testimony that appellant had a taste for controlled drugs, obtainable at a drug store, is relevant to the issue of the accused's intent to commit larceny. *Pope* v. *State,* supra.

Furthermore, the state also had a right to prove that the accused had a motive for committing the crime, whether this proof of motive discloses the commission of other crimes or not, at least if the evidence is so closely connected with the main issue that it tends to prove the crime charged. *Pope* v. *State,* supra. See also, *People* v. *Durso,* 40 Ill. 2d 242, 239 N.E. 2d 842, (1968); *Grubb* v. *State,* 551 P. 2d 289 (Okla. Cr., 1976). In the Illinois case evidence of other crimes involving possession, sale and use of narcotics was admitted to prove the motive for murder — that the murder was punishment for shorting on drug profits. In the Oklahoma case evidence that the accused had escaped from the penitentiary was admitted to prove motive for concealing stolen property, a birth certificate and Social Security card — to be used for the purpose of concealing his own identity.

The judgment of this court is that the case be remanded for a new trial at which the identification of the defendant by James Uselton be excluded from evidence.

We agree. HARRIS, C.J., and GEORGE ROSE SMITH and JONES, JJ.

# TEETER MOTOR COMPANY, Inc. *v.* FIRST NATIONAL BANK of Hot Springs

76-185 543 S.W. 2d 938

Opinion delivered December 13, 1976
(Division II)

[redacted]

*Bryant & Spears Law Offices,* for appellant.

*Wootton, Land & Matthews,* for appellee.

FRANK HOLT, Justice. By the terms of a Financing and Security Agreement, appellee agreed to advance funds to appellant for the floor-planning of new and used cars to be sold by appellant. About two years later, after appellant had encountered financial difficulties, appellee took possession of appellant's automobile stock pursuant to their agreement and liquidated it. Appellee then filed suit for a deficiency judgment for the balance of the debt owed by appellant. From the chancellor's decree in favor of appellee comes this appeal.

Appellant first "contends that the Agreement for disposal of collateral should have been held invalid by the Trial Court and the Appellee required to give notice [ten days] as provided by Paragraph 13 of the Financing and Security Agreement." Appellant signed the disposal of collateral agreement about nine days after repossession of the cars by appellee. This after default agreement waived all notice of the terms, times, and places of sale of the repossessed automobiles. Our Uniform Commercial Code clearly con-

templates that a debtor can, as here, waive notification of the sale of collateral following a default. Ark. Stat. Ann. § 85-1-102 (3) (Add. 1961); Ark. Stat. Ann. § 85-9-501 (1) (3) (Supp. 1975); and Ark. Stat. Ann. § 85-9-504 (3) (Supp. 1975). Such an agreement, reached after default, as here, can result in a quick and efficient disposal of collateral for the benefit of the parties.

Neither can we agree with appellant's further argument that Teeter, owner of Teeter Motor Company, was coerced into signing the supplemental agreement, which it first refused to do. The asserted coercion of Teeter occurred when the appellee bank officials told him that it would be necessary to sign the agreement or the sheriff would be forced to serve the necessary papers on the Teeters. Teeter felt that litigation "would likely drive her [Mrs. Teeter] crazy and put her in a state of shock." Therefore, the Teeters signed the agreement. Of course, the statement was merely an assertion of a fact; i.e., that legal proceedings would be initiated if Teeter refused to sign the agreement. Appellee was within its legal rights to inform Teeter of its possible course of action. Further, there was a nine day period between the repossession of the automobiles and the Teeters' written agreement as to the method of the sale of the collateral. Teeter, a business man, had sufficient time to consult with an attorney as to whether he should or should not sign the agreement. We agree with the chancellor that Teeter's testimony is not "anywhere near sufficient to show that he was coerced, forced, or fraud or misrepresentation practiced on him."

Appellant argues that appellee failed to give notice before the repossession of the automobiles. Appellant does not point out any provision of the agreement between the parties which required notice of repossession nor does appellant cite any authority that notice of intention to repossess must be given. § 85-9-503 provides:

> Unless otherwise agreed, a secured party has on default the right to take possession of the collateral. In taking possession, a secured party may proceed without judicial process if this can be done without breach of the peace or may proceed by action.

Appellant had knowledge of its default through continued

negotiations between Mr. Teeter and the appellee bank concerning Teeter's financial difficulties. There is ample evidence that appellant was in default. In fact, Teeter, who owned the motor company, acknowledged default in the after default agreement.

Appellant also argues that Teeter protested the repossession by appellee and, therefore, the repossession was a trespass and a breach of the peace in violation of § 85-9-503. Therefore, the subsequent sale of the automobiles was invalid. We cannot agree. As discussed, appellant waived notice of the sale of the cars by the after default agreement for disposal of the collateral. Further, the financing agreement between the parties states:

> The bank may, so far as borrower can give authorization therefore, enter upon any premises on which the collateral may be situated and remove the same therefrom.

This is authorized by § 85-9-503. The repossession took place when bank employees went to Teeter's lot and informed him that they were taking possession of his stock. Teeter stated: "Well, I wish you wouldn't but I'm not going to do anything to stop you." When asked if the cars were repossessed peacefully, Teeter responded that he offered no resistance and "I stayed out of their way." A bank employee testified that Teeter stated: "it was a burden lifted from my shoulders" when appellee took the automobiles. It appears that Teeter himself assisted in starting the cars when they were removed from his premises. There is no evidence of force or intimidation by the appellee. We agree with the chancellor that the repossession here, in conformity with both statutory authority and the contractual provision, did not constitute a breach of the peace.

Appellant next contends that the repossession of appellant's stock was a violation of "federal [14th Amendment] and state [Ark. Const., Art. 2 § 21 (1874)] constitutional rights." Teeter argues that § 85-9-503, which provides for repossession of collateral, is unconstitutional. Enactment of a "self-help" statute, which authorizes the actions taken by the secured party, as here, is not such significant state involvement as to constitute action taken under

color of state law and creates no cause of action under Federal Civil Rights Acts. *Nichols* v. *Tower Grove Bank,* 497 F. 2d 404 (8th Cir. 1974); *Nowlin* v. *Professional Auto Sales, Inc.,* 496 F. 2d 16 (8th Cir. 1974). Further, the procedure challenged here involved actions between individuals arising out of the express written agreement of these parties. See *Adams* v. *Southern California First National Bank,* 492 F. 2d 324 (9th Cir. 1973). In the case at bar, we hold the statute is clear and unambiguous and the rights guaranteed by the Federal 14th Amendment and Art. 2, § 21 of our State Constitution were not violated by the appellee's repossession.

Appellant's final point is that "the trial court erred in not holding that the repossession and sale of appellant's vehicles by the appellee were in violation of the Uniform Commercial Code of Arkansas and that appellee should be barred from taking a deficiency judgment against the defendant." Appellant argues that since the repossession and agreement for disposal of collateral were invalid, any deficiency judgment is barred. We cannot agree. As indicated, the appellant was in default, the appellee rightfully took possession of the collateral under their financing agreement and then sold the collateral pursuant to a valid after default agreement approved by the Teeter corporation and by the Teeters individually. Further, there was ample evidence of compliance with § 85-9-504 (3) which states "every aspect of the disposition including the method, manner, time, place and terms must be commercially reasonable."

There was ample evidence that Teeter had knowledge of the location of the lot where the repossessed cars were being sold, contacted and sent some prospective buyers to the lot, was notified of the time and place of auctions, and attended same. The cars were offered first at retail sale and not sold until appellee was satisfied with the adequacy of the price. Only after efforts had been made to dispose of the collateral at retail were the automobiles sold at wholesale or at auction. None of the cars were sold until after the agreement for disposal of collateral was signed by the Teeters.

§ 85-9-504 (2) provides for a deficiency judgment:

> If the security interest secures an indebtedness, the secured party must account to the debtor for any surplus, and, unless otherwise agreed, the debtor is liable for any deficiency. . . .

Appellant's and appellee's after default agreement for disposal of collateral expressly provided:

> Nothing contained herein shall be construed to release Darrell M. Teeter or Huberta Teeter, or Teeter Motor Company, from their personal liability herein should sale of the collateral and reserve account be insufficient to extinguish the Floor Plan debt, and endorsed liability owed to Secured Party by Debtor.

The decree is affirmed.

We agree: HARRIS, C.J., and BYRD and ROY, JJ.

David Boon NORRIS *v.* MILLER COUNTY CHANCERY COURT.

76-87 543 S.W. 2d 946

Opinion delivered December 13, 1976
(Division II)

*Thomas G. Montgomery,* for petitioner.

*Damon Young*, for respondent.

ELSIJANE T. ROY, Justice. A decree of divorce involving Sandra Jean Norris and the petitioner herein, David Boon Norris, was entered May 31, 1974, in the Chancery Court of Miller County.

On March 16, 1976, the respondent herein entered its order finding petitioner, David Boon Norris, in contempt of said court. Petitioner was never served with a copy of this order or the previously filed petition to show cause why he should not be held in contempt. Both were served upon the attorney who had represented petitioner in the earlier divorce action and whose services were terminated over a year prior to the contempt proceeding.

On April 1, 1976, this Court issued its writ of certiorari for the record in this cause so that the chancery court proceedings might be reviewed.

Ark. Stat. Ann. § 27-362(b) (Supp. 1975) provides as follows:

> In cases involving divorce, child custody, child support, or other cases wherein the court has continuing jurisdiction, the attorney of record shall be considered as such for the purpose of subsection (a) herein, only until such time of the entry of a final decree. In such cases wherein the court has continuing jurisdiction, *it shall be insufficient to show that the service was obtained upon the attorney of record after the date of entry of the final decree.* In such cases, service may be obtained by mailing a copy of the petition by certified mail, return receipt requested, to the address of the other party, or if no address be known, then to the last known address of the said party. (Italics supplied.)

Respondent has filed no brief in the cause, but a letter has been received by the Clerk of the Supreme Court from the attorney for Sandra Jean Norris stating that the issue herein is moot because by agreement of the parties and later proceedings petitioner "has been afforded all relief requested." Of course the letter is not a part of the record and cannot be considered by this Court.

Obviously the provisions of Ark. Stat. Ann. § 27-362(b) were not complied with, and the order of March 16, 1976, finding petitioner in contempt of court is invalid.

Temporary writ made permanent.

We agree. HARRIS, C.J., and BYRD and HOLT, JJ.

Bettina B. IWERSON, Individually and as Duly Appointed Personal Representative of the Estate of Frank Beals *v.* Nicholas DUSHEK et al

76-93 543 S.W. 2d 942

Opinion delivered December 13, 1976
(Division II)

*John C. Schaller,* San Jose, Cal., and *Charles N. Williams,* for appellant.

*Paul Jackson,* for appellees.

ELSIJANE T. ROY, Justice. Appellees, relatives of Ida D. Beals, brought this action against appellant Bettina B. Iwerson (daughter of Frank Beals) for the purpose of compelling specific performance of an alleged oral contract between Ida D. Beals and Frank Beals to make joint and mutual wills. The action also prayed that Mrs. Iwerson be constituted a trustee of certain assets which appellees would have received had the terms of the wills been consummated. From a decree in favor of appellees Mrs. Iwerson brings this appeal.

On November 20, 1962, Frank Beals and Ida B. Beals executed joint and mutual wills in one document,[1] creating a testamentary plan in favor of the surviving testator as a life tenant with remainders in the heirs at law of both testators. The pertinent provision of the wills reads as follows:

> 3rd. All the rest and residue of my estate, real personal and mixed, wherever situate, I give, devise and bequeath to my spouse, for life with full power to use, invest, reinvest, manage, control any part or parts thereof for the care, maintenance, comfort, convenience, recreation and pleasure of said spouse; and to execute all necessary quittances and assurances pertaining thereto; and at death of said spouse, all remainder in said estate to the

[1]A photocopy of the document is attached as an appendix to this opinion.

following persons to the extent shown, to wit: (a) To Mrs. Bettina B. Iwerson (daughter of Frank L. Beals) if living; and if deceased, in equal parts of her nearest next of kin, per stirpes; one half (1/2); (b) To Nicholas Duchek (brother to Ida D. Beals) one fourth, (1/4); (c) To the surviving children (or heirs,per stirpes) of Rosemary Mabbott (sister to Ida D. Beals), and this date including Susan, Lynn, Jill, Ann, James and Michael; one fourth (1/4).

Frank and Ida were married May 1, 1941, and lived together until Ida's death on May 13, 1972. No children were born of their marriage. Appellant is Frank's daughter by a previous marriage.

Frank Beals, although some 30 years older than his wife, survived her and qualified as executor of her estate. He served as such executor until his death on August 31, 1972. On May 17, 1972, (four days after Ida's death) Frank executed a holographic will, leaving his entire estate to appellant.[2] On August 22, 1972, he executed a declaration of trust, conveying the assets of Ida Beals' estate to himself as trustee for the exclusive use and benefit of himself and appellant, for maintenance in their accustomed manner of living and/or for any other purposes the trustee believes to be in the best interest of the said beneficiaries. Attached to the trust document as Schedule A was a list of assets substantially in excess of $300,000 in market value. By amendment to the trust on August 29, appellant was designated as sole beneficiary to the exclusion of Ida Beals' relatives.

At her father's request appellant came from California to Eureka Springs on May 2, 1972, to take care of him. However, she gave no money or property to her father for the beneficences awarded her under the trust and his holographic will. While Frank Beals was alive she received a home in Eureka Springs from him together with $20,000 to pay the mortgage thereon and other gifts of furniture and personal property. These assets were not made a part of Ida Beals' es-

[2]In an unpublished opinion, *Iwerson* v. *Mabbott,* No. 75-241 (July 19, 1976), we affirmed the probate court in its decision that Frank Beals could not dispose of property passing to him under the residuary clause of the will of Ida Beals by a subsequent will leaving all the property to his daughter, Bettina Iwerson.

tate, and the court specifically found that Mrs. Iwerson could retain this property.

In *Janes, Excr.* v. *Rogers,* 224 Ark. 116, 271 S.W. 2d 930 (1954), we held a contract for reciprocal wills need not be expressed in the wills, but may arise by implication from circumstances which make it clear that the parties had such wills in mind and that they both agreed to the terms of the testamentary disposition made therein.

Here the wills are not only reciprocal in terms, but both are contained in one document, executed by the testators contemporaneously and necessarily in identical terms. The document and the circumstances surrounding it indicate an agreement by Frank and Ida Beals concerning disposition of their properties. In fact the document is itself in the nature of a contract, being dated, signed by the parties and signatures witnessed by three persons.

The major part of the property was held in Ida's name,[3] who was 30 years younger than Frank. It is logical to assume that Frank thought he would die first and wanted to be sure his only daughter would receive the benefit of half of the joint estate after Ida's death. Provision in the wills for all surviving kin of both testators is significant of the agreement and intentions of the testators at the time. The testimony also reflected that Frank and Ida acted jointly in almost everything.

The limited power of disposition under the joint wills reposed in Frank Beals the right to utilize the assets of the estate for his well-being subject to the limitations set out therein. It did not give him the right or power to convey by will *or by trust* the remainder of the estate to his daughter on his death, rather it contemplated an equitable division of the residue among the various heirs of both testators.

In *Owen* v. *Dumas,* 200 Ark. 601, 140 S.W. 2d 101 (1940), we dealt with a will containing a limited power of disposition. *Owen* held that under the will of the deceased, by which he gave all of his property to his wife in trust for herself

[3]The record reflects one reason most of the property was in Ida Beals' name was because Frank Beals had transferred it to her to avoid paying a large sum of back alimony for which judgment against him had been secured in Illinois.

and his children with power to sell when necessary for her support and maintenance, and/or for the maintenance and education of his minor children, the wife acquired a life estate only and that she had no power to sell the property except for the purposes mentioned in the will. See also other cases cited therein.

It is illogical to argue, as appellant did, that Frank's actions in establishing the trust should be sustained as being for his use and "recreation and pleasure." In *Galloway* v. *Sewell*, 162 Ark. 627, 258 S.W. 655 (1924), we held:

> As a general rule the use of a thing does not mean the thing itself, but means that the user is to enjoy, hold, occupy, or have in some manner the benefit thereof. If the thing to be used is in the form or shape of real estate, the use thereof is its occupancy or cultivation, etc., or the rent which can be obtained for its use. If it is money or its equivalent, generally speaking, it is the interest which it will earn. (Citations omitted.)

The facts we have detailed here and others, upon which we need not elaborate, certainly indicate the preponderance of the evidence supports the chancellor's finding "that the joint wills of Frank and Ida Beals were the result of a contract between them, and once Ida Beals died, Frank Beals could not in equity violate the agreement." Accordingly we hold the trust invalid as exceeding the limited power of disposition under the wills.

We have considered the various arguments advanced by appellant for holding the trust valid and also the allegations made as to errors in the trial court proceedings; however, we find these contentions to be without merit.

Affirmed.

We agree. HARRIS, C.J., and GEORGE ROSE SMITH, JONES, BYRD and HOLT, JJ.

[redacted]

# APPENDIX

LAS WILL and TESTAM NT

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FRANK L. BEALS

I, Frank L. Beals, a citizen and resident of Eureka Springs, Carroll County; Arkansas, over the age of 21 years, and of sound and disposing mind and memory, husband of Ida D. Beals, spouse, hereby, make, publish, and declare this to be my last will and testament and cancel and revoke all other instruments of like kind by me at any time heretofore made, as follows:

IDA D. BEALS

I, Ida D. Beals, a citizen and resident of Eureka Springs, Carroll County, Arkansas, over the age of 21 years, and of sound and disposing mind and memory, wife of Frank L. Beal spouse, hereby make, publish and declare this to be my last will and test ament, and cancel and revoke all other instruments of like kind by me at any time heretofore made, as follows:

1st. From whatever estate I may own at death, I direct all my just debts be paid.

2nd. I give and bequeath the following sums to

| | |
|---|---|
| (a) St. Elizabeth's Catholic Church, Eureka Springs, Arkansas | $1000.00 |
| (b) Arkansas Children's Home, Little Rock Arkansas . . . . . | 200.00 |
| (c) Ark. Lighthouse for the Blind, Little Rock, Arkansas , . . | 200.00 |
| (d) Arkansas T. B. Association, Little Rock, Arkansas . . . . . | 200.00 |
| (e) Dominican Monastary of St. Jude, Marbury, Alabama . . . . . | 100.00 |
| (f) Children's Memorial Hospital, Chicago, . . . . . | 300.00 |

3rd. All the rest and residue of my estate, real personal and mixed, wherever situate; I give, devise and bequeath to my spouse, for life with full power to use, invest, re-invest, manage, control any part or parts thereof for the care, maintainance, comfort, convenience, recreation and pleasure of said spouse; and to execute all necessary quittances and assurances pertaining thereto; and at death of said spouse, all remainder in said estate to the following persons to the extent shown, to wit:
(a) To Mrs.Bettina B. Iwerson(daughter of Frank L. Beals)if living; and if deceased, in equal parts to her nearest next of kin, per stirpes; one half(½)
(b) To Nicholas Dushek (brother to Ida D. Beals) one fourth,(¼);
(c) To the surviving children(or heirs,per stirpes) of Rosemary Mabbott (sister to Ida D. Beals), and this date including Susan, Lynn, Jill, Ann, James and Michael; one fourth(¼).

4th. In the event my said Spouse predeceases me, I give, devise and bequeath all the said remainder of my estate and residue, to the beneficiaries named in the preceding paragraph, in the same proportions and under same conditions as are there stated.

5th. In the event myself and my said spouse expire in or as a result of common accident of catastrophe, it shall be conclusively presumed that the survivor(actual or legal) derived title to and became vested with ownership of all assets of the spouse under the will of said spouse(identical in tenor, date and attestation, herewith,(except as to names of testator and of spouse). It is declared that no marshalling of assets shall be required; and that the word"spouse" as herein used, designates the individual herein so identified, and no other.

6th. I name and appoint my said spouse, if qualified and willing, to execute this instrument; or in the alternative, the said NICHOLAS DUSHEK to be executor; in either case, to serve without bond.
The legacies set out in Paragraph 2nd. above, shall not be payable hereunder if like legacies previously have been paid by estate of my said spouse.

IN WITNESS, I here set my hand this twentieth day of November, 1962.

Frank L. Beals — Ida D. Beals

The foregoing instrument was signed and to us declared to be his last will, by the above FRANK L. BEALS in the presence of each of us, who at his request and in his presence and in the presance of each other, hereign our names as witnesses, this date last above written.

Mrs. Bettina W. Iwert
George H. Ford
R.E. Pratt

The foregoing instrument was signed and to us declared to be her last will by the above IDA D. BEALS in the presance of each of us, who at her request and in her presence and in the presence of each other, here sign our names as witnesses, this date last above written.

Mrs. Bettina W. Iwert
George H. Ford
R.E. Pratt

CITY OF FORT SMITH, Arkansas et al *v.*
Doyle W. BATES and Bernice B.
BATES

76-192 544 S.W. 2d 525

Opinion delivered December 13, 1976
(In Banc)
[Rehearing denied January 17, 1977.]

*Daily, West, Core & Coffman,* for appellants.

*Hardin, Jesson & Dawson,* for appellees.

ELSIJANE T. ROY, Justice. In November, 1973, appellees Doyle and Bernice Bates purchased certain real property from Mrs. Jamie Williamson. The property was adjacent to Wheeler Avenue in Fort Smith, Arkansas, on which a widening project had commenced several years prior to the purchase. Before beginning this work the City of Fort Smith (hereafter City) secured permission, after lengthy negotiations, from Mrs. Williamson to utilize an eleven foot strip of land across the front of her property for widening purposes in exchange for making certain improvements to the remaining property. The agreement between the parties is incorporated in the following letter to the City of Fort Smith:

> I have enclosed the executed easement agreement as you requested in order that Wheeler Avenue can be expanded to four lanes. The easement has been signed however, subject to a reciprocal agreement by the City that the property be left clean, with utility taps at the front of the property on Wheeler Avenue. You have also agreed that *there will be two curb cuts* (location to be determined at a later date) *with two driveways paved a minimum of 40 feet on the property.* (Italics supplied.)
>
> Sincerely,
> /s/ JAMIE V. WILLIAMSON
> Jamie V. Williamson
>
> The City of Fort Smith acknowledges the above and will Incorporate this work as a part of the construction, for the Wheeler Avenue Widening Project.
>
> /s/ WILLIAM E. HUEY, JR.
> William E. Huey, Jr.

All of the improvements with the exception of the driveways had been completed at the time this action was filed. The City construed the agreement to require the construction of two 40-foot wide cuts in the curbs extending to the edge of the right of way and that it was not obligated to build the driveways on appellees' property. Appellees thereafter filed this action in chancery court requesting that the City be required to construct the driveways or, alternatively, that compensation be granted in the amount of $2,-870. The court decreed that the City had entered into an agreement with appellees' predecessor in title to build the two driveways 40 feet in length; that appellees had standing to enforce this agreement; that the City had ratified the actions of its employee, William Huey, in negotiating the agreement and was thereby estopped to deny its enforcement; and that appellees should be awarded compensation in the sum of $1,244.25 plus costs. Appellants thereafter perfected this appeal.

The first alleged error is the trial court's action in admitting into evidence a copy of the assignment to appellees from their predecessor in title. The document, captioned "Assignment," conveyed to appellees all rights of Mrs. Williamson pursuant to the agreement she entered into with the City. Appellants' objection to its introduction was twofold; first, that appellees did not produce the original of the document and failed to properly explain its unavailability and, second, that the copy introduced did not contain the properly authenticated signature of Mrs. Williamson.

Don Smith, the real estate broker who helped negotiate the agreement between Mrs. Williamson and appellants, at the City's request testified that the photocopy of the agreement was a true and correct reproduction of the original. Smith testified that after he secured the original instrument from Mrs. Williamson he gave it to appellees' counsel, William Wright, who stated to the court that the original had disappeared and he was unable to locate it and he only had the copy.

Smith further testified he was familiar with Mrs. Williamson's signature, having handled business for her for a number of years and having seen her signature on numerous documents. Since Smith was familiar with Mrs. Williamson's

signature his confirmation of its authenticity was sufficient. *Davis* v. *Falls,* 172 Ark. 314, 288 S.W. 723 (1926). It must follow that the chancellor acted correctly in admitting the document.

Appellants also contend error in the trial court's construction of the agreement between appellants and Mrs. Williamson.

In construing the agreement the court evaluated the conflicting testimony of Don Smith and William Huey. Huey was an engineer and assistant director of planning who was handling the widening project for the City, and he testified he signed the agreement at the instruction of Cliff Keheley, City Administrator.

Smith testified the City was unable to get Mrs. Williamson to grant the easement and he assisted the City in securing it. When he and Mrs. Williamson worked out the agreement Smith submitted it to Huey. Then Huey added a paragraph reflecting the City's acquiescence to the terms. It was Smith's testimony that the agreement meant the City should construct two driveways 40 feet in depth upon appellees' property; that this depth or length would go to the normal setback for buildings; and that he assumed the width would comply with zoning policy of the City. Although Huey's testimony was in sharp conflict, the chancellor resolved the issue in favor of appellees.

In reviewing chancery appeals we affirm unless the chancellor's holding is against the preponderance of the evidence. We also recognize that the chancellor is better situated to appraise witnesses and reconcile conflicts in testimony than the appellate court. *Minton & Simpson* v. *McGowan,* 256 Ark. 726, 510 S.W. 2d 272 (1974). Furthermore we think the plain wording of the agreement clearly supports the decision of the chancellor. Under the facts here it is not necessary to answer in detail all the contentions of appellants on this issue but we find them without merit.

In other points the City argues that the agreement is *ultra vires* and/or void; and that the agreement is outside the

scope of the authority of those agents of the City who actually negotiated it.

Appellant City contended it had no right to go upon private property to make improvements, relying *inter alia* upon Article 12, § 5 of the Arkansas Constitution which provides:

> No county, city, town or other municipal corporation shall become a stockholder in any company, association or corporation; or obtain or appropriate money for, or loan its credit to, any corporation, association, institution or individual.

This section of our Constitution was not meant to apply as a limitation on the ability of the municipal corporation to acquire private property for a public purpose in exchange for fair and equitable consideration. See 63 C.J.S. Municipal Corporations § 957. Here the City agreed to construct the improvements in lieu of cash consideration for the easement acquired.

We also note the action taken by the City in other instances is contrary to its argument on this issue. On a number of the tracts, in connection with acquiring the right of way, the City allowed its contractor to go on the tracts for regrading and paving of driveways on private properties and allowed Administrator Keheley to negotiate grants for cash consideration from one dollar to several thousand dollars. To allow the City to avoid the duties assumed under the agreement by alleging that its agents had no authority to so act would result in injustice to appellees.

From the above facts it appears that Huey and Keheley acted with at least implied authority from the City, but even if we concluded that authority was absent this does not preclude appellees from recovery. In *Day* v. *City of Malvern,* 195 Ark. 804, 114 S.W. 2d 459 (1938), a case factually similar to the instant appeal, we held that:

> . . . a contract illegally entered into or entered into without authority by agents or officers of a municipal corporation, may be ratified and rendered binding upon the municipal corporation by affirmative action on its

> part, or some negative action, which of itself would amount to an approval of the contract. * * *

The City accepted the property, utilized it and carried out most of the terms of the agreement. In fact, the City did not until several years later question the provision concerning the driveways. This action certainly constituted ratification under our decisions, and appellants accordingly are estopped from denying the terms of the agreement. However, in order to avoid the application of the doctrine of ratification, appellants contend the doctrine itself must have been specifically pled. Because the word "ratification" was not used in appellees' original or amended complaint, it is argued it should not have been invoked by the trial court. Although the exact word "ratification" was not used in the pleadings, the facts necessary to invoke the doctrine (agency, acceptance and retention of the benefits and knowledge of the contract) were well pled, and appellants had sufficient notice of appellees' position to allow presentation of any testimony through necessary to controvert the doctrine of ratification.

Appellants also complain about the measure of damages but we find the chancellor properly applied the standard established in *Day, supra.* As to other arguments for reversal urged by appellants we likewise find them to be without merit.

Accordingly the decree of the chancellor is affirmed.

In the Matter of Uniform Rules
For Circuit and Chancery Courts

December 13, 1976

PER CURIAM

The following is adopted as Rule 17 of the Uniform Rules for Circuit and Chancery Courts:

Sec. 1. Whenever possible the necessity for election of special judges should be avoided by utilizing exchanges of circuits pursuant to Art. 7, § 22 of the Constitution of Arkansas and Ark. Stat. Ann. § 22-340 (Repl. 1962) or by assignment of a judge by the Chief of the Judicial Department pursuant to Ark. Stat. Ann. § 22-142 (Supp. 1975). The procedures set out in the succeeding sections of this rule shall be utilized only where no exchange of circuits and no assignment of a judge has been made.

Sec. 2. If it becomes necessary to elect a special judge of any circuit or chancery court in any county, notice shall be given to the practicing attorneys in that county by the clerk of the court in the most practical manner under the circumstances. Notice may be given by posting notice in a public place in the courthouse where the court is held or by telephone. The clerk may use both methods of giving notice to assure that as many attorneys as possible receive notice of the election. Personal notice must be given to all attorneys who have indicated to the clerk, in writing, that they desire personal notice when an election is to be held.

Sec. 3. Whenever the judge of a circuit court shall fail to attend on the first day of a term of court, or the office is vacant on that day, the attorneys shall meet at 10:00 a.m. on the second day of the term in the courtroom where the court is held, to elect a special judge. Whenever a judge of a chancery court shall fail to attend on any day scheduled for the holding of that court according to the annual court calender prescribed by Ark. Stat. Ann. § 22-406.2 (Supp. 1976), and whenever the judge of a circuit court shall fail to attend on any day scheduled for the holding of that court after the first day of the term, the attorneys shall meet at 10:00 a.m. in the courtroom where said court is held to elect a special judge. The attorneys present in the courtroom shall elect one of their number as special judge. The election shall be conducted by the clerk of the court, who will accept nominations from the attorneys present. The election shall be by secret ballot. The attorney receiving a majority of the votes cast shall be declared elected as special judge of the court. He shall immediately be sworn in by the clerk and shall immediately thereafter enter upon the duties of the office.

Sec. 4. No attorney shall be elected special judge who is

not an attorney regularly engaged in the practice of law in the State of Arkansas and duly licensed in this state to do so, and who is not a resident possessed of the qualifications required of an elector of this state, whether registered to vote or not. An attorney not qualified to serve as special judge shall not be permitted to vote in any election held under this rule.

Sec. 5. The authority of a special circuit judge elected after the commencement of a term shall extend only to those cases which, at the time of his election, are pending in the court over which he is to preside.

Sec. 6. In a circuit court, a special judge shall serve until the end of the term during which he was elected or until the regular judge appears. If the regular judge does not appear prior to or at the beginning of a new term of the court, and there has not been an exchange of circuits or assignment of another judge by the Chief of the Judicial Department, another special judge shall be elected pursuant to this rule. In a chancery court, the special judge elected shall serve until the regular judge appears or until the Governor appoints a judge pursuant to Ark. Stat. Ann. §§ 22-437 and 22-438 (Repl. 1962) and the appointee has taken office.

Sec. 7. Where there is a vacancy in the office of circuit or chancery judge by reason of death of the judge, either at the time of the election of the special judge, or during the time the special judge would otherwise serve, the special judge elected under this rule or the judge assigned by the Chief Justice shall continue to serve as such until the Governor makes an appointment to fill the vacancy and the appointee has taken office.

Sec. 8. For purposes of this rule, each division of a court in a county shall be considered to be a separate court.

BYRD, J., dissents because he challenges the court's authority to promulgate the rule.

Clance Sidney ALEXANDER *v.* STATE of Arkansas

CR 76-133 545 S.W. 2d 606

Opinion delivered December 20, 1976
(In Banc)
[Rehearing denied February 7, 1977.]

*W. Palma Rainey,* of *Rubens, Rubens & Rainey,* for appellant.

*Jim Guy Tucker,* Atty. Gen., by: *Joseph H. Purvis,* Asst. Atty. Gen., for appellee.

GEORGE ROSE SMITH, Justice. This capital felony case has not yet been tried. Two preliminary motions were filed, one asking that W. Palma Rainey be allowed to withdraw as appointed counsel and the other that all prosecuting attorneys, circuit judges, and circuit clerks be summoned to testify concerning the death penalty. The trial court denied both motions, its order reciting that the rulings are final for the purpose of appellate review or, alternatively, that the defendant should be allowed an interlocutory appeal.

Inasmuch as the case is still pending below, the appeal must be dismissed for want of a final judgment, a point which this court itself raises. *H.E. McConnell & Son* v. *Sadle,* 248 Ark. 1182, 455 S.W. 2d 880 (1970). The trial court's attempt to enlarge our jurisdiction must fail, because the limitation of our jurisdiction to the review of final judgments and decrees is statutory. Ark. Stat. Ann. § 27-2101 (Supp. 1975).

Appeal dismissed.

Earl Allen WOODALL *v.* STATE of Arkansas

CR 76-163 543 S.W. 2d 957

Opinion delivered December 20, 1976
(Division I)

*McArthur & Johnson,* for appellant.

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

GEORGE ROSE SMITH, Justice. The appellant, tried without a jury, was found guilty of carrying a pistol illegally and was sentenced to a fine of $100 and to 30 days in jail. He argues three points for reversal.

First, the appellant questions the validity of the arrest that led to the discovery of the weapon. Two State police officers were aware, through the law enforcement agencies' computer system, that the Pulaski County sheriff's office had a warrant from South Carolina charging Woodall with assault and battery with intent to kill. That offense is a felony, although the warrant did not so indicate. South Carolina Code, § 16-93.1 (Cum. Supp. 1975). In connection with a narcotics investigation the officers were following a truck occupied by two men. When that vehicle stopped for a traffic light in Little Rock, one of the officers recognized Woodall. Officer Brookman alighted, went to the truck, identified himself as an officer, and placed Woodall under arrest. The officer saw a box of ammunition in Woodall's lap. When Woodall reached for a pistol in a holster under his armpit, the officer disarmed him. This prosecution resulted from that encounter.

The arrest was lawful. A police officer's knowledge of the existence of an out-of-state warrant can furnish probable cause for an arrest, even though the officer does not have the warrant with him. *Whiteley* v. *Warden,* 401 U.S. 560 (1971); *Stallings* v. *Splain,* 253 U.S. 339 (1920); *Berigan* v. *State,* 2 Md. App. 666, 236 A. 2d 743 (1968). Moreover, probable cause is to be evaluated on the basis of the collective information of the police. *Jones* v. *State,* 246 Ark. 1057, 441 S.W. 2d 458

(1969). Hence the trial judge was justified by the evidence in finding that the arrest was valid. It may also be noted that the principles just mentioned have been embodied in Rule 4.1 (d) of our new Rules of Criminal Procedure (1976), though they were not yet in force when this arrest occurred and of course could not have retrospectively validated the arrest had it been unlawful when made.

Secondly, we hold that the gun was properly admitted in evidence. Officer Brookman testified that the gun was in his custody until it was introduced in evidence at a preliminary hearing, after which it was in the court's custody. Officer Brookman said that he could identify the weapon just by looking at it. If there was a slight defect in the chain of custody, that was merely a circumstance to be considered by the trial judge. *Bedell* v. *State,* 260 Ark. 401, 541 S.W. 2d 297 (1976). Furthermore, the officer could have testified about Woodall's possession of the gun even if it had not been in the courtroom. *Scott* v. *State,* 251 Ark. 918, 475 S.W. 2d 699 (1972).

Thirdly, it is argued that Woodall was entitled to carry the gun, because he was on a journey. Ark. Stat. Ann. § 41-4501 (Repl. 1964). Whether a person was on a journey may be a question of fact. *Collins* v. *State,* 183 Ark. 425, 36 S.W. 2d 75 (1931). That is the situation here. Woodall testified that when he was arrested he was going from North Little Rock to his parents' house in Little Rock, hardly such a perilous journey as to necessitate his being armed with a pistol.

Affirmed.

We agree. HARRIS, C.J., and FOGLEMAN and JONES, JJ.

Sylvia WOODS *v.* Jerry A. WOODS, Welby Larry WOODS, Terry Wade Woods and Lois F. HUTCHISON

76-73 543 S.W. 2d 952

Opinion delivered December 20, 1976
(Division I)

*Johnson, Calhoon & Lewis, Ltd.*, by: *Fletcher C. Lewis*, for appellant.

*Joe N. Peacock*, for appellees.

JOHN A. FOGLEMAN, Justice. Appellant was the widow of Welby Earl Woods who was also survived by appellees Jerry A. Woods, Welby Larry Woods, Terry Wade Woods and Lois F. Hutchinson, children of a previous marriage. He left a testamentary document which was admitted to probate as his last will and testament. This will was executed April 2, 1968, prior to appellant's marriage to the testator. His four children were the only devisees and legatees. After her husband died, appellant executed an agreement which provided, in substance, that she relinquished her right of dower and homestead, acknowledged that she was not entitled to any interest in the farming operation conducted by appellee Jerry Woods, and received certain real property and an equal share with each of appellees in other property of her deceased husband. This appeal was taken from a decree of the chancery court refusing to cancel and void her agreement in a suit brought by her seeking that relief. We find no reversible error and affirm.

Appellant first contends that the chancery court was without jurisdiction in the matter, because the probate court

was vested with exclusive jurisdiction by virtue of Ark. Stat. Ann. § 62-3201 et seq (Supp. 1975). Appellant says that under the terms of this section she was a "beneficiary" because she was entitled to take an interest in her husband's real and personal property by intestate succession. She further contends that the agreement into which she entered was a "disclaimer" as defined by the statute, i.e., a written instrument which unequivocally declines, refuses, releases or renounces an interest which would otherwise be received by her (as a beneficiary) signed, witnessed and acknowledged by her in the manner required by the statute.

The agreement involved was a written instrument signed by the parties in which it was agreed that it was the intention of all parties that the wishes of Welby Earl Woods be carried out; that appellant have the use of the home of decedent and his real property as long as she lived in the home; that Jerry A. Woods should pay to her one-fourth of the real property rent as long as appellant lived on the property and remained unmarried; that appellant should release and relinquish all right of dower and homestead or statutory allowance in the property of her husband and would not contest his will; and that the residue of his estate, after payment of his debts and expenses, should be equally divided among the parties to the agreement (i.e., appellant and appellees). The agreement contained a statement that the decedent had no interest in the farming operations of Jerry A. Woods and that decedent had relinquished any interest he may have had in farming machinery, equipment and the farming operation on January 1, 1968.

The sections of the act (Act 457 of 1973) relied upon by appellant are Ark. Stat. Ann. §§ 62-3201, 3203 (Supp. 1975) which read:

> 62-3201. Disclaimer of property and property interests - Definitions. As used in this Act [§§ 62-3201 - 63-3212], these terms shall have the following meanings ascribed to them:
>
> (a) Beneficiary. The term "beneficiary" shall mean and include any person entitled (but for a disclaimer) to take an interest by intestate succession; by devise; by legacy or bequest; by succession to a disclaimed interest by

Will, intestate succession, or through the exercise or nonexercise of the testamentary power of appointment, by virtue of a renunciation and election to take against a Will; as beneficiary of a testamentary trust; pursuant to the exercise or non-exercise of a testamentary power of appointment; as donee of a power of appointment created by a testamentary instrument; or in any other manner under a testamentary interest.

(b) Interest. The term "interest" shall mean and include the whole of any property, real or personal, legal or equitable, or any fractional part thereof, share or particular portion or specific assets thereof, or any estate in any such property or power to appoint, consume, apply or expend property, or any other right, power, privilege, or immunity relating thereto.

(c) Disclaimer. The term "disclaimer" shall mean a written instrument which unequivocally declines, refuses, releases or renounces an interest which would otherwise be received by a beneficiary, and which defines the nature and extent of the interest disclaimed, and which must be signed, witnessed and acknowledged by the beneficiary in the manner hereinafter provided.

62-3203. Filing and notice. - (a) A disclaimer shall become effective when filed in the Probate Court for the county in which the estate of the person by whom the interest was created, or from whom it would have been received, is, or has been administered, or, if not Probate administration has been commenced, then in the Probate Court of the county in which the decedent was a resident at the date of his death.

(b) A copy of the disclaimer shall be delivered or mailed to the representative, trustee, or other person having legal title to, or possession of, the property in which the interest disclaimed exists, and no such representative, trustee or person shall be liable for any distribution or other disposition otherwise proper and which was made without actual notice of the disclaimer.

Appellant argues that the provision that a disclaimer shall become effective when filed in the probate court vests

that court with exclusive jurisdiction in regard to matters concerning the validity of a disclaimer under the act. But we find nothing in the act, or in the words appellant relies upon which suggests to us that the General Assembly intended to vest in the probate court any jurisdiction, either exclusive or concurrent, to cancel an instrument. On the other hand, cancellation of instruments for fraud or undue influence in their procurement (as alleged here) has always been a matter for the exercise of chancery jurisdiction, perhaps exclusively. Furthermore, appellant herself invoked the jurisdiction of the chancery court, seeking relief which that court had the power to grant, so she is in no position to complain.[1]

Appellant next contends that the chancery court erred in not invalidating the agreement for the reason that it was not filed with the probate court in the time and manner prescribed by Ark. Stat. Ann. §§ 62-3202, 3203 (Supp. 1975) and was not filed before a written waiver of the right to disclaim and a conveyance of property was entered into by appellant. Section 62-3202 requires that a disclaimer be filed after the creation of the interest disclaimed but within nine months after the date of death of the person from whom it would have been received. As will appear above, the disclaimer becomes effective upon its filing in the proper court. It is not shown that the instrument executed by appellant was filed in the probate court within nine months of her husband's death. Appellant says that it is ineffective for that reason. Although the agreement may contain a disclaimer and might fall into that category for the basic purposes of the statute in question, it is more extensive, because there is an agreement among the widow and heirs of the decedent governing the distribution of his estate and eliminating a potential contest of the will. It seems clear to us that our statute governing disclaimers was never intended to supersede the common law family settlement agreement. To accomplish that purpose, the intention to do so must have been manifestly clear from the words of the act itself. It was not.

A disclaimer may be accomplished by means other than that prescribed by the act in question, because it clearly

[1]In this respect this case differs from *Hilburn* v. *First State Bank,* 259 Ark. 569, 535 S.W. 2d 810, in that the court in which appellant here sought relief was not without power to grant the relief sought.

provides that it does not abridge the right of any person, apart from its terms, under any existing or future statute or rule of law, to disclaim any interest, or to assign, convey, replace, renounce or otherwise dispose of any interest. Furthermore, the language of § 62-3202 (a), which states that a beneficiary may disclaim an interest in the manner provided in the act, does not indicate that a disclaimer may be accomplished *only* in the manner provided in the act. There was clearly no legislative intention to make this method of disclaimer exclusive. We simply cannot find any intention to render ineffective a family settlement agreement which is not in compliance with the act in question.

Appellant also argues that her agreement was invalidated by her filing a written waiver of her right to disclaim and by her entering into a contract for the sale of an undivided one-hundreth interest in a 40-acre tract of land and in all personal property that she had a claim or title to, or right in, under the homestead statute, statute for widow's allowance, or statute allowing a taking against the will. No consideration was paid, but the purchaser agreed to pay the value arrived at by an independent appraiser. She relies on Ark. Stat. Ann. § 62-3206 which provides that a contract to convey real property or contract to assign or transfer personal property or a written waiver of the beneficiary's right to disclaim before the expiration of the period in which a beneficiary may lawfully disclaim shall bar the right to disclaim with respect to that property or interest. Of course, we find nothing to indicate that the statutory provisions relating to contracts are designed to protect anyone other than the purchaser, who is not a party to this action. The provision does nothing more than bar the withdrawal of a waiver. The statute does not, as appellant seems to indicate, relate to the filing of a disclaimer. It does operate to bar disclaimer following a waiver executed before the expiration of the period in which a beneficiary may lawfully disclaim. Regardless of the effect of the act, the subsequent acts of appellant could not invalidate a properly executed family settlement agreement.

Appellant somehow concludes that her agreement with appellees on the day after the decedent's funeral to equally divide $14,000, which was buried in a jar, among the five is invalid because of a conflict with the statute. She argues that

the $14,000 should become a part of her husband's estate because the division was a transfer prior to the expiration of the period during which a beneficiary may disclaim. We are unable to follow this reasoning, because it appears to us that the agreement would be protected against a disclaimer by appellant. Whatever the effect may be, we find the act to be without effect on the transactions between appellant and appellees.

Appellant finally argues that appellees used undue influence to induce her to enter into the agreement and breached a confidential and fiduciary relationship with her, knowing full well that she was unaware and uninformed of her legal rights and the extent of her husband's estate. The chancellor held that the preponderance of the evidence favored the finding that there was no fraud or imposition or overreaching by misplaced confidence practiced upon appellant either in the verbal agreement between the parties on June 14, when it was partially consummated, or on June 19, when it was reduced to writing. We are unable to say that the findings of the chancellor were clearly against the preponderance of the evidence, in spite of the fact that appellees elected to avail themselves of the services of the scrivener of the agreement as a trial advocate rather than as a witness, although it seems that he might have shed considerable light on the transaction. The chancellor did modify the agreement to enable appellant to receive her share of the profits from her husband's lands, without living on it and without remaining unmarried, on the ground of mutual mistake in including these requirements in the agreement.

The relationship between appellant and her stepchildren was something less than cordial. It was highly unlikely that they could unduly influence her actions or that she suddenly had a confidence in them which had not previously existed. Her own daughter stated that she did not have a good relationship with them. This daughter came and stayed with her mother at least part of every day and sometimes at night after her stepfather's death, and was present when her mother left home to go sign the agreement. She said that her mother was very nervous at the time and had not slept for several weeks. When this daughter suggested to appellant that someone accompany her when she went to sign the agreement, the mother declined, saying that they had agreed

and that she would rather not have the witness or any of her brothers interfere.

Appellant's husband died on June 12, 1974. Appellant testified that he was buried on a Friday and that appellee Terry Wade Woods and his wife stayed with her right after her husband's death until the Saturday after the funeral. On Friday morning (June 14), prior to the funeral, but after the parties had paid the bill, she and appellees dug up $14,000 which had been buried near the corner of a shop building. This was split five ways so that appellant and each of the appellees received an equal share. She testified that when she signed the agreement she was unable to read, was upset, and was ignorant of the meaning of the terms "dower," "homestead" and "statutory allowance" contained in the agreement. She says, without explanation, that she thought she had to do what appellees told her to do and that they told her not to bring anyone with her when the agreement was signed at the office of the lawyer who drew it. Prior to the trip to the lawyer's office, she said there had been a conversation at her home among all the parties to the agreement, during which there was a division of money and a payment by one of the sons of $100 to each of the others, including her, for a Honda and another took her husband's guns. She said appellees agreed that she should have "a lifetime dowry," which is what she said her husband had said that she should have and that he had advised her to get a lawyer if appellees didn't give it to her. She said she thought they were trying to be nice to her.

Appellant testified that after the agreement was signed she began having problems with the son who was farming the Woods land, and decided to contest the agreement when these problems arose; but that these problems were not the reason she made the decision. She said that she had been to a few lawyers during her lifetime, and that she had, on one occasion had one personal injury suit and another of some type. She disliked lawsuits. She talked to no lawyer prior to or at the time of the signing of the agreement other than the one who drew it. She had been aware of the existence of her husband's will since 1968, and recalled her husband reading some of it to her subsequent to 1968.

Appellee Jerry Woods was appointed administrator. He testified that he saw appellant every day for several days after his father's death and that she appeared to be normal and did not appear to be upset at any time. He said that after the funeral the whole family went "home" and discussed settlement of his father's estate for more than two hours and arrived at the terms of the agreement. A part of the agreement was that appellees' present attorney would prepare the document. This was signed at the attorney's office on June 19, 1974. Jerry Woods said that all the family was present and that they related the terms of the agreement to the lawyer, who caused it to be typed by his secretary and gave each one a copy. He stated that each of them read it and that the attorney either read or stated appellant's rights to her. According to him, he did not know what her rights were until the parties were in the lawyer's office. He recalled appellant's saying that she knew that she was entitled to "possibly a third or a half," at least, he said, more than she would get under the agreement.

Appellee Larry Woods testified that he suggested the lawyer's name and, when he asked her if it would be satisfactory for him to prepare the agreement, she answered in the affirmative and said that this lawyer had helped her in a lawsuit. It was his recollection that appellant said that she could have gotten one-third of everything when she expressed her satisfaction just outside the lawyer's office as she was leaving it. He also believed that the lawyer told her what her rights would be. He was sure that the words "dower," "homestead," and "statutory allowances" were mentioned. He corroborated Jerry's testimony about the agreement at the informal family gathering before the written agreement was prepared.

Terry Woods testified that the family meeting to work things out was suggested by appellant. He thought that the lawyer told appellant that she was entitled to one-third. He said that, as she was coming out of the lawyer's office, she expressed her satisfaction with the agreement and that he heard of no problems until three or four months later.

All the appellees who testified said that appellant did not appear to be upset at the time of the discussion when the

terms of the agreement were arrived at or at the lawyer's office when it was formalized and signed. It should also be noted that appellees contended that the buried money had been given to them by their father and that appellant was entitled to no part of it. Although we think their proof of gift failed, it is clear that their position could easily have caused litigation.

We deem no further recitation of testimony to be necessary. Comparison of the facts with those in other cases would be of little value. So much depended upon the credibility of the witnesses that we must defer to the judgment of the chancellor on that score. When we do, we cannot say that his findings were clearly against the preponderance of the evidence, which we would have to do to reverse the decree.

Appellant also argues that the chancellor erred in excluding the inventory filed by Jerry Woods, as administrator. The Chancellor refused to admit it, finding that it was not in conflict with the testimony of the witness. We find no reversible error on this point.

The decree is affirmed.

We agree. HARRIS, C.J., and GEORGE ROSE SMITH and JONES, JJ.

# FIREMAN'S FUND INSURANCE COMPANY *v.* POLK COUNTY, Arkansas, and Helen THOMAS and ST. PAUL FIRE AND MARINE INSURANCE CO.

76-173 543 S.W. 2d 947

Opinion delivered December 20, 1976
(Division I)

*Tackett, Moore, Dowd & Harrelson,* for appellant.

*J. Michael Cogbill* and *Charles R. Ledbetter,* of *Shaw & Ledbetter,* for appellees.

JOHN A. FOGLEMAN, Justice. Appellant, Fireman's Fund Insurance Company, was surety on the bond of Herman J. Callahan, as Collector of Polk County, covering the year 1973. An audit of the accounts of Callahan for that year by the Division of Legislative Audit of the Legislative Joint Auditing Committee reflected that there was a net shortage in his accounts of $6,982.20 attributable to an excessive withholding of $7,444.16 in commissions on school tax collections and additional commissions due him on other funds totalling $461.96. Callahan and Fireman's Fund were notified of the discrepancy by letters from the Division of Legislative Audit. When neither paid the shortage the Prosecuting Attorney of the Ninth Judicial District, of which Polk County is a part, filed this suit for Polk County against appellant in the circuit court seeking to recover the amount of the shortage.

Appellant answered, alleging that the discrepancies arose from an erroneous calculation of the collector's commissions by Helen Thomas, County Clerk of Polk County

and that she, rather than Callahan and appellant, was liable to the County for the shortage. Appellant filed a third party complaint against Ms. Thomas and the surety on her bond, St. Paul Fire & Marine Insurance Company asking that they be held liable to the county, or in the alternative, to appellant for any judgment rendered against it in the action. Helen Thomas and St. Paul Fire & Marine Insurance Company filed a motion for summary judgment.

By an amendment to its answer, Fireman's Fund alleged that the statutory notice of overpayments had not been timely served on the collector, that no judgment had been rendered against the collector in the County Court, that no timely examination of the collector's settlement had been effected or changed, that the accounts of the collector could not be settled in the circuit court in an action against the surety on the collector's bond, that the complaint against appellant could not be maintained in the circuit court and that the circuit court was without jurisdiction. Appellant then filed its motion for summary judgment.

At a pretrial hearing the facts were stipulated by the parties. It was agreed that:

> The information contained in the letters from the Legislative Joint Auditing Committee to Callahan and Fireman's Fund, dated November 22, 1974 and December 6, 1974, respectively, was based upon an audit made during the months of August, September and October, 1974. On March 14, 1975, the Legislative Joint Auditing Committee notified Prosecuting Attorney Steel of the Ninth Judicial District that the Fireman's Fund had failed to pay the shortage. The prosecuting attorney filed the complaint seeking judgment against Fireman's Fund for the net shortage on June 6, 1975. The calculations made by the Auditing Committee were correct. The discrepancy in the commissions on school funds was attributable to the utilization of a rate of .04039 by Helen Thomas, County Clerk, in calculating the commission rather than the correct rate of .0302053136. No official of Polk County had made any demand upon Callahan prior to the filing of

> the complaint. Based upon the county clerk's computation, Callahan retained collections amounting to $6,982.20 over and above the amount to which he was entitled. The county clerk did nothing except make a computation for a "tentative" settlement to be made by the collector with the taxing units. She did not receive any benefits by reason of the overpaid commission and no demand had been made on her or her surety by anyone. During the years 1973 and 1974 neither the Polk County Court nor the Polk County Judge made or filed any record concerning the collector's accounts, collections or commissions for the year 1973, other than the settlement of the collector for the year 1973, dated December 4, 1973, which was exhibited.

The circuit court then rendered judgment against appellant based upon the stipulation, holding that the procedure provided by Ark. Stat. Ann. § 13-209 (E) governed and had been followed. The motions for summary judgment were denied and the cross-complaint against Ms. Thomas and St. Paul Fire & Marine Insurance Company dismissed. The judgment was rendered on November 6, 1975 at the pretrial hearing but was not filed until November 24, 1975. It was dated November 21, 1975.

A certified copy of an undated order of the County Court of Polk County, purportedly pursuant to the authority vested by Ark. Stat. Ann. § 84-1401 et seq, found its way into the transcript. The certificate of the county clerk is dated November 10, 1975 and it appears to have been filed with the Clerk of the Circuit Court of Polk County on the same date. It contained a finding that Callahan had "overdrawn" his collector's compensation for the year 1973 by the amount of $6,982.20, as shown by the audit by the Legislative Joint Auditing Committee, and ordered him to repay the amount. There is nothing to indicate that it was presented to or considered by the circuit court in rendering the judgment. It could not, and should not, have been admitted into evidence because it was not made before the bringing of this suit. *Graham* v. *State,* 100 Ark. 571, 140 S.W. 735. At any rate, it cannot be considered on appeal.

Appellant asserts a single point for reversal. It questions

the propriety of the holding that Ark. Stat. Ann. § 13-209 (E) alone governed the procedure. In its argument, appellant contends that the section in question does not authorize an action in the circuit court against it, without the liability of the collector having been determined in the County Court of Polk County. We agree with appellant. The section in question does nothing more than authorize the Director of the Division of Local Affairs and Audits, with the approval of the Legislative Joint Auditing Committee, to give notice and make demand upon the surety on an official bond, and in default of payment, to give notice to the prosecuting attorney of the proper circuit, who is, by the act, directed to "forthwith take such legal action as may be necessary to collect the amount so found to be due from the officer and his surety or sureties." The amount referred to is the amount of any shortage or other liability reflected by reports of audits of the records of a county official.

There is no language in the act which purports to vest any jurisdiction in any court of an action for recovery of amounts found due by an audit, or which suggests that there was any intention to repeal or amend statutes which do govern the procedure for establishing the liability of a county official, and, at least indirectly, that of a surety on his official bond. Specific acts were repealed, but none are germane to this procedure. Of course, neither repeals nor amendments by implication are favored in construing statutes. *Penney* v. *Vessels,* 221 Ark. 389, 253 S.W. 2d 968. In *Arnold* v. *City of Jonesboro,* 227 Ark. 832, 302 S.W. 2d 91, we said:

> *** The Legislature will not be held to have changed a law it did not have under consideration while enacting a later law, unless the terms of the subsequent act are so inconsistent with the provisions of the prior law that they cannot stand together.

The statute relied upon is not so inconsistent with the provisions of the earlier law that all cannot stand. By omitting these acts from the specific repealer, there is more indication that the General Assembly intended that they be unimpaired than that they be superseded.

In the first place, it is the duty of the county clerk to set up the collector's settlement, by charging him with the amount to be collected and deducting amounts delinquent and the commissions allowed him by law, Ark. Stat. Ann. § 81-1409 (Repl. 1960). The collector is charged with the duty, however, to render his accounts to, and settle with, the county court. Ark. Stat. Ann. § 84-1430 (Repl. 1960). It is the duty of the county court to pass upon the collector's settlement made and filed with the county court and to approve, reject or restate it. Ark. Stat. Ann. § 84-1410 (Repl. 1960). Failure of the county judge to act is misfeasance and a misdemeanor and failure of the county clerk to set up the settlement is a misdemeanor punishable by removal from office. § 84-1410. If the settlement is found correct, the county court shall order it spread of record; if rejected, the clerk must restate the settlement and resubmit it to the county court. Ark. Stat. Ann. §§ 81-1411, 1431 (Repl. 1960). It is only after this is done that the collector makes final payment to the various agencies for whom he has made collections. Ark. Stat. Ann. §§ 81-1412, 1416, 1432 (Repl. 1960). If the collector fails to make settlement, the county court must adjust his accounts, according to the best information obtainable. Ark. Stat. Ann. § 84-1436 (Repl. 1960). This proceeding may be ex parte, but it is only a preliminary step on which judgment cannot be entered without further proceedings. *Trice* v. *Crittenden County,* 7 Ark. 159; *Carnall* v. *Crawford County,* 11 Ark. 604; *Christian* v. *Ashley County,* 24 Ark. 142. If the collector does not show good cause for setting aside a settlement so made, the county court then enters judgment against him. Ark. Stat. Ann. § 84-1439. If good cause is shown, the court may reexamine, settle and adjust the settlement so arrived at by it. Ark. Stat. Ann. § 84-1440 (Repl. 1960). But notice must first be given to the collector, so he may be heard. *Trice* v. *Crittenden County,* supra. If the amount found due by the collector is not paid after 15 days' notice to the collector and his sureties, the county court may render judgment against them. Ark. Stat. Ann. § 84-1442 (Repl. 1960). If an error either of law or fact is discovered in the settlement, it is the duty of the county court, within one year from the date of the settlement, to reconsider and adjust it, after ten days' notice to the officer. Ark. Stat. Ann. §§ 84-1443, 1444 (Repl. 1960). See *Haley* v. *Thompson,* 116 Ark. 354, 172 S.W. 880.

These proceedings against the collector are exclusively within the jurisdiction of the county court.[1] *Trice* v. *Crittenden County,* supra. In acting on such matters the county court acts judicially. *Brandenburg* v. *State,* 24 Ark. 50.

This record is totally devoid of any evidence that the collector made or *filed* any settlement with the *county court* or that the county court ever adjusted his accounts upon his failure to make a settlement or for any error (unless this was done after the hearing in this case). There certainly is nothing in the record to indicate that the county court ever rendered a *judgment* against the collector, pursuant to the statutes and after notice to the collector. This was a condition precedent to an action against the surety on the collector's bond. *Graham* v. *State,* 100 Ark. 571, 140 S.W. 735; *Jones* v. *State,* 14 Ark. 170. In *Jones,* we said:

> The county court is the forum where the liability of the collector, upon which that of his securities depends, is to be ascertained and evidenced by its records. An adjudication in the forum is conclusive evidence against the securities, as well as the collector, in an action upon his bond in the Circuit Court. There can be no liability upon the collector's bond without such adjudication unless the Circuit Court can in an action upon the bond draw to itself, in a collateral way, a jurisdiction to investigate and settle the accounts of delinquent officers for the collection of revenue, which appropriately belongs to the county courts.

Later in *Goree* v. *State,* 22 Ark. 236, we held that a judgment in circuit court against the surety on a collector's bond was defective because no action could be maintained against the surety until a final judgment had been rendered in the county court upon the collector's settlement or its adjustment and settlement, and that the ex parte preliminary settlement was not sufficient basis for the action. Upon the basis of this holding we rejected the argument that the circuit court, and not the county court, had jurisdiction of such an action. *Chris-*

[1]It may well be that this jurisdiction could not be given to any other court because of Art. 7, § 28 of the Constitution of Arkansas. *E. F. Leathem & Co.* v. *Jackson County,* 122 Ark. 114, 182 S.W. 570; Ann. Cas. 19.70 438.

*tian* v. *Ashley County,* 24 Ark. 142. It is clear that notice prior to the final judgment is essential to its validity. *Christian* v. *Ashley County,* supra; *Trice* v. *Crittenden County,* supra; *Carnall* v. *Crawford County,* supra.

It is quite clear that no cause of action accrues against the surety on the bond until a final judgment fixing the liability of the collector has been entered. *Graham* v. *State,* supra, 100 Ark. 571.

Inasmuch as the record does not disclose that the conditions precedent to the cause of action have been met, the judgment must be reversed.

Appellant has argued that the action is barred by the statute of limitations. But the earliest date the statute can begin to run is the date *the collector* actually *files* his settlement with the *county court, McCoy* v. *State,* 190 Ark. 297, 79 S.W. 2d 94, unless it should be put in motion by the county court's ex parte preliminary settlement or by any notice given thereafter. In any event, there is nothing in this record to show any basis for the accrual of the cause of action, so we cannot hold that the action is barred upon the record before us. *Bledsoe* v. *State,* 167 Ark. 160, 267 S.W. 571, has no application, because, as far as this record discloses, the collector never *filed* his settlement with the *county court* and the statement of the account by the county clerk is not necessarily the settlement contemplated. See Ark. Stat. Ann. § 84-1430.

It should be noted that there is no allegation of either actual or legal fraud in this case. All parties agree that the shortage is due to a mistake, which may well not have been the basis of relief in equity for fraud. *State* v. *Perkins,* 101 Ark. 358, 142 S.W. 515, but see *Fuller* v. *State,* 112 Ark. 91, 164 S.W. 770. Even if fraud has been the basis of the action, or could be alleged, this case could not be transferred to chancery court and an action on that basis would have to be instituted in that court. *Bledsoe* v. *State,* supra.

Since conditions precedent had not been met, there was no cause of action of which the circuit court had jurisdiction, so the judgment is reversed and the cause dismissed.

We agree. HARRIS, C.J., and George Rose Smith and JONES, JJ.

Dewey BROCKWELL *v.* STATE of Arkansas

CR 76-32 545 S.W. 2d 60

Opinion delivered December 20, 1976
(In Banc)

*John F. Gibson Jr.*, for appellant.

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

JOHN A. FOGLEMAN, Justice. Appellant was convicted of second degree murder for the killing of his son-in-law, Walter Griffin, by shooting him with a 12 gauge shotgun loaded with buckshot. Brockwell and his wife lived next door to their daughter and son-in-law at McGehee. The killing took place as Griffin approached the front door of the Brockwell house, where his wife, Goldie Griffin, had gone with her mother on the preceding day. Goldie Griffin was ill at the time and died before the trial. Appellant's defense was that he acted in defense of his habitation. He urges 20 points for reversal, most of which merit little discussion. We do find reversible error in the court's failure to sustain appellant's objection to the prosecuting attorney's cross-examination of him.

Appellant had testified that his daughter was ill and had been released from the hospital just a few days earlier and had first come to the Brockwell house, but had gone to the Griffin house just two days prior to the day of the killing. On the evening of that same day, according to Brockwell, his wife had brought their daughter back to the Brockwell house and Griffin had followed them at a distance of about two and one-half feet, cursing and raging. Brockwell said he had latched the storm door at the front of the Brockwell house after his wife and daughter entered and Griffin had threatened to tear

it down and come into the house. Brockwell stated that when he closed and latched the main door, Griffin left and Mrs. Brockwell called the police. Brockwell said that he watched and saw that Griffin had turned out all the lights in the Griffin house. Brockwell told of the steps taken by him and his daughter to institute "peace bond" proceedings against Griffin the following day. On still the next day he stated that Griffin returned home from work, sent for his wife, and, when she didn't come, came out and said that if she were not back home in 15 minutes, he would come back, tear the door down and get her. Then, Brockwell said, Griffin left, after having upbraided his wife on the telephone for having taken his gun, telling her he could get another. He stated that Griffin promptly got in his car and "took off," spinning his wheels, but returned in about one and one-half hours and sat on his front steps drinking beer, after which the five-year-old son of the Griffins came into the Brockwell house and reported that his daddy had said that, if he came back to the Brockwell house, "it would be rough." Brockwell said that Griffin sat on his own porch for about 15 minutes and then started toward the Brockwell house.

Brockwell testified that he thought Griffin had a gun, but could see only his shirt, not his hands. He said that the shirt hung down pretty long. On cross-examination, Brockwell testified that Griffin's shirttail was out as he approached the Brockwell house. Then the prosecuting attorney showed a photograph to the witness, prompting an objection that the picture had not been introduced in evidence. The prosecuting attorney showed a photograph to the witness, prompting an objection that the picture had not been introduced in evidence. The prosecuting attorney responded that the photograph was offered for the purpose of impeaching the testimony of the witness, because it clearly showed that "the man's shirttail was in." The trial judge permitted the prosecuting attorney to question the witness about the picture without its being shown to the jury. The witness protested that the picture had been taken after the shooting but that he had been unable to see Griffin's hands prior to the shooting. The prosecuting attorney asked if the witness assumed that Griffin tucked his shirt in after the killing. When appellant's attorney objected to any statement by the prosecution that Griffin's shirt was tucked in after the shooting, the prosecuting attorney answered that the witness

had testified that the shirttail was out and that if the defendant wanted to introduce the picture, he could do so, and the trial judge stated: "I'm going to now — This witness testified that his shirttail was hanging out." The picture was never introduced in evidence, even though the prosecuting attorney had said that it would be if Brockwell could identify it. There was no indication other than the statement of the prosecuting attorney, what it depicted relative to the shooting or when it was taken.

This attempt to impeach the defendant related to a very critical issue in the case. Admissibility of the photograph in evidence depended upon the laying of a foundation showing that it was a fairly accurate representation of the conditions existing at the time in question. *Riggan* v. *Langley,* 238 Ark. 649, 383 S.W. 661; *Wheeler* v. *Delco Ben & Broadway Ice Co.,* 237 Ark. 55, 371 S.W. 2d 130. In this case, the picture would not have been admissible, unless it was indicated, in some manner, other than the prosecuting attorney's statement, that it showed Griffin's clothing was arranged substantially as it had been when the shooting occurred, or unless the difference was properly explained. *Powell Bros. Truck Lines* v. *Barnett,* 196 Ark. 1082, 121 S.W. 2d 116. The prosecuting attorney's statement about what the picture portrayed was not evidence and was patently improper.

Appellant's objection should have been sustained. The statement that appellant could introduce it if he wished certainly did not cure the error, or erase the manifestly prejudicial effect of the prosecuting attorney's statements or the trial court's failure to sustain the objections. It was not appellant's responsibility to lay the foundation for the introduction of the picture; and he should not have been called upon to rebut statements of the prosecuting attorney that are not supported by evidence. It should be noted that the picture was never introduced or offered for identification and, in effect, the witness was impeached on a critical point by the unsupported statement of the prosecuting attorney. Even though leading questions are permissible on cross-examination, an attorney cannot be permitted to make statements of fact in the guise of cross-examination. *Nelson* v. *State,* 257 Ark. 1, 513 S.W. 2d 496.

Although we find no reversible error on other points,

there are matters that will arise on a retrial that we must treat in order to avoid potential reversible error on other points. Even though we consider the record deficient on two points for want of a proper proffer of proof, there are indications that such a proffer would have demonstrated that the trial court erred in excluding testimony about statements made to appellant by his daughter prior to the shooting relating to a telephone conversation between her and her husband and about previous actions and statements of the victim.

Appellant's wife, Marie Brockwell, told of caring for her daughter after she was released from the hospital and said that she had gone to her daughter's house the first night the latter was at her own home and had found her having trouble with her heart and her husband bathing her face and cursing loudly. Mrs. Brockwell testified that she invited her daughter to come to the Brockwell house. Objections to her stating that Griffin grabbed Goldie when she started to arise from her bed were sustained. When asked if she had run into any obstruction in helping her out of the house, an objection to the question was sustained before any answer was given, with the court ruling that the testimony was not admissible because appellant was not present. Subsequently, Mrs. Brockwell testified that her daughter had later talked on the telephone with Griffin. When Mrs. Brockwell was asked what her daughter had repeated to her and whether Brockwell was present at the time, objections were sustained. Appellant's attorney then objected to the court's ruling, arguing that the statement made by Goldie Griffin to her father was admissible to show what she told him and relevant to the determination whether it was sufficient to excite fear of Griffin. Appellant also now suggests that Mrs. Brockwell should have been permitted to testify as to facts she had communicated to her husband which tended to show that Brockwell was acting with reasonable apprehension of danger at the time of the shooting.

A homicide in defense of one's habitation is justifiable. Ark. Stat. Ann. § 41-2231 (Repl. 1964). His house or place of residence is, in law, his castle. Ark. Stat. Ann. § 41-2233 (Repl. 1964). A manifest attempt and endeavor, in a violent, riotous or tumultous manner to enter the habitation of another for the purpose of assaulting or offering personal violence to any person dwelling or being therein, is a justifica-

tion of homicide. Ark. Stat. Ann. § 41-2234 (Repl. 1964). To justify a killing, it must appear that the circumstances were sufficient to excite the fears of a reasonable person and that the killer really acted under their influence and not in a spirit of revenge. Ark. Stat. Ann. § 41-2235 (Repl. 1964). The burden of proving justification devolves upon the accused, once the killing is established. Ark. Stat. Ann. § 41-2246. *Phillips* v. *Turney,* 198 Ark. 364, 129 S.W. 2d 963. These statutes are, so far as they extend, a reenactment of the common law and leave the common law, as to the extent, manner and circumstances in or under which the right may be exercised, in force. *Carpenter* v. *State,* 62 Ark. 286, 36 S.W. 900.

An assault upon one's house was considered as an assault upon him, at common law. *Brown* v. *State,* 55 Ark. 593, 18 S.W. 1051. It is so considered by this court. *Hall* v. *State,* 113 Ark. 454, 168 S.W. 1122. Generally, speaking, the defense of one's habitation or members of his family[1] or other persons therein is similar to, and an extension of, the right of self-defense. See *Brown* v. *State,* supra; *Hall* v. *State,* supra; *Carpenter* v. *State,* supra; *Wheatley* v. *State,* 93 Ark. 409, 125 S.W. 414; *Crawford* v. *State,* 231 Md. 354, 190 A. 2d 538 (1963). In either case, the danger to the person defended may be either real or apparent. *Maples* v. *State,* 225 Ark. 785, 286 S.W. 2d 15; *Hall* v. *State,* supra; *Brown* v. *State,* supra; *Carpenter* v. *State,* supra. Even though the danger may be only apparent to the slayer, it must be reasonably so or he must honestly or reasonably believe that the person defended is in such danger and that it is necessary to kill to save him from it. *Brown* v. *State,* supra; *Carpenter* v. *State,* supra; *Maples* v. *State,* supra.

In case of defense of habitation, however, it may be that the danger, real or apparent, need not, by the plain language of the statute, be the peril of death or great bodily harm in every case, because a violent attempt to enter with the apparent purpose of assaulting or offering personal violence does not necessarily imply the greater danger. *Hayner* v. *People,* 213 Ill. 142, 73 N.E. 792 (1904). In this case, there was no evidence that the victim was making a manifestly violent attempt to enter the home of appellant, but the right of one to

[1]The right of one to defend his close relatives from attack is widely recognized. This is so even when the "attacker" is the husband of the person defended. *Bailey* v. *People,* 54 Colo. 337, 130 P. 832, 45 LRA (ns) 145 (1913).

use force to prevent an intrusion into his house does not depend upon the manner of the attempt. *Brown* v. *State,* supra. The reasonableness of the defender's belief that there was danger of great bodily harm, at the least, is judged by the facts and circumstances as they appeared to him at the time. *Sledge* v. *State,* 507 S.W. 2d 726 (Tex. Cr. App., 1974); *Miller* v. *Commonwealth,* 188 Ky. 435, 222 S.W. 96 (1920). See also *Sullivan* v. *State,* 171 Ark. 768, 286 S.W. 939. Evidence which tends to explain the conduct or actions or state of mind of the deceased or the accused is admissible. See *Lasater* v. *State,* 133 Ark. 373, 198 S.W. 122; *Rogers* v. *State,* 152 Ark. 40, 237 S.W. 435.

All the sections of the Criminal Code defining justifiable homicide are parts of the same original statute and are so closely related that each to some extent explains or controls the meaning of the others. *Brown* v. *State,* supra. The rules regarding the defense of one's person and regarding defense of his habitation are generally similar. *State* v. *Miller,* 267 N.C. 409, 148 S.E. 2d 279 (1966); *Crawford* v. *State,* 231 Md. 354, 190 A. 2d 538 (1963). Every fact that would be competent evidence in a case of self-defense by the person defended is competent where the killing by the accused is alleged to be in defense of another. See *Commonwealth* v. *Girkey,* 240 Ky. 382, 42 S.W. 2d 513 (1931). This is undoubtedly the rule where both the accused and the person defended are in the same dwelling. This includes evidence of hostile feelings and previous conduct toward and communicated threats and assaults against the person defended. *King* v. *State,* 55 Ark. 604, 19 S.W. 110; *Brown* v. *State,* supra; *Hart* v. *State,* 161 Ark. 649, 257 S.W. 354. See also, *Commonwealth* v. *Girkey,* supra.

Testimony showing the conduct, declarations of hostile purposes, and communicated or uncommunicated threats of the person slain on the day and near the time of killing are admissible as part of the res gestae in self-defense cases. *Pitman* v. *State,* 22 Ark. 354. A doctrine often announced by this court is that threats and conduct of the slain person, when they tend to explain or palliate the conduct of the accused are admissible circumstantial facts which are a part of the res gestae, whenever they are sufficiently connected with the acts and conduct of the parties at the time of the killing. *Burton* v. *State,* 82 Ark. 595, 102 S.W. 362; *Palmore* v. *State,* 29 Ark. 248. The same sort of evidence is admissible as tending to show who was the aggressor where the defense is defense of

another. *Brown* v. *State,* supra; *Trapp* v. *N.M.,* 225 F. 968 (8 Cir., 1915). Cf. *Armstrong* v. *State,* 251 Ark. 865, 475 S.W. 2d 541; *Decker* v. *State,* 234 Ark. 518, 353 S.W. 2d 168; *Parsley* v. *State,* 151 Ark. 246, 235 S.W. 797; *Jackson* v. *State,* 103 Ark. 21, 145 S.W. 559; *Turner* v. *State,* 128 Ark. 565, 195 S.W. 5.

Evidence of threats made by the victim of an assault to or against someone other than the accused is admissible when it tends to show the state of mind between the parties or to show who was the aggressor or to have probative value in determining whether the accused had reason to believe that danger of bodily harm was imminent. *Rogers* v. *State,* 152 Ark. 40, 237 S.W. 436. Furthermore, such statements may well have a bearing on the question of the motives of the parties. *Prewitt* v. *State,* 150 Ark. 279, 234 S.W. 35; *Palmore* v. *State,* supra, 29 Ark. 248.

Questions as to when efforts to enter the dwelling began, how far these persons may be permitted to proceed with safety to those assailed, the necessity for the use of fatal force and other such matters must be determined from the facts and circumstances existing at the time. They are usually, as here, questions of fact, not law. *Brown* v. *State,* supra. *Hall* v. *State,* supra.

Appellant had the burden of proving all the elements of justifiable homicide including the fact that the deceased was the aggressor and that appellant had a reasonable apprehension of danger to himself or the occupants of his household. He was entitled to have the jury consider all the conduct of the deceased from the time he commenced his threats against appellant's daughter, who was, at the time of the fatal encounter, an occupant of appellant's dwelling, until the shooting, in order to determine whether there was a necessity for appellant to act in her defense or the defense of his household, or whether he honestly believed that such a necessity existed. *Hart* v. *State,* supra, 161 Ark. 649. The case of *Sanders* v. *State,* 245 Ark. 321, 432 S.W. 2d 467 as to violent disposition of the person killed toward third persons is relied upon by the state. It is not applicable here, because defense of a third person or defense of habitation was not involved there. We did recognize, however, that even uncommunicated threats are admissible when there is doubt as to who was the aggressor. The court erred in excluding this testimony. *Bailey*

v. *People,* supra, 54 Colo. 337, 130 P. 832, 45 LRA (ns) 145.

The state's argument that there was no error in exclusion of this evidence because it would have only been cumulative to appellant's own testimony is not persuasive, because corroboration of the testimony of the party most interested in the case is important. See *Hall* v. *State,* 64 Ark. 121, 40 S.W. 578.

We find no abuse of discretion on the part of the trial court in the admission of photographs over the objection of appellant. Furthermore, there was no error in the sustaining of an objection to the question by appellant's attorney whether Griffin on some occasion was shaking his finger "in a menacing manner." The question was leading and called for a conclusion.

There was no error in the denial of a motion for a directed verdict. Appellant contends that there was no substantial evidence of malice or that the killing was done without reasonable apprehension of danger on his part. He further contends that Griffin had offered considerable provocation and that there was no evidence of any circumstances manifesting an abandoned or wicked disposition on the part of appellant. The fact that there was evidence that would have supported a finding favorable to appellant does not mean that there was no evidence to the contrary. The killing was admitted. The burden of showing circumstances that excused or justified the killing was upon appellant unless they were manifest from the state's evidence. Ark. Stat. Ann. § 41-2246 (Repl. 1964). The killing was done with a deadly weapon. This in itself was sufficient basis for a finding of malice, if the jury found that the killing was without justification. *Erby* v. *State,* 253 Ark. 603, 487 S.W. 2d 266.

Griffin had not attempted to enter the house when he was shot. There was no evidence that Griffin was armed. The screen door was locked but the front door was not, even though Brockwell was expecting Griffin and testified that he latched both doors to prevent Griffin's entry on the preceding day. Brockwell had told the officers that when he fired the fatal shot he was in the middle of his house. He testified that he was in a "partial stoop" when Griffin approached the door. Max Marbury, a neighbor who lived directly across the

street testified that, on the day of the killing, Brockwell had called on the telephone and warned him to keep his family away from the front of the house because Brockwell was having trouble and might have to shoot across the road. Brockwell said nothing when he fired the fatal shot except to say to his wife and daughter, "Here he comes. You all go to the bedroom and stay in the bedroom." Brockwell had kept his gun loaded with buckshot for two days. There was certainly sufficient evidence to warrant the submission of the case to the jury.

There was no error in the trial court's exclusion of testimony of the circuit court clerk about statements made in Brockwell's efforts to obtain a restraining order against Griffin, because they were self-serving.

Appellant has massed several points together in his brief. We consider the following points as waived because they were not argued. They were:

> THE COURT ERRED IN OVERRULING DEFENDANT'S OBJECTION TO CROSS-EXAMINING DEFENDANT'S WITNESS AS TO WHETHER A RESTRAINING ORDER IS EFFECTIVE.
>
> THE COURT ERRED IN ADMITTING IRRELEVANT AND IMMATERIAL EVIDENCE AGAINST THE DEFENDANT.
>
> THE COURT ERRED IN REFUSING TESTIMONY REGARDING APPELLANT'S KNOWLEDGE OF MARRIAGE PROBLEMS BETWEEN APPELLANT'S DAUGHTER AND THE VICTIM.
>
> THE COURT ERRED IN PERMITTING PROSECUTING ATTORNEY TO CROSS-EXAMINE DEFENSE WITNESS CONCERNING WHO HELD TITLE TO THE BROCKWELL HOUSE.
>
> THE COURT ERRED IN PERMITTING PROSECUTING ATTORNEY TO CROSS-EXAMINE DEPUTY CIRCUIT CLERK

REGARDING PARTIES AND PURPOSES OF RESTRAINING ORDER.

THE COURT ERRED IN REFUSING TESTIMONY OF CONVERSATIONS HAD BETWEEN THE DEPUTY PROSECUTING ATTORNEY AND THE APPELLANT PRIOR TO THE SHOOTING AS TO WHETHER APPELLANT CONSIDERED THE DECEASED A VIOLENT PERSON.

We do not agree with appellant that mere statement of any of these points is sufficient argument for reversal.

We do not agree with appellant that the trial court permitted the prosecuting attorney to harass defense counsel in examination of appellant. The examination was rather extensive in showing the condition of appellant's daughter's health. In the first place, after considerable argument, the court permitted appellant to pursue the line of examination, as far as he liked. In the next place, the court has some discretion in controlling the extent of examination on a particular matter, especially when it is of secondary importance.

We find no error in the giving of court's instruction No. 16. Appellant made no objection to remarks of the prosecuting attorney in closing argument or to those of the trial judge of which he now complains on appeal. Some of them will not likely recur on retrial; others are clearly not improper and any that were could have been corrected if a timely objection had been made. For these reasons, we forego further discussion.

The judgment is reversed and the cause remanded.

BYRD, J., concurs in the result.

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

CARLETON HARRIS, Chief Justice, dissenting. I cannot agree that the case should be reversed for the reason given by the majority.

In the first place, I find nothing in the record wherein Brockwell states that the reason he could not see whether Griffin had a gun was because the latter's shirt was hanging out. In fact, the record reveals that however the shirt was being worn (hanging or "tucked in"), this had no effect on what Brockwell could, or could not, see. From the record (cross-examination of Brockwell):

> "Q When he was coming to the house you said that you couldn't see his hands?
>
> A I did not.
>
> Q Why couldn't you see his hands?
>
> A I couldn't say. I don't know whether he had them behind him like this is the only reason that I could figure that I couldn't see his hands.
>
> Q Well, you mentioned something about he had a long shirt on.
>
> A Yes sir, he had a long shirt on, but his hands was behind him."

Now, if Brockwell could see that Griffin's hands were behind him, he certainly could have seen any movement of the hands wherein Griffin was endeavoring to get a gun out from under his shirt. Brockwell never testified that Griffin made any movement with his hands before the shooting; to the contrary, he emphatically stated that he saw no gesture or move by Griffin until he [Brockwell] fired, at which time the victim clutched himself with his right hand. Of course, if Brockwell was contending that Griffin had a gun behind his back, I cannot see the relevance of whether his shirt was in or out.

It is also my opinion that a proper objection was not made to the offer to introduce the photograph, i.e., counsel did not state that there was no proper foundation, i.e., no evidence that the shirt tail was found "tucked in" after the shooting; rather, counsel simply stated, "I don't want the

jury to be able to determine anything from something that happened after the shooting, I am making an objection." The court never ruled on the objection, and of course, the burden is on the party making the objection to obtain a ruling. *Downs* v. *State*, 231 Ark. 466, 330 S.W. 2d 281. The photograph was not placed in evidence.

At any rate, since it is clear to me from Brockwell's testimony that the arrangement of the shirt tail did not prevent Brockwell from knowing whether Griffin was reaching for a gun, I do not see how any prejudicial error could have resulted.

I would affirm.

JONES, J., joins in this dissent.

The MAYOR & CITY COUNCIL of
El Dorado *v.* EL DORADO BROADCASTING
COMPANY and Carl CONNERTON

76-99 544 S.W. 2d 206

Opinion delivered December 20, 1976
(In Banc)

*J. V. Spencer, III,* City Atty., for appellants.

No brief for appellee.

CONLEY BYRD, Justice. Following some complaints by the black residents of the City of El Dorado about the use of federal revenue funds, the mayor held a conference in his office, at which four of the city's eight aldermen were in attendance, together with the city attorney and a man from the Mediation Service of the U.S. Department of Justice. Carl Connerton, a news reporter, was refused admittance to that conference. The record indicates that as a result of that meeting the city attorney was directed to prepare a resolution for the next formal city council meeting. The trial court entered a declaratory judgment to the effect that a meeting of any number, less than a quorum, of the members of the city council is subject to the Freedom of Information Act if the members of the council discuss, or take action on any matter on which foreseeable action will be taken. The trial court's order also emphasized that the Freedom of Information Act did not apply to meetings of any number of the city council for purposes of only obtaining information. The city councilmen appeal contending that the Freedom of Information Act should not be applied to a group of individual members of a governing body, less in number than a quorum, who meet either formally or informally on a matter on which foreseeable action might be taken, and who are not delegated on behalf of the governing body to perform any function whatsoever. In other words, appellants contend that the Freedom of Information Act should not be extended past the "Committee" level envisioned in *Arkansas Gazette Co.* v. *Pickens*, 258 Ark. 69, 522 S.W. 2d 350 (1975). We cannot agree with appellants.

Ark. Stat. Ann. § 12-2802 (Repl. 1968), provides:

"12-2802. Declaration of public policy. — It is vital in a democratic society that public business be performed in an open and public manner so that the electors shall be advised of the performance of public officials and of the decisions that are reached in public activity and in making public policy. Toward this end, this act [§§ 12-2801 — 12-2807] is adopted, making it possible for them, or their representatives, to learn and to report fully the activities of their public officials. [Acts 1967, No. 93, § 2, p. 208.]"

Ark. Stat. Ann. § 12-2805 provides:

"12-2805. Open public meetings. — Except as otherwise specifically provided by law, all meetings formal or informal, special or regular, of the governing bodies of all municipalities, counties, townships, and school districts, and all boards, bureaus, commissions, or organizations of the State of Arkansas, except Grand Juries, supported wholly or in part by public funds, or expending public funds, shall be public meetings."

In discussing informal meetings the Court in *Sacramento Newspaper Guild* v. *Sacramento County Board of Supervisors,* 69 Cal. Rptr. 480, 263 Cal. App. 2d 41 (1968) stated:

". . . An informal conference or caucus permits crystallization of secret decisions to a point just short of ceremonial acceptance. There is rarely any purpose to a nonpublic pre-meeting conference except to conduct some part of the decisional process behind closed doors . . . ."

In the *Gazette* case, *supra,* we pointed out:

". . . When the General Assembly used the expression 'to learn and report *fully* [our emphasis] the activities of their public officials', it meant not only the action taken on particular matters, but likewise the reasons for taking that action. . . ."

The Freedom of Information Act applies alike to formal

and informal meetings and since we are required to give the Act a liberal interpretation, we cannot agree with appellants that it applies only to meetings of officially designated committees. We can think of no reason for the Act specifying its applicability to informal meetings of governmental bodies unless it was intended to cover informal but unofficial group meetings for the discussion of governmental business as distinguished from those contacts by the individual members that occur in the daily lives of every public official. Any other construction would obliterate the word "informal" as applied to meetings and make it simpler to evade the Act than to comply with it.

It has been suggested that the judgment appealed from is too far reaching in that it would apply to any chance meeting of any two members of a governmental agency or body. The suggestion that the trial court's order is too broad has not been raised by the appellants. The appellants' argument as set forth in their conclusion is as follows:

> "It is respectfully submitted that the laudatory purpose of our Freedom of Information Act would be protected and the public interest best served if the Act were not judicially extended to meetings of members of a governing body, not a committee, and less in number than a quorum, who discuss a matter on which foreseeable action might be taken. Certainly, such a group could not take 'official action,' nor could they bind the governing body in any way. Their actions would be limited, by operation of law, only to discussions."

Furthermore, we do not interpret the trial court's judgment as applying the Freedom of Information Act to a chance meeting or even a planned meeting of any two members of the city council. By its very terms the trial court's order applies only to those group meetings such as the facts here showed — *i.e.* any group meeting called by the mayor or any member of the city council at which members of the city council, less in number than a quorum meet for the purpose of discussing or taking any action on any matter on which foreseeable action will be taken by the city council.

Affirmed.

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

CARLETON HARRIS, Chief Justice, dissenting. I would affirm the judgment, if modified to confine the holding to the particular facts of this case, which I consider to be in violation of the Freedom of Information Act. However, the opinion, in my view, goes much further, and I accordingly dissent.

JOHN A. FOGLEMAN, Justice, dissenting. My task would be easier if I could be certain exactly what the majority has held. The judgment of the lower court is affirmed. The majority states that it held that a meeting of any number less than a quorum of the members of the City Council of El Dorado is subject to the Freedom of Information Act, if the members of the council discuss, or take action on any matter on which foreseeable action *will* be taken. Then by invisible legerdemain, it does not construe the judgment to apply to any *two* members of the city council. And then it says that by its very terms the trial court's order applies only to those group meetings *called by the mayor* or *any member of the city council, less in number than a quorum,* for the purpose of discussing or taking any action on any matter on which foreseeable action will be taken by the council. No two of the three statements relating to the court's holding are consistent with each other.

I would first suggest that we should modify the court's judgment so that it applies to the facts of the particular controversy only. That related to a meeting called by the mayor, with four of eight council members and the city attorney present. It is a fair inference that the preparation of a resolution for action by the council was the direct result of this meeting, although the proposition is not without dispute. If the only question involved was whether there was substantial evidence to support a finding that the particular meeting involved violated the Freedom of Information Act, I would agree that the judgment should be affirmed. Anything beyond that was an advisory opinion, the giving of which is consistently shunned by this court and beyond the purposes of the Declaratory Judgment Act. *Andres* v. *First Arkansas Development Co.,* 230 Ark. 594, 324 S.W. 2d 97. I submit that the action

taken here is subversive of the salutary purposes of the Declaratory Judgment Act. Such a result could, and should, be easily avoided.

The purpose of the Declaratory Judgment Act was considered in *Andres*. There it was pointed out that the requisite precedent condition to declaratory relief is a justiciable controversy, i.e., a controversy in which a claim of right is asserted against one who has an interest in contesting it. It was also emphasized that a declaratory judgment should not be granted unless the danger or dilemma of the plaintiff is present, not contingent upon the happening of hypothetical events, and that the prejudice to his position is actual and genuine, and not merely possible, speculative, contingent and remote. Whatever the reasons for not responding, appellees' failure to file a brief here is clearly indicative that they have no present danger or dilemma and that any issue, beyond the propriety of the meeting actually held, which gave rise to the controversy, is contingent, indeed, upon the happening of hypothetical future events. It also makes their prejudice appear to be highly speculative, contingent and remote.

The court before which a proceeding is pending cannot enlarge the issue beyond those raised by the pleadings. *Weber* v. *Pryor*, 259 Ark. 153, 531 S.W. 2d 708. Both the trial court and this court have extended the issues. The appellees, who did not even favor us with a brief, and who have not pursued their cross-appeal,[1] had requested notice of the following:

> 1. Any and all meetings of any officially designated committee of the City Council of El Dorado, Arkansas.
>
> 2. Any meeting called by the Mayor or any member of the City Council at which members of the City Council, less in number than a quorum, who do not constitute a committee of the City Council, meet for the *sole* purpose of discussing matters or receiving information pertaining to the public business of the City of El Dorado, Arkansas. [Emphasis mine.]
>
> 3. Any time the Mayor requests as many as four

[1]Certainly the cross-appeal should be dismissed.

members of the City Council plus the Mayor to meet in the Mayor's office for the purpose of receiving a report or information from any representative of a federal or state governmental agency, which report or information pertains to the public business of the City of El Dorado.

The city recognized appellees' entitlement to notice in accordance with Item 1 but not Items 2 and 3.

The point relied on by appellants for reversal is:

A MEETING OF LESS THAN A QUORUM OF A GOVERNING BODY, NOT DESIGNATED BY THE GOVERNING BODY AS A COMMITTEE AND NOT AUTHORIZED COLLECTIVELY IN ANY MANNER WHATSOEVER TO ACT FOR THE GOVERNING BODY, WHO DISCUSS, OR ATTEMPT TO "TAKE ACTION" ON ANY MATTER ON WHICH FORESEEABLE ACTION WILL BE TAKEN BY THE GOVERNING BODY, IS NOT A "MEETING" WITHIN THE MEANING OF THE FREEDOM OF INFORMATION ACT OF THE STATE OF ARKANSAS.

Not only does the majority, in saying that appellant did not argue that the trial court order was too broad, overlook the statement of the only point urged for reversal, it totally ignores a vital part of appellant's argument, viz:

The ruling of the lower court (T. 68) would in effect, extend the Freedom of Information Act past the "committee" level envisioned by this court in the *Gazette* case into an area which would place a discussion of a public issue on which foreseeable action is contemplated, between two or more members of a governing body, not constituting a committee and less than a quorum, and not authorized collectively in any matter whatsoever to act for the governing body, to be directly within the purview of the Freedom of Information Act.

The appellants certainly agree that "public business should be performed in an open and public

manner," but it is also certainly true that a group of aldermen less in number than a quorum and not constituting a committee have no authority to "perform" public business. As the California Supreme Court said in *Adler* v. *City Council of Culver City,* 7 Cal. Rpts. 805 (1960), such a gathering is not a "meeting" in the legal sense. The California Supreme Court goes on to point out:

> "As stated by one of the text-writers, 'the general rule is that, to bind the municipality, the council or legislative body must be duly assembled and act in the mode prescribed by the law of its creation, evidenced by an order entered by record, and such act, if legislative in character, must ordinarily be by ordinance, by-law or resolution, or something equivalent thereto.' *McQuillin, Municipal Corporations,* 2d Ed., Vol. 2, Section 602, p. 529. Unless, therefore, the members of the council formally come together, in the manner required by law, for the purpose of joint discussion, decision and action with respect to municipal affairs there can be no 'meeting' of this governing body within the legally accepted sense of the terms, for the individual or separate acts of a member or the unofficial agreements of all or a part of the members of the council are ineffectual and without binding force; joint, official deliberation and action as provided by law being essential to give validity to the acts of the council."

* * *

Certainly officially delegated committees of the city council are covered by the act under the authority of the *Gazette* case, because they are an "alter ego" of the "governing body," authorized by the governing body to fulfill certain functions. Ark. Stats. Anno. 12-2805 states as follows:

> Except as otherwise specifically provided by law, all meetings formal or informal, special or regular of the *governing bodies* of all municipalities . . . should be public meetings.

> This Court found in the *Gazette* case that this act applied to committees of "governing bodies" under the rationale that a "parent body could divide itself into groups of small committees, each member of the committee thus having a chance to commit himself concerning a matter on which foreseeable action would be taken by the parent authority." Under the *Gazette* case, the parent body could not form small committees which can meet in closed session. Such an attempt would be illegal.
>
> The pivotal and distinguishing feature between the *Gazette* case and the interpretation of the act by the lower court is that the *Gazette* case dealt with an officially delegated "committee" of the "board" and the court is here concerned with, not a "committee," but a group of individual members of a governing body, less in number than a quorum, who meet either formally or informally on a matter on which foreseeable action might be taken, but who are not delegated on behalf of the "governing body" to perform any function whatsoever on behalf of the governing body. Certainly, such a strained construction of the Act to cover such a situation is far beyond the liberal rule of construction applied in the interpretation of this act, *****

No application of this or any similar act has been so far reaching. The hypothetical meeting of less than a quorum dealt with in the majority opinion would not be a committee, would not be authorized to take or recommend any action and may meet for purposes in addition to discussion of matters on which "foreseeable action" will be taken. I fail to see how any decision binding either on the city council or the participants could have been made at the gathering proscribed by this opinion. I cannot escape the conclusion that the majority has not read the act beyond its first section, the declaration of public policy. Then the majority has undertaken to usurp a legislative function, i.e., implementation of the policy declared by creating the "foreseeable action" requirement. A meeting must fall within a classification of legality or illegality at the time it is held. This act carries criminal penalties for violation. This "if so" "then so" interpretation has serious constitutional implications.

By applying the majority interpretation, it will never be necessary to decide whether there was a "meeting," so long as three (or is it two?) members participate at the behest of one of them. Or can two members do just anything without violating the act? Just what "action" by councilmen constituting neither a committee nor a majority of the city's governing body is, I don't suppose will ever be defined. And what does "taking any action on any matter on which foreseeable action will be taken by the city council" mean? For that matter what is the meaning of "foreseeable action will be taken"? If the action is foreseeable, then what is the significance of the minority's "action"?

I submit that the majority's construction of the act cannot be found anywhere in its language, even by inference. I daresay that the most ardent advocate of the Freedom of Information Act never dreamed that its scope could possibly be taken to be so extensive or confused. If the act is so comprehensive, it was a foolish extravagance to waste so much judicial time and talent in arriving at the conclusion that a meeting of a committee of a governing board must be a public meeting in *Arkansas Gazette Company* v. *Pickens,* 258 Ark. 69, 522 S.W. 2d 350.

In my concurring opinion in the *Pickens* case I observed that the extension of the act, to cover meetings of committees which were less than a quorum and did not have authority to act, was accomplished by rhetoric rather than reason. Here, I find both missing. I find only judicial legislation amending the Freedom of Information Act. By it the court has extended the scope of the act beyond any statutory or judicial decision in any jurisdiction. In the most extreme position taken by any other court prior to the decision of this court in *Arkansas Gazette Co.* v. *Pickens,* supra, an intermediate court in Florida, in *Bigelow* v. *Howze,* 291 So. 2d 645 (1974) said:

> We do not suggest that the committee cannot interview others privately concerning the subject matter of the committee's business or discuss among itself in private those matters necessary to carry out the investigative aspects of the committee's responsibility. Cf. *Basset [Bassett]* v. *Braddock,* Fla. 1972, 262 So. 2d 425.

> However, at the point where the members of the committee who are also members of the public body make decisions with respect to the committee's recommendation, this discussion must be conducted at a meeting at which the public has been given notice and a reasonable opportunity to attend.

The proper application of the "public meetings" provision is expressed in *McLarty* v. *Board of Regents,* 231 Ga. 22, 200 S.E. 2d 117 (1973) thus:

> *** It applies to the meetings of the variously described bodies which are empowered to act officially for the State and at which such official action is taken. Official action is action which is taken by virtue of power granted by law, or by virtue of the office held, to act for and in behalf of the State. The "Sunshine Law" does not encompass the innumerable groups which are organized and meet for the purpose of collecting information, making recommendations, and rendering advice but which have no authority to make governmental decisions and act for the State. What the law seeks to eliminate are closed meetings which engender in the people a distrust of its officials who are clothed with the power to act in their name. It declares that the people, who possess ultimate sovereignty under our form of government, are entitled to observe the actions of those described bodies when exercising the power delegated to them to act on behalf of the people in the name of the State. ***

I feel so strongly about the matter that I am compelled to repeat a part of my concurring opinion in *Arkansas Gazette Co.* v. *Pickens,* supra when I said:

> It can be argued with considerable force that the result of the extension made here is an impediment to informal discussions and exchange of information among committee members, and consultation by them with experts or informed individuals having special qualifications to speak upon problems being investigated by the committee. There is an appropriate in-

vestigative and exploratory stage preceding many actions by governmental bodies and agencies. At this stage, it may be said there are advantages to the public in permitting preliminary discussions in which there can be greater freedom of expression without fear of benefitting special interests, harming reputations, inviting pressure from special interests, creating a public image of ignorance by searching questions, producing demagogic oratory, exposing disagreements of subordinates with policy determinations they must administer, or "freezing" members into publicly expressed opinions they might well prefer to abandon. In such initial stages, it is well that much be done and said which is exploratory, experimental and hypothetical and open meetings could prove to be an impediment to a free exchange of ideas of that sort. See Open Meeting Statutes: The Press Fights for the "Right to Know," 75 Harvard Law Review 1199, 1202, 1219 (1962). The writer of that article, an advocate of the extension of Freedom of Information Acts, demonstrates that a policy determination is involved in this language found at p. 1206:

> . . . Whether the courts will construe less explicit statutes as applying to subordinate committees and agencies is problematical. Since such groups have no power to make governmental decisions and since their recommendations must be considered in open session by the parent body, the need for public meetings is less compelling; indeed, privacy may facilitate the gathering of information as well as preliminary discussion. But if in practice recommendations are adopted with only perfunctory consideration by the parent group, the public will be deprived of information about the actual process of decision. And since there seems to be no particular reason for leaving subordinate groups always free to meet in private, the preponderant interest in informing the public seems sufficient to justify their inclusion.

Likewise, an Ohio court has recognized the impossibility of satisfactory accomplishment of the desired freedom of discussion and exchange of ideas essential to clear un-

derstanding and thinking under a spotlight or before a microphone. *Dayton Newspapers, Inc.* v. *City of Dayton,* 28 Ohio App. 2d 95, 274 N.E. 2d 766 (1971).

Public policy matters are involved. Fundamentally, the legislative branch declares public policy. If the common law is to be changed by extension of the Freedom of Information Act to all committees of every public board, commission, agency, organization or governing body, it should be done, as it was in California and New Jersey, by the General Assembly. See Sacramento *Newspaper Guild* v. *Sacramento Co. Bd. of Supervisors,* 263 Cal. App. 2d 41, 69 Cal. Rptr. 480 (1968); Comment, Access to Government Information (Blum), 54 California Law Review 1650, 1653 (1966); *Wolf* v. *Zoning Board of Adjustment of Park Ridge,* 79 N.J. Super. 546, 192 A. 2d 305 (1963). The great disadvantage in courts' attempting to declare public policy lies in the fact that attention is necessarily focused on the particular interests of the litigants. In contrast, the legislature has the advantage of having all perspectives presented and considered in making such determinations. This determination should have been left with the General Assembly where it belongs, both as a policy decision and as a change in the common law. Even the Florida Supreme Court has finally recognized the hazards of "judicial implementation." *Bassett* v. *Braddock,* Fla., 262 So. 2d 425 (1972).

See also, Comment, Access to Governmental Information in California, (Blum) 54 California Law Review 1650, 1651, 1655 (1966).

In *Bassett,* the Florida Supreme Court said:

Every action emanates from thoughts and creations of the mind and exchanges with others. These are perhaps "deliberations" in a sense but hardly demanded to be brought forward in the spoken word at a public meeting. To carry matters to such an extreme approaches the ridiculous; it would defeat any meaningful and productive process of government. One must maintain perspective on a broad provision such as this

> legislative enactment, in its application to the actual workings of an active Board fraught with many and varied problems and demands.

I would also reiterate my belief in the act and the policy declared in it. The Florida Supreme Court in *Board of Public Instruction* v. *Doran*, 224 So. 2d 693 (Fla., 1969) articulated these views better than I can. The court said:

> The right of the public to be present and to be heard during all phases of enactments by boards and commissions is a source of strength in our country. During past years tendencies toward secrecy in public affairs have been the subject of extensive criticism. Terms such as managed news, secret meetings, closed records, executive sessions, and study sessions have become synonymous with "hanky panky" in the minds of public-spirited citizens. One purpose of the Sunshine Law was to maintain the faith of the public in governmental agencies. Regardless of their good intentions, these specified boards and commissions, through devious ways, should not be allowed to deprive the public of this inalienable right to be present and to be heard at all deliberations wherein decisions affecting the public are being made.

In *Adler* v. *City Council*, 184 Cal. App. 2d 763, 7 Cal. Rptr. 805 (1960), I find this appropriate language:

> It seems quite evident that the language of the Brown Act was not directed at anything less than a formal meeting of a city council or one of the city's subordinate agencies. If it were, no practical line could be drawn. The members of the planning commission and the city council (whether the full number or only two or three members) would be impeded in conducting informal discussions among themselves, thus exchanging information, would be handicapped in viewing property upon which they were about to legislate, would be unable to confer with real estate experts or with their planning director or with informed individuals having special qualifications to speak upon municipal problems.

I must call attention to the fact that the meeting being discussed in *Sacramento Newspaper Guild* v. *Sacramento County Board of Supervisors,* 69 Cal. Rptr. 480, 263 Cal. App. 2d 41 (1968) included all of the county supervisors and several other county officials. The injunction issued applied only to a *majority* of the board, not less.

I must also point out that this judicial implementation of the act will subject far more persons to prosecution under the act than the General Assembly intended. It is at least arguable that there is a possibility that many acts of governing bodies and boards may be voided for causes over which a majority had no control.

I would reverse the circuit court judgment to the extent indicated.

If, however, the court would, it could modify the judgment of the trial court to limit it to the sustention of the position of appellees as to the particular meeting and to eliminate from it any declaratory judgment beyond that particular issue. In addition to the reasons previously given for so limiting our judgment in this case, there are others. Ark. Stat. Ann. § 34-2505 (Repl. 1962) permits a court to refuse to enter a declaratory judgment where the judgment would not terminate the uncertainty or controversy giving rise to the proceedings. In this respect the remarks of Dean Joe Covington, an advocate of liberal use of the procedure are appropriate. In his article, "Act 274, The Declaratory Judgment Act," 7 Ark. Law Review 306, 310, he said:

> In declaratory proceedings courts have been careful to limit the conception of a justiciable controversy to guard against mere advisory opinions and decisions on moot questions. To exclude consideration of issues under this category courts frequently state that an "actual controversy" is necessary. Some state statutes have a specific provision requiring an "actual controversy," but Act 274 has no such provision though there is a reference in Sections 4 and 5 to "uncertainty or controversy." Some cases have limited declaratory relief to instances of actual physical damage. It is true that there

must be a genuine controversy which is ready for judicial determination so that a judgment would at least serve to "remove an uncertainty" and would be of some practical assistance to the parties. The court may dismiss a petition on this ground when the plaintiff will not be endangered or forced to decide on action concerning asserted rights which depend upon some contingency which does not seem sufficiently likely to take place. Some courts have said there must be an actual controversy or "the ripening seeds of a controversy." A proceeding may be regarded as justiciable if a coercive cause of action has already accrued to one of the parties with respect to the issue, or if it is relatively certain that coercive litigation will eventually ensue between the same parties if a declaration is refused. It is strongly urged that "controversy" be given a liberal construction in accordance with the mandate to this effect found in Section 11.

It is clear that a cause of action in the conventional meaning of the term is not necessary for declaratory relief. "Cause of action" is a very elusive term, but in a sense the declaratory judgment statute may be regarded as enlarging the conception of a "cause of action" for it does permit suit on factual situations not heretofore justiciable.

Power of the courts to grant declaratory relief is specifically made discretionary in Section 5 of Act 274. It is there stated that the court may refuse to enter the judgment or decree if such a decision "would not terminate the uncertainty or controversy giving rise to the proceeding." This provision was included in the Uniform Act as a part of the established jurisprudence as a guide to the courts, indicating that the declaratory relief was not something to be literally followed, but that the court could exercise its judgment by dismissing petitions for declaratory relief when such relief would serve no useful purpose. Despite the broad language of the statute, this discretion should not be regarded as absolute. It should be limited to a determination of the usefulness of the judgment or decree. It may be regarded

as similar to the discretion of chancery courts in exercising equity jurisdiction. Dismissal of a petition for declaratory relief is subject to review on appeal and the appellate court should exercise its own judgment on the propriety of the refusal or grant of relief.

As an exercise of this discretion courts have shown a reluctance to hear declaratory petitions based on future rights. But some recent cases under a more liberal construction have granted relief under certain circumstances involving future rights where all parties who could claim an interest are represented and an actual controversy exists.

The courts definitely have the discretion to deny declaratory relief in proper cases. Prof. Borchard, perhaps the father of declaratory judgment procedure in the United States addresses this subject in the light of the section which appears as § 34-2505. In his work, Declaratory Judgments (2d Ed.), p. 304, et seq, he says:

The declaration will be refused where in the court's opinion it is inexpedient, for some reason outside the record, such as public policy, or where the question might be raised again in some other way or where it would be embarrassing in the operations of government. It may also be refused *where by laches or defaults or inequity the plaintiff has weakened his claim to relief,* or where it would result in possible injustice to third persons. *** It will be refused where it would be futile or useless under the circumstances, for example, where the one against whom it is made is privileged to escape its effects by some action within his own discretion. As already observed, it will be refused where it is superfluous, or where it is not practical for the court to reach a conclusion, e.g., the effect of a prospective structure, or where it will serve no practical purpose in terminating uncertainty or insecurity. Thus, it will not be made "in the air," or in the abstract, i.e., without definite concrete application *to a particular state of facts* which the court can by the declaration control and relieve and thereby settle the controversy. [Emphasis mine.]

He also says:

> This rule merely embodies the established Anglo-American practice in all jurisdictions and indicates both the practical and remedial scope and limitations of the relief. Yet the discretion granted, however wide and unlimited in appearance, is a judicial discretion, hardened by experience into rule, and its exercise is subject to appellate review.
>
> *** There is and there must be a broad discretion in determining whether a declaration will serve a useful purpose, but the many considerations which enter into this matter of policy should not be left exclusively to a lower court, but should be weighed by the court of appeal. The grant of equitable remedies is also generally a matter of discretion and policy, hardened by experience into rule; but it would hardly be thought proper for an appellate court to suggest that the propriety of or discretion in granting an equitable remedy should be left to the trial court, and would not be reviewed by an appellate court except for "abuse." Equally unsound is the suggestion in its application to declaratory judgments. *** But the appellate court in all cases must exercise its own judgment on the propriety of the refusal or grant and not rely on the judgment of the trial court. Otherwise the remedy is actually "abused."

If the court would exercise its discretion to modify the judgment to limit it as I have indicated, I would concur.

Mr. and Mrs. Rufus E. CAPPS *v.*
McCARLEY AND COMPANY

76-138 544 S.W. 2d 850

Opinion delivered December 20, 1976
(In Banc)
[Rehearing denied January 31, 1977.]

*Rubens, Rubens & Raney,* by: *Kent J. Rubens,* for appellants.

*Reid, Burge & Prevallet,* for appellee.

FRANK HOLT, Justice. This is an action to recover damages for the physical injuries sustained by the appellant, Mrs. Capps, when she slipped and fell on a wet spot in her garage. Appellants alleged that the accident was caused by the appellee contractor's negligence in failing to provide adequate drainage in the construction of the driveway of appellants' home and in failing to correct the alleged defect

after notice was given to it. At the close of appellants' proof, the trial court granted appellee's motion for a directed verdict. Appellants contend that the trial court erred in finding that, as a matter of law, there was an assumption of risk by Mrs. Capps.

Assumption of risk bars recovery whenever it is shown, as a matter of law, that a dangerous situation existed which was inconsistent with the safety of the plaintiff; that the plaintiff knew the dangerous situation existed and realized the risk of injury from it; and that the plaintiff voluntarily exposed himself to the dangerous situation which proximately caused his claimed injuries. *Spradlin* v. *Klump et al,* 244 Ark. 841, 427 S.W. 2d 542 (1968); *McDonald* v. *Hickman,* 252 Ark. 300, 478 S.W. 2d 753 (1972); *Price* v. *Daughterty,* 253 Ark. 421, 486 S.W. 2d 528 (1972); and AMI Civil 2d § 612.

The primary thrust of appellants' argument is that the testimony of Mrs. Capps clearly shows there was no voluntary assumption of risk. During the three months the appellants had occupied their new home, they had noticed on several occasions that water collected in the garage following a rainfall. This was caused by a half inch "crown" in the driveway during its construction. The "crown" diverted water into the garage. Appellee was made aware of this defect and had not corrected it at the time of the accident. Mrs. Capps worked during the daytime and regularly returned home at lunchtime to tend to the needs of her mother who was bedfast as a result of a broken hip. On the day Mrs. Capps fell, it rained just before lunchtime resulting in the collection of water in the garage. There were three entrances into her house. The entrances, other than from the garage, were locked from the inside. Mrs. Capps testified that she used the garage door entrance because she "had no other choice but to go through the water." However, she walked "very carefully" to avoid a mishap since she recognized that it was "dangerous" to walk through the water.

In *McDonald* v. *Hickman, supra,* we quoted with approval:

> As Prosser puts it: 'Knowledge of the risk is the watchword of assumption of risk.' Under ordinary cir-

> cumstances the plaintiff will not be taken to assume any risk of either activities or conditions of which he is ignorant. Furthermore, he must not only know of the facts which create the danger, but he must comprehend and appreciate the danger itself. Prosser on Torts, § 68 (4th ed., 1971). See also Restatement of Torts (2d), § 496 D (1965) . . . .

In *Price* v. *Daugherty, supra,* we said:

> Assumption of risk occurs only when the injured person actually knows and appreciates the danger. The standard is a subjective one, being based upon what the particular person in fact sees, knows, understands, and appreciates.

Here the defective condition was completely open and obvious. Mrs. Capps readily admitted on cross-examination that she saw, knew, and understood the hazardous condition and appreciated it to the extent that she felt it was necessary to walk "very carefully" in the area. This was not an emergency situation since Mrs. Capps regularly came home at lunchtime to tend to the needs of her mother. In the circumstances, although we view the evidence most favorable to appellants, as we do on appeal from a directed verdict, we must hold that the court correctly held that the appellants' action is barred by Mrs. Capps' assumption of the risk. See *Spradlin* v. *Klump, et al, supra.*

Appellants' final contention for reversal is that the trial court erred in admitting an offer and acceptance agreement between the parties, because provision 9 of the agreement contains language which excludes certain warranties. This contention is without merit since it clearly appears from the record that the exhibit was not considered by the court in directing a verdict on the grounds of assumption of risk.

Affirmed.

ROY, J., dissents.

ELSIJANE T. ROY, Justice, dissenting. I respectfully dis-

agree with the majority opinion because Mrs. Capps presented substantial evidence to go to the jury on the question of whether she voluntarily assumed the risk of her injuries.

A voluntary act is one done without compulsion or obligation. The doctrine of assumption of risk can only be applied in cases where the person may reasonably elect whether he shall expose himself to the danger.

In *Kuykendall* v. *Newgent,* 255 Ark. 945, 504 S.W. 2d 344 (1974), appellee was employed as a deliveryman. He carried meat to his employer's customers. While carrying a box weighing from 80 to 100 pounds he slipped and fell on an accumulation of ice at the delivery entrance. Both the trial court and this Court refused to hold that the appellee had assumed the risk as a matter of law.

Newgent admitted he knew it was dangerous to walk across the ice and stated he was being as careful as possible. When asked on cross-examination why it was his decision to walk across the icy spot, he replied "the only decision I had to make was to keep my job." The Court on this issue stated:

> * * * While Newgent may have been guilty of some negligence, we cannot say as a matter of law that such negligence exceeded that of appellants. Such issues are ordinarily a question of fact for the jury. (Citation omitted.)

See also *Woodruff Electric Co-op. Corp.* v. *Daniel,* 251 Ark. 468, 472 S.W. 2d 919 (1971).

Newgent felt it was necessary to cross the icy spot because his job demanded it. In the case at bar certainly no less impelling was the need for the daughter (appellant) to render necessary assistance to her mother who, according to appellant's testimony, "had a broken hip and the ball and socket had deteriorated after the surgery." Mrs. Capps stated her mother was bedfast, had no one with her and appellant had to come home at noon each day to assist with her bodily needs and "to give her medication" and "to take her food."

She then stated, "I had no other choice but to go through the water." She was compelled by duty and obligation to take this course of action.

Neither can I agree with the statement of the majority that this was not an emergency. One definition of emergency is a "pressing need." Certainly there was a continuing "pressing need" for the daughter to reach her mother at noon time and take care of her.

Prosser, Torts 4th Ed. § 68 (1971) (Voluntary Assumption of Risk) states:

> The second important limitation upon the defense of assumption of risk is that the plaintiff is not barred from recovery unless his choice is a free and voluntary one. There must first of all, of course, be some manifestation of consent to relieve the defendant of the obligation of reasonable conduct. It is not every deliberate encountering of a known danger which is reasonably to be interpreted as evidence of such consent.* * *
>
> . . . [T]he risk will not be taken to be assumed if it appears from his words, or from the facts of the situation, that he does not in fact consent to relieve the defendant of the obligation to protect him. * * *

There is absolutely nothing in the record to indicate appellants intended to relieve McCarley and Company from the admitted responsibility of repairing the defect in the driveway which caused the accumulation of water when it rained. To the contrary, appellants had made several demands for corrective action and each time appellee had promised to remedy the situation.

> * * * In general, *the plaintiff is not required to surrender a valuable legal right, such as the use of his own property as he sees fit*, merely because the defendant's conduct has threatened him with harm if the right is exercised. He is not, for example, required to forego pasturing his cattle in a field because the defendant has failed in its duty to fence its adjoining railway track. By placing him in the

> dilemma, *the defendant has deprived him of his freedom of choice, and so cannot be heard to say that he has voluntarily assumed the risk.* * * * (Italics supplied.)

Prosser, Torts, *supra.*

On appeal from a directed verdict the reviewing court must view the evidence in the light most favorable to the appellant, regardless of credibility, in determining if a question of fact exists for a jury's consideration. *Gramling* v. *Baltz et al*, 253 Ark. 352, 485 S.W. 2d 183 (1972).

For the foregoing reasons, I would reverse and remand the case for a new trial.

Roger Dale PENNINGTON *v.*
STATE of Arkansas

CR 76-144 545 S.W. 2d 72

Opinion delivered January 10, 1977
(Division I)

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

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

JOHN A. FOGLEMAN, Justice. Appellant Roger Dale Pennington was convicted for violating Ark. Stat. Ann. § 41-3508 (Repl. 1964) which proscribes escape from a penitentiary. He appeals alleging that the state failed to sufficiently prove that he was the same Roger Pennington who had been convicted of kidnapping and robbery and committed to the Department of Correction; or that his custody, at the State Hospital, was lawful.

To convict a person of the crime of escape in violation of § 41-3508 the state must present evidence that the accused was convicted of a crime, was committed to the Department of Correction and escaped from the custody of the Department. It is not sufficient merely to offer evidence that

someone by the same name as the accused was convicted, but there must be evidence that the accused is the same identical person who was convicted. *State* v. *Murphy,* 10 Ark. 74.

The state submitted as evidence certified copies of a judgment and order rendered in St. Francis County on June 1, 1971, finding one Roger Pennington guilty of robbery and kidnapping and sentencing him to serve two concurrent 21-year sentences. The judgment ordered the clerk of the court to deliver a certified copy of the judgment to the Sheriff of St. Francis County to be delivered to the Department of Correction as authority for confinement of Pennington. The certified copy of the commitment recites that it was issued on June 10, 1971. The certified copy of the judgment also recites that the state's attorney was Fletcher Long, Jr., defense attorney was Knox Kinney and the docket number was 7898.

The Superintendent of the Tucker Unit, Arkansas Department of Correction testified that he was responsible for the records of the inmates incarcerated there; that he had with him the original records of Roger Dale Pennington. He stated that Arkansas Department of Correction Admission Summary (state's exhibit 2) and Status Assignment Release Date Record (state's exhibit 3) were kept in the normal course of business and that it was the regular course of the business at Tucker to keep such records. Although appellant's attorney objected at trial that there was an insufficient foundation laid for the admission of the records into evidence, this argument was not pursued on appeal and we cannot, without further research, say that the foundation was insufficient.

A copy of the admission summary, included in the record, bears the name Roger Pennington, inmate No. 62258. A photograph bearing the numbers 62258 and 6-19-71 is attached. This record recites that two concurrent 21-year sentences were rendered on June 1, 1971 in St. Francis County, docket number 7898, for the offense of robbery and kidnapping; that the state's attorney was Fletcher Long and defense attorney was Knox Kinney. The copy of the Status Assignment Release Date Record included in the record bears the following: Inmate Name: Pennington, Roger; Date,

9-13-74; Assignment, Rel-State Hospital. The witness testified that this record shows that Pennington was sent out to the State Hospital on September 13, 1974.

Two other witnesses testified that they were employed at the State Hospital on October 30, 1974. They stated that they recognized Pennington as having been a patient at the hospital on that day; that Pennington had been shackled with a leather ankle cuff to a wheelchair but that on the evening of October 30, 1974 the wheelchair was found empty, close to an open window; that they searched for Pennington but he was not found in the hospital or on the grounds.

Appellant does not allege that the state has failed to sufficiently prove that he was in the State Hospital on October 30, 1974, that he had been an inmate at Tucker, or that the prison records refer to him. He alleges only that the state has not presented sufficient evidence to prove that he is the same person who was convicted of robbery and kidnapping in St. Francis County on June 1, 1971, but does not otherwise challenge the accuracy of the records kept in the regular course of business.

Although it is incumbent on the state to present evidence that the accused is the same person who was previously convicted, the proof of identity may be circumstantial, *State* v. *Murphy,* supra. The identity of facts recited on the judgment and sentence with the Admission Summary could not likely have been the result of coincidence; therefore the state has sufficiently proved the identity of the appellant by circumstantial evidence, which is substantial.

Appellant's second contention is also without merit. It is from the State Hospital that the appellant escaped, and he now claims that there is no evidence that he was in the lawful custody of the State Hospital. Ark. Stat. Ann. § 46-106 (Supp. 1975) provides that all commitments are to be made to the Department of Correction. It is provided in § 46-150 that an inmate may be taken, when necessary, to a medical facility outside the institution and in Ark. Stat. Ann. § 46-153 (Supp. 1975) that the Commissioner may transfer an inmate for observation and diagnosis to the State Hospital. It was not

required, for the purposes of Ark. Stat. Ann. § 41-3508 that the state prove that a transfer of an inmate from one institution to another was necessary so long as it was within the authority of the Department to make such transfer. The state must prove only that the accused was in the custody of the Department of Correction when he escaped. The records in evidence and the testimony of the Superintendent of Tucker and the other witnesses are sufficient to show that the appellant was transferred from Tucker to the State Hsopital; therefore he was still in the custody of the Department of Correction when he escaped, insofar as Ark. Stat. Ann. § 41-3508 is concerned.

There is another matter which we must mention in connection with this appeal. Appellant moved to dismiss the deputy public defender as his attorney on this appeal. We denied that motion by a Per Curiam order of this court without prejudice to appellant's filing a supplemental pro se brief on appeal with this court. When afforded the opportunity to do so, appellant failed to address himself to the issues on appeal. He simply filed a "Motion to Dismiss Appointed Counsel and Strike Attorney's Brief" on December 17, 1976. This hand lettered document was nothing more than a renewal of his previous motion. By filing it, in spite of notice by the clerk of this court on November 24, 1976, that the pro se brief had not been received, appellant has waived the right to file such a brief.

The judgment is affirmed.

We agree. HARRIS, C.J., and GEORGE ROSE SMITH and HOLT, JJ.

MFA INSURANCE COMPANY *v.* CITIZENS NATIONAL BANK of Hope, Arkansas, a corporation

76-202 545 S.W. 2d 70

Opinion delivered January 10, 1976
(Division I)

*Graves & Graves,* by: *Albert Graves, Jr.,* for appellant.

*McMillan, Turner & McCorkle,* by: *Otis H. Turner,* for appellee.

FRANK HOLT, Justice. In a suit on an insurance contract brought by appellee, the trial court, sitting as a jury, awarded appellee a judgment for $3,450, plus 6% interest, 12% penalty and $1,000 attorney's fee. The insured (not a party here) had purchased an automobile with a loan from appellee bank which was named as loss payee on the policy. The purchaser made no payments and the appellee bank took possession after the automobile was damaged by fire. Appellant tendered payment for the damages based on the cost of repairs. Appellee refused and filed suit alleging it was entitled to recover the difference in the market value of the automobile before and after the fire since the car was "almost totally destroyed by fire." For reversal of the judgment for appellee, the appellant asserts the trial court erred in applying the "before and after values" method in determining the measure of damages in this contract action.

The contract of insurance contains a provision which states:

> 10. Limits of Liability - **** the limit of the Company's liability shall not exceed the actual cash value of the automobile, or if the loss is of a part thereof, the actual cash value of such part at the time of the loss, nor what it would then cost to repair or replace the property or such part thereof *with other of like kind and quality,* less depreciation . . . . (Italics supplied.)

Appellant argues that its liability is limited to the cost of repairing the automobile. Appellant relies upon *Unigard Insurance Co.* v. *Wish,* 254 Ark. 832, 496 S.W. 2d 392 (1973), and *Tri-State Ins.* v. *McCraw,* 252 Ark. 1259, 483 S.W. 2d 212 (1972), as typical cases in support of its argument. It is true that these cases hold that a limitation of liability as to property damage in an insurance contract is valid. The appellee acknowledges the validity of these provisions. However, it cites our cases as holding that the measure of damages is the difference in the market value of the vehicle immediately before and after the alleged damages. *Home Insurance Co.* v. *Springdale Motor Co.,* 200 Ark. 893, 141 S.W. 2d 522 (1940); *The Home Insurance Company of New York* v. *Williams,* 201 Ark. 460, 145 S.W. 2d 743 (1940); *Service Fire Ins. Co.* v. *Horn,* 202

Ark. 300, 150 S.W. 2d 53 (1941); *Motors Insurance Corp.* v. *Lopez*, 217 Ark. 203, 229 S.W. 2d 228 (1950); *Southern Farm Bureau Cas. Ins. Co.* v. *Gaither*, 238 Ark. 50, 378 S.W. 2d 211 (1964); and *Insured Lloyds* v. *Mayo*, 244 Ark. 802, 427 S.W. 2d 164 (1968). Suffice it to say that we do not deem *Unigard* and *Tri-State* controlling here. In these cases the issue was not presented, as here, whether the repairs to a fire damaged vehicle with parts of like kind and quality would restore the car to its former condition.

Here the appellee adduced evidence that the cost of repairs with parts of other like kind and quality would not restore the vehicle to its former market value. Therefore, a fact question existed as to the proper measure of damages. In our view this is the better rule and seems to have general approval by the text writers.

In Couch on Insurance 2d, Vol. 15, § 54:240, it is stated:

> Where the repairs by the insurer under a collision policy did not substantially restore the automobile to its former condition and value, the proper measure of damages was the difference in the value before it was wrecked and the value after it was wrecked, repaired, and tendered to the insured.

In 7 Am. Jur. 2d, Automobile Insurance, § 192, p. 532, it reads:

> Generally, the proper measure of recovery under an automobile collision insurance policy is the difference in value of the vehicle before and after the accident, at least if it is not practicable to repair the vehicle, less any amount stipulated in a deductible clause. **** In other cases, though, where the motor vehicle could be repaired, it has been held or recognized that, subject to the operation of the deductible clause, the measure of recovery is the cost of repairs, not in excess of the value of the vehicle before the accident and *providing the repairs restore the vehicle to its former market value.* (Italics supplied.)

The testimony of appellee's two expert witnesses was

that, even with repairs, the vehicle would not have the same market value ($5,000) as it did prior to the fire. Although appellant's own expert witness testified that the cost of repairs would be $1,370, he acknowledged that the loss in the market value of the vehicle was $2,200. Clearly, a fact question was made as to whether the repairs with parts of other kind and quality would or could not restore the vehicle to its prior value. There was substantial evidence supporting the trial court's finding that repairs would not restore the car to its previous market value.

Affirmed.

We agree: HARRIS, C.J., and GEORGE ROSE SMITH and BYRD, JJ.

Warren RENFRO *v.* CITY OF CONWAY, Arkansas

CR 76-199 545 S.W. 2d 69

Opinion delivered January 10, 1977
(Division II)

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

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

ELSIJANE T. ROY, Justice. Appellant Warren Renfro was found guilty in the Municipal Court of Conway, Arkansas, on a count of overpossession and possession for sale of intoxicants and on a count of selling intoxicants in a dry county. He was fined $750 on each count. Appellant timely appealed the municipal court actions to the Circuit Court of Faulkner County. On October 6, 1975, appellant did not appear at a scheduled pre-trial hearing, and the trial court made a docket entry forfeiting the bail bonds on the appeals and affirmed the municipal court in both cases.

When the judgments reflecting the docket entries were filed appellant then filed motions to vacate and set aside the judgment forfeiting the bail bonds and affirming the municipal court action. Appellant's motions in each case were overruled, and this appeal followed.

For reversal appellant contends the judgments of the circuit court forfeiting bail bonds and affirming the municipal court convictions denied him substantive and procedural due process of law because of insufficient notice. The only notice

appellant had that his appeals were to be considered by the circuit court was a multi-page calendar which listed his appeals among 203 criminal non-jury matters and stated, "The cases appearing on this docket are listed for plea, arraignment, and pre-trial only."

Appellee contends appellant had an affirmative duty to be present at the October 6, 1975 hearing and also to request a setting for trial. In support of its position the State cites Ark. Stat. Ann. § 44-507 (Repl. 1964), which provides:

> If the appellant shall fail to appear in the circuit court *when the case is set for trial,* . . . , then the circuit court may, unless good cause be shown to the contrary, affirm the judgment of the [lower] court and enter judgment against the appellant . . . . (Italics supplied.)

Appellee's position would have merit if we could find that the 14-page calendar constituted a setting of the cases for *trial;* however, the calendar stated "pre-trial only." Although circuit court always remains open [Ark. Stat. Ann. § 22-312 (Repl. 1962)] we do not deem the notice given here sufficient to comport with the requirements of Ark. Stat. Ann. § 22-311 (Repl. 1962) nor with federal requirements of due process.

The Supreme Court of the United States said in *Goss* v. *Lopez*, 419 U.S. 565, 95 S. Ct. 729, 42 L. Ed. 2d 725 (1975):

> There are certain bench marks to guide us, however. *Mullane* v. *Central Hanover Trust Co.,* 339 U.S. 306, 70 S. Ct. 652, 94 L. Ed. 865 (1950), a case often invoked by later opinions, said that "[m]any controversies have raged about the cryptic and abstract words of the Due Process Clause but there can be no doubt that at a minimum they require that deprivation of life, liberty or property by adjudication *be preceded by notice and opportunity for hearing appropriate to the nature of the case.*" * * * (Italics supplied.)

Appellant received no proper notice that his appeals would be heard on the merits on October 6, 1975. Failure to give such notice is failure to meet the minimum requirement of due process.

Reversed and remanded for appropriate proceedings in circuit court.

We agree. HARRIS, C.J., and FOGLEMAN and HICKMAN, JJ.

THURSTON NATIONAL INSURANCE COMPANY
*v.* Darrell K. HAYS and Joann HAYS

76-211 544 S.W. 2d 853

Opinion delivered January 10, 1977
(Division II)

*Putman, Davis & Bassett,* for appellant.

*Creekmore & Harriman,* for appellees.

DARRELL HICKMAN, Justice. On April 15, 1975 the

Appellees signed an Offer and Acceptance Agreement to purchase two houses for a total of $20,000.00. The Offer was accepted on the same date. The Appellees made a down payment of $150.00, and the balance was to be paid in cash. The Agreement was silent as to the date the property was to be transferred. The Offer and Acceptance Agreement contained a clause that the risk of loss until the closing date was assumed by the seller. On April 23rd the Appellees purchased from the Appellant fire and extended insurance coverage on each house in the amount of $11,000.00. On April 30th one of the houses burned to the ground. The Appellant declined to pay the claim.

The sole issue submitted to the Court, by stipulation, was whether or not the Appellees had an "insurable interest" in the property at the time of the fire. The lower court held that the Appellees did have an insurable interest and awarded judgment in the sum of $10,950.00, plus 12% statutory penalty and $4,000.00 attorney's fee.

The Appellant contends that the Appellee did not have an insurable interest at the time of the loss and that the $4,000.00 attorney's fee was excessive and should be reduced.

An insurable interest has been defined in Arkansas by the Legislature in Ark. Stat. Ann. § 66-3205 (2) (Repl. 1966).

> "Insurable interest" as used in this section means any actual, lawful, and substantial economic interest in the safety of [or] preservation of the subject of the insurance free from loss, destruction, or pecuniary damage or impairment.

It is undisputed that the Appellees paid $150.00 towards the purchase price of the property. Also, the Appellees had, on its face, a legal, enforceable contract.

The record contains no evidence that the Appellees made a material misrepresentation to the Appellant insurance company.

In the case of *Briscoe* v. *National Union Fire Insurance Com-*

*pany*, 248 Ark. 220, 451 S.W. 2d 205 (1970), the Court ruled on a similar problem and held that the insurance company was not liable. However, in the *Briscoe* case, there was a finding that the claimant suffered no actual loss of cash or property.

The Arkansas Statutes clearly state that an insurable interest means any actual, lawful, and substantial economic interest in the property.

In the absence of misrepresentation or fraud, and based on the facts that are recited, the Appellees clearly had an insurable interest.

The attorney's fee is approximately one third of the amount of the judgment and is found to be reasonable. No additional fee will be allowed on appeal.

Affirmed.

We agree: HARRIS, C.J., and FOGLEMAN and ROY, JJ.

Roy Lee DIXON *v.* STATE of Arkansas

CR 76-164 545 S.W. 2d 606

Opinion delivered January 10, 1977
(In Banc)

*Kenneth C. Coffelt,* for appellant.

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

GEORGE ROSE SMITH, Justice. At a bifurcated trial the jury first found the appellant, Roy Lee Dixon, guilty of possession of heroin with intent to deliver, as charged. The jury then found Dixon to be a habitual criminal, with three previous felony convictions, and imposed a 40-year sentence. The principal question is whether there is sufficient evidence to support the finding that Dixon intended to deliver the heroin that was found in his possession.

The witness Andol testified that after having pleaded guilty to a drug charge he volunteered to assist undercover officers in making a purchase of heroin from Roy Lee White (not the same person as the appellant, Roy Lee Dixon), who was apparently known to Andol as a seller of drugs. Andol supplied White's telephone number to an officer, who dialed the number with Andol listening in on an extension. When a

woman answered, Andol asked to speak to Roy Lee White. Over a defense objection that no foundation had been laid, Andol testified that Roy Lee White came to the phone. Andol arranged for White to bring two $20 bags of heroin to Andol's motel room at a certain time later in the day.

Andol waited in the motel room, with two officers concealed in the bathroom and a third one stationed outside. White arrived in his car, accompanied by Dixon, whom Andol had never seen before. White and Dixon entered Andol's room together. White handed two foil packets to Andol, assuring him that it was good "skag," a slang term for heroin. The two officers then stepped from the bathroom, identified themselves, and placed White and Dixon under arrest.

White submitted, but Dixon ran out the door. The third officer subdued him and brought him back into the room. The officers searched Dixon, finding in his pocket a small match-box containing six tinfoil packets. White asserted that the two packets which he had delivered contained brown sugar, a claim that was verified by chemical analysis.Dixon's six packets, however, were found to contain 561 milligrams of a substance that was 5.5% pure heroin. The chemist considered that to be an average percentage for (illegal) heroin.

Upon the issue of intent to deliver we must at the outset lay aside the rebuttable presumption that arises from the possession of more than 100 milligrams of heroin. Ark. Stat. Ann. § 82-2617 (d) (Supp. 1975). The statute refers merely to 100 milligrams of "heroin." Does that mean pure heroin, of which Dixon possessed only 30.855 milligrams, or an adulteration, of which Dixon possessed 561 milligrams?

We must conclude from the statute as a whole that the reference is to pure heroin. In several instances the statute refers to any material, compound, mixture, or preparation that contains "any quantity" of specified prohibited substances (or uses similar language). Four such instances in the statute are § 82-2605 (d), § 82-2609 (b), § 82-2609 (c) (1), and § 82-2611 (b). On the other hand, the rebuttable presumption of an intent to deliver heroin arises only from

the possession of more than 100 milligrams of "heroin." Inasmuch as the draftsmen of this Uniform Act took pains to prohibit traffic in many specified drugs in an adulterated form, we must infer that the omission of similar language with reference to heroin was deliberately selected to exclude such adulterations.

Absent the statutory presumption, we find no basis except speculation for a conclusion that Dixon possessed the small packets of adulterated heroin with the requisite intent to deliver. The telephone call was to White, who arrived with the stipulated *two* packets of some substance (actually brown sugar) that had been ordered. If the State were contending that Dixon was an accomplice, under the circumstances, in the delivery of the brown sugar, its contention might be supported by our holding in *Hartman* v. *State,* 258 Ark. 1018, 530 S.W. 2d 366 (1975). But that is not what the State argues. Instead, it is contended that Dixon, although he uttered not one word from the time he entered the motel room until he was apprehended after his flight, brought *six* packets of heroin to the motel with the intention of selling *two* of them to Andol. It may be that such a transaction would eventually have been proposed if the purchasers had somehow discovered that they were being offered brown sugar and had demanded genuine skag. But the officers foreclosed that speculative possibility by emerging from concealment and making the arrests. We are compelled to rule that the proof is insufficient to show that Dixon possessed the heroin with the required intent to deliver.

The appellant next contends that the search of Dixon's person was illegal, because he was not advised of his "constitutional rights." Apparently the reference is to a Miranda warning, which the officers asserted they gave before the search. That warning, however, has to do with the right of a suspected person to remain silent. It is not essential to a search. Here the search was proper as an incident to what we hold to have been a lawful arrest, in view of Dixon's having arrived with White and having fled when the officers appeared. See *Graves* v. *State,* 256 Ark. 117, 505 S.W. 2d 748 (1974).

The appellant also states as points for reversal, without any citation of authority and actually without any real argument, that proof of the telephone conversation was not admissible and that the sentence is excessive. In effect the court is asked to research the law and to hold in favor of the appellant if the result of our labor so demands. We must decline that invitation. We adopt the position taken by the Supreme Court of Oklahoma in its own syllabus in *Irwin* v. *Irwin,* 416 Pac. 2d 853 (1966): "Assignments of error presented by counsel in their brief, unsupported by convincing argument or authority, will not be considered on appeal, unless it is apparent without further research that they are well taken."

We come, lastly, to the disposition of the case. The proof does not support the jury's finding of possession with intent to deliver, but it does support the lesser included offense of mere possession. In this situation we may, depending upon the facts, "reduce the punishment to the maximum for the lesser offense, reduce it to the minimum for the lesser offense, fix it ourselves at some intermediate point, remand the case to the trial court for the assessment of the penalty, or grant a new trial either absolutely or conditionally." *Clark* v. *State,* 246 Ark. 876, 440 S.W. 2d 205 (1969). We pointed out in *Bailey* v. *State,* 206 Ark. 121, 173 S.W. 2d 1010 (1943), that our decision may echo the verdict, as by imposing the minimum punishment for the lesser offense when the jury has imposed the minimum for the greater. In the case at bar the jury found three previous convictions and fixed the penalty at 40 years, or two thirds of the difference between the minimum of 30 and the maximum of 45 years. The range of punishment for a fourth offender, as the jury found Dixon to be, is not less than the maximum for the offense and not more than 1 ½ times that maximum. Ark. Stat. Ann. § 43-2328 (Supp. 1975). The maximum punishment for the mere possession of heroin, a Schedule I drug under the Uniform Act, is 5 years. Section 82-2617 (c). The range of punishment for a fourth offender is therefore 5 to 7 ½ years. We accept the jury's choice of two thirds of the difference, or 6 years and 8 months.

Accordingly, in harmony with *Bailey* v. *State, supra,* the

judgment will be so modified and affirmed, unless the Attorney General elects within 17 days to have the cause remanded for a new trial.

FOGLEMAN, J., dissents. HICKMAN, J., would remand for a new trial.

JOHN A. FOGLEMAN, Justice, dissenting. I would affirm the judgment in this case. I agree that there was no statutory presumption of intent to deliver heroin in this case. But the circumstances here are certainly sufficient to afford a basis for a finding that Dixon's possession was with the intent to deliver. Andol, a drug user, who was held on a felony charge relating to drugs, had the telephone number of White and gave it to a police officer, as that of a dealer in heroin. Andol talked to White and placed an order for "skag" and asked him to deliver it to Room 115 at Days Inn Motel. Andol said that "skag" was a "street term" for heroin. Two black men, one answering a description given the police officers by Andol, pulled into the motel parking lot. Both White and Dixon, both of whom were black, immediately thereafter appeared at the door to the motel room. Although White handed over two packets which actually contained brown cake powder, or brown sugar, after responding affirmatively to Andol's inquiry whether he had the "junk," it was Dixon who actually had in his possession what Andol had ordered, who appeared with White in response to that order, and who made a break for the door and had to be subdued in effecting his arrest. The fact that Dixon possessed six packets instead of only two ordered by Andol certainly is not inconsistent with an intent to deliver. A dealer in any commodity hardly ever confines his inventory to the amount required to fill a single order.

If Dixon had no intent to deliver heroin, why did he accompany White to the motel carrying the substance Andol ordered? And why did he leave the vehicle in which the two pulled into the parking lot and accompany White to the room designated for delivery? And why did he run when the police officer appeared? The jury could reasonably have drawn the inference that the answer to these questions was that Dixon intended, if all went well, to make the delivery to Andol pursuant to the order placed. The fact that Andol knew White

but did not know Dixon is also a circumstance to be considered.

It must be remembered that Dixon is not charged with making a sale or a delivery. He is charged with possession of the drug with intent to deliver.

STATE of Arkansas *v.* James R. (a/k/a Sam) BLACK

CR 76-152 545 S.W. 2d 617

Opinion delivered January 17, 1977
(In Banc)

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

*Harold L. Hall*, Public Defender, by: *Milton R. Simpson Jr.*, Dep. Public Defender, for appellee.

CARLETON HARRIS, Chief Justice. This is a case of first impression in this state. Sam Black, appellee herein, was incarcerated in the "drunk tank" of the Little Rock city jail with another prisoner, and on February 12, 1976, Officer Gentry, who was employed at the jail, observed Black engaging in oral sex with the other prisoner. The two prisoners were the only ones occupying the "tank" at the time. Black was charged with violation of Ark. Crim. Code § 41-1811 (1976), Public Sexual Indecency, the information charging that the deviate sexual activity mentioned was committed "in a public place or in public view in the Little Rock Police Department Detention Center." The state filed a motion asking the court to rule on whether the Little Rock city jail is a public place under the statute for the purposes of sexual crimes, before jeopardy attaches, in order that the state might preserve its right of appeal. On hearing, the court held that the jail was not a public place within the meaning of the statute and dismissed the case. From such order, the state brings this appeal.

Pertinent portions of the statute at issue provide as follows:

> (1) A person commits public sexual indecency if he engages in any of the following acts in a public place or public view:
>
> (a) an act of sexual intercourse; or
> (b) an act of deviate sexual activity; or
> (c) an act of sexual contact."

Officer Gentry testified that the "drunk tank" is one of the "forward cells," i.e., near the front of the jail area, and that it is open on the east side. The officer stated that it is directly across the hall from another similar cell which is open on the west side; that the latter cell was being occupied by 10 or 11 people.[1]

[1]According to Gentry, these people told him that they observed the act between Black and the other prisoner, but, of course, this was hearsay evidence and properly objected to.

The witness said there were two jailers and a supervisor employed at the jail at the time, and that these employees customarily walk up and down the halls. He further stated that prisoners are brought into the jail on an average of about one every two hours and that all customarily will pass by the "drunk cell." Further, Gentry testified that tours of the jail are conducted for the public from time to time, though these tours are in charge of some official at the jail.

It is argued by appellee that the jail is licensed to only a very few members of the public at one time, and there are no "occasional observers in the city jail that could witness an offense."

Ark. Crim. Code § 41-1801 (6) (1976) defines "public place" as "a publicly or privately owned place to which the public or substantial numbers of people have access."

Of course, visitation to a jail by members of the public must necessarily be restricted and subject to supervision by an officer; otherwise, weapons could be brought to prisoners, or, for that matter, some outsider could commit harm to a prisoner.[2]

The case of *Bishoff* v. *The State of Texas*, 531 S.W. 2d 346 (Tex. Crim. App. 1976), bears great similarity to the instant case, even to the statute involved. Bishoff was convicted of sodomy, the act occurring in the "drunk tank" of the city jail. The offense was observed by a police officer as he opened the door to the "tank." Subsequent to the commission of the act, a new criminal code went into effect and Bishoff elected to receive punishment under the new code. The court stated:

> "He was convicted of the old Code offense of sodomy, and his election for punishment under the new Penal Code only made it necessary for the trial judge to

[2]Though involving a police station house, rather than a jail, the observation of the court in the case of *People* v. *Fine,* 135 NYS 2d 515, is rather pertinent:

> "As the term suggests a 'public place' is a place open to the general public and available for use by the general public without limitation except such as may be required in the interest of safety and good order."

determine from the proof which of the applicable sections of the new Code to apply. Both Secs. 21.06 (homosexual conduct) and 21.07 (public lewdness) replaced the old sodomy statute. Since the proof showed that *the act of deviate sexual intercourse took place in a public place*, (our emphasis), the court did not err in assessing punishment as a Class A misdemeanor under the provisions of said Sec. 21.07."[3]

Summarizing, what is a public place? Primarily, the circumstances must be considered. While the fact situation was different, the language of the Maryland Court of Appeals in the indecent exposure case of *Messina* v. *State*, 212 Md. 602, 130 A. 2d 578, we think, succinctly answers the question asked. There, the court said:

> "An exposure is 'public,' or in a 'public place,' if it occurs under such circumstances that it could be seen by a number of persons, if they were present and happened to look."

It is not uncommon for groups of persons to tour a jail, and, according to the evidence in the present case, persons constituting such groups would have no difficulty in seeing acts committed in the "drunk tank;" in other words, if such a tour had been in progress at the time Black committed the act herein set out, he could easily have been observed. Of course, families and friends frequently visit inmates and, as also reflected by the evidence, persons coming into the jail customarily pass the "drunk tank." As already mentioned, Black and his companion were in plain view of the inmates across from the cell.

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[3] V.T.C.A. Penal Code, Sec. 21.07, sets forth the offense of "Public Lewdness" as follows:

> "(a) A person commits an offense if he knowingly engages in any of the following acts in a public place or, if not in a public place, he is reckless about whether another is present who will be offended or alarmed by his act:
>
> "(1) an act of sexual intercourse;
>
> "(2) an act of deviate sexual intercourse;
>
> "(3) an act of sexual conduct;
>
> "(4) an act involving contact between the person's mouth or genitals and the anus or genitals of an animal or fowl."

It follows from what has been said that the court erred in holding that the offense did not occur in a public place. The judgment is accordingly reversed and the case remanded for further proceedings not inconsistent with this opinion.

HICKMAN, J., not participating.

James LITVINKO *v.* Richard E. DOWNING and John E. ROUSSOS

76-225 545 S.W. 2d 616

Opinion delivered January 17, 1977
(Division I)

*Ben J. Harrison,* for appellant.

*Glover, Sanders & Parkerson,* by: *J. E. Sanders,* for appellees.

GEORGE ROSE SMITH, Justice. The question here is whether James Litvinko is entitled to retain the proceeds of two $5,000 certificates of deposit which belonged to his wife. payable on her death to her two adult sons, and which Litvinko, under a power of attorney, cashed during her terminal illness. The chancellor held that the money belongs to the two sons. Our statement of the case is greatly simplified by Litvinko's candid concession, through counsel, that he violated his fiduciary duty in the transaction.

Mrs. Litvinko had been successful as a business woman before she married Litvinko in about 1963. In February of 1974 they executed similar wills, each leaving his property to the other. About two months later Mrs. Litvinko used her own money to purchase the two certificates of deposit, each being payable on her death to one of her sons.

In May of 1975 Mrs. Litvinko was found to be terminally ill. When she became unable to write her name she executed a general power of attorney in favor of her husband. It authorized him, as her agent, to manage her property, receive money on her behalf, deposit it to her account, and draw checks upon her account — all as might be necessary and expedient. On the same day that the power of attorney was executed Litvinko took the two certificates from the couple's safety deposit box and cashed them, incurring a $371 prepay-

ment penalty to the issuing bank. Litvinko deposited the money in his own bank account. Mrs. Litvinko died less than two months later. There were other funds available to pay the expenses of her last illness and funeral. This suit was brought by the two sons, for an accounting.

The appellant concedes, and there can be no doubt, that he violated his fiduciary duty, as an agent, in cashing the certificates and depositing the money in his own bank account. In Cardozo's often quoted words: "A trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior." *Meinhard* v. *Salmon*, 249 N.Y. 458, 164 N.E. 545, 62 A.L.R. 1 (1928). Litvinko's conduct fell far short of that standard.

It is argued, however, that Litvinko could, under the authority of the power of attorney, have cashed the certificates and deposited the proceeds to his wife's account. Upon her death he would have received the money as the beneficiary of her will. Hence, it is argued, the breach of duty makes no practical difference in the end.

What that argument disregards is the basic premise that an agent's fiduciary duty requires him to avoid any possible conflict of interest, by acting solely in the best interest of his principal. Had Litvinko cashed the certificates and put the money into his wife's account in a good faith effort to shield her from hardship or suffering, a different question might be presented. That is not what happened. To the contrary, Litvinko hastened to the bank, cashed the certificates, and tried to make the proceeds his own. His motive was evidently to thwart his wife's wish that her sons have the certificates. What the chancellor found to have been done in bad faith cannot be condoned upon the supposition that a different course of conduct, pursued in good faith, might have led to the same final result.

Affirmed.

We agree. HARRIS, C.J., and BYRD and HOLT, JJ.

Alvin HAZEN et al *v.* The
CITY OF BOONEVILLE, Arkansas et al

76-44 545 S.W. 2d 614

Opinion delivered January 17, 1977
(Division I)

*Wayland A. Parker,* for appellants.

*C. Richard Lippard,* for appellees.

JOHN A. FOGLEMAN, Justice. Appellants commenced this action by filing their petition in the chancery court on June 25, 1974, as citizens, residents, taxpayers and property owners situated in the Annex to Street Improvement District No. 1 of the City of Booneville. They contended there and here that both the order creating the annex and the assessment of benefits in the annexed territory were void. Appellants state three points for reversal, but all are argued together in appellants' brief. In it, appellants contend that the failure of the city council to act upon the petition for the annexation within two years allotted by Ark. Stat. Ann. § 20-108 made the council's ordinance annexing the territory described in the petition and the assessments of benefits thereunder null and void. That section provides that a petition for the creation of a municipal improvement district shall become void unless it has been acted upon within two years from the date of its filing.

The fallacy in appellants' approach lies in their assumption that § 20-108 applies to petitions for annexation. We find nothing in the language of the statute providing for annexation of territory to a municipal improvement district [Act 280 of 1919, appearing as Ark. Stat. Ann. § 20-134 (Repl. 1968)] indicative of a legislative intent that Ark. Stat. Ann. § 20-108 (§ 3 of Act 64 of 1929 as amended) have any application to an annexation proceeding. Nor do we find anything in Act 64 of 1929 on which to base a finding of such legislative intent.

Appellants also argue that the court erred in granting appellees' oral motion to dismiss that portion of the complaint alleging the invalidity of the assessment of benefits. The basis of this argument is that the court, in effect, granted

a summary judgment, without following the procedures required by Ark. Stat. Ann. §§ 29-205, 29-203 and 29-202 (Repl. 1962). This issue was waived because it was not raised by an objection on this ground in the trial court. We cannot consider it for the first time on appeal. *Ragge* v. *Bryan*, 249 Ark. 164, 458 S.W. 2d 403. To the contrary, appellants, insisting that § 20-108 governed, then offered to prove that the record showing that the petitions were filed in 1969 was incorrect and that the petitions were actually filed some two years earlier. Appellants also asked to be allowed to prove all the other allegations of their complaint. The trial court not only heard evidence on one issue, i.e., whether Street Improvement District No. 1 of the City of Booneville was in existence when the additional territory was annexed to it, but it also advised appellants' counsel that he might make an offer of proof on other issues.

No argument is made in appellants' brief that the chancellor erred in holding that Street Improvement District No. 1 was "a live, viable street improvement" and that the face of the record disclosed that the attack made by appellants was barred by the applicable statute of limitations, Ark. Stat. Ann. § 20-134 (Repl. 1968). No authority to support appellants' position on these points is cited. Failure to argue a point constitutes a waiver. See *Brockwell* v. *State,* 260 Ark. 807, 545 S.W. 2d 60 (1976). We will not consider assignments of error presented in a brief unsupported by convincing argument or authority, unless it is apparent without further research that they are well taken. *Dixon* v. *State,* 260 Ark. 857, 545 S.W. 2d 606 (1977). We cannot say that it is apparent that these points are well taken. This court accepts as correct the decisions of a trial court which the appealing parties do not show to be wrong. *Clemson* v. *Rebsamen,* 205 Ark. 123, 168 S.W. 2d 195.

There is one other matter that we feel compelled to mention because it is recurring too frequently. We note that appellants' statement of the case consists of ten pages, in spite of the admonitions in Rule 9 (b) that such statements should ordinarily not exceed two pages in length. The statement in this case goes far beyond the requirements of the rule in that

it gives a complete history of the entire litigation, recites allegations in pleadings and even contains a verbatim recitation of the dialogue pertaining to, and including, appellants' offer of proof. Striking the brief would be too severe a sanction in this case. We take this opportunity to call the attention of the bar to the two-page ideal espoused by our rule. We believe that such lengthy statements result from a misconception of their purpose. For a complete statement of that purpose, we refer the bar to an article by Mr. Justice George Rose Smith, appearing in Vol. 15, Arkansas Law Review at p. 357. Adherence to the precepts there expounded will be of material assistance to this court.

The decree is affirmed.

We agree. HARRIS, C.J., and GEORGE ROSE SMITH and BYRD, JJ.

## James M. CAVETTE *v.* FORD MOTOR CREDIT COMPANY

76-208 545 S.W. 2d 612

Opinion delivered January 17, 1977
(Division II)

*Mike J. Etoch, Jr.,* for appellant.

*Griffin Smith* and *W. R. Nixon, Jr.,* for appellee.

JOHN A. FOGLEMAN, Justice. This appeal is from a judgment quashing service of process for improper venue. Appellant Cavette brought suit against appellee Ford Motor Credit Company in the Circuit Court of Phillips County alleging conversion of a 1975 Ford truck, in which appellee had a security interest, by taking it in the nighttime.

Summons was issued, directing the Sheriff of Pulaski County to serve it on appellee by serving The Corporation Company at 620 West Third Street in Little Rock. The return of the Sheriff of Pulaski County recites that it was served by delivering a copy to Jan Zanoff, assistant secretary to The Corporation Company, statutory agent for the service of process. After this summons had been served as directed, appellee filed a motion to quash the service upon the ground that Phillips County was not the proper venue for the action against appellee, a foreign corporation with its only place of business in Pulaski County. The circuit court granted the motion, finding that Ford Motor Credit Company was a foreign corporation, domiciled in Michigan, with its principal place of business at Dearborn, Michigan, but duly licensed to do business in the State of Arkansas; that service was had on appellee's designated agent for service in Pulaski County; and that appellant had alleged that he was indebted to appellee for the purchase price of the truck.

Both of appellant's points for reversal rest upon the premise that venue in Phillips County is proper under Ark. Stat. Ann. § 27-608 (Repl. 1962), and for the purposes of this opinion we will assume that there was property of, or debts owing to, Ford Motor Credit Corporation, in Phillips County. Even so, there seems to be no question about the status of Ford Motor Credit Company as a foreign corporation authorized to do business in Arkansas.

We can agree with appellant that, for *garnishment* purposes, the situs of his debt to appellee could be taken to be in Phillips County under the holding in *St. Louis Southwestern Ry. Co.* v. *Vanderberg*, 91 Ark. 252, 120 S.W. 993, cited by appellee. But this fact does not control the venue under our statutes except where service on the defendant is constructive. See *Jacks* v. *Central Coal & Coke Co.*, 156 Ark. 211, 245 S.W. 483, where this section was invoked by a foreign corporation as fixing the venue in a personal injury action. Appellant argues that Ark. Stat. Ann. § 27-605 (Repl. 1962) fixing venue for a domestic corporation in the county in which it is situated or has its principal office or place of business or in which its chief officer resides is complimented by § 27-608 as to foreign corporations. But this would decidedly differentiate

between foreign and domestic corporations as to venue of identical causes of action. Such a differentiation in an Arkansas statute has been held to unconstitutionally discriminate against, and deny equal protection of the laws to, foreign corporations. *Power Manufacturing Co.* v. *Saunders,* 274 U.S. 490, 47 S. Ct. 678, 71 L. Ed. 1165 (1927), reversing 169 Ark. 748, 276 S.W. 599. We have continually and repeatedly recognized the impact of *Power* in our venue statutes. See *Chapman & Dewey Lumber Co.* v. *Bryan,* 183 Ark. 119, 35 S.W. 2d 80; *Anheuser-Busch* v. *Manion,* 193 Ark. 405, 100 S.W. 2d 672; *Crutchfield* v. *McLain,* 230 Ark. 147, 321 S.W. 2d 217; *B-W Acceptance Corp* v. *Colvin,* 252 Ark. 306, 478 S.W. 2d 758. In the last case cited we stated the full impact of *Power,* saying:

> *** Consequently, venue cannot constitutionally be laid against such a foreign corporation in any county where the venue would not be proper in a suit against a domestic corporation or a resident individual.

Apparently, we have not otherwise specifically considered § 27-608 in the light of *Power,* probably because of the *Jacks* decision and because of *Millsap* v. *Williams,* 236 Ark. 416, 366 S.W. 2d 705, where we held it applicable to a corporation not authorized to do business in Arkansas, but did not decide whether, in view of Ark. Stat. Ann. § 27-347 (Repl. 1962), it controlled venue when the foreign corporation has a place of business or office in this state where service of summons may be had. Appellant argues, however, that no other venue statute applies to foreign corporations in actions in personam and that, in spite of *Power,* the state may make a reasonable classification, even in venue statutes, to adjust its laws to fit particular situations, so long as the classification is not arbitrary, relying upon *Kelso* v. *Bush,* 191 Ark. 1044, 89 S.W. 2d 594. But *Kelso* involved an individual non-resident defendant who had no place of business or domicile at which to fix local venue or by which her status might be compared with that of a domestic corporation or natural person and we found the difference between her situation and that of the foreign corporation in *Power* to be substantial and controlling. The same rationale might well be applied to a foreign corporation not authorized to do business in Arkansas. But we see no indication that the rule of *Power* relating to foreign cor-

porations doing business within the state by her permission and having a place of business and a resident agent on whom process may be served does not govern here. According to *Power* the situation of a corporation authorized to do business in the state is not distinguishable from that of a domestic corporation or individual insofar as venue of transitory actions is concerned.

Furthermore, we do not agree with appellant that there is no venue statute as to actions against a corporation such as appellee in the absence of § 27-608. We have held that venue statutes such as Ark. Stat. Ann. §§ 27-613, 614, 615 are applicable to corporations, both foreign and domestic. *Harger* v. *Oklahoma Gas & Electric Co.,* 195 Ark. 107, 111 S.W. 2d 485, cert. den. 304 U.S. 569, 58 S. Ct. 1038, 82 L. Ed. 1534; *International Harvester Co.* v. *Brown,* 241 Ark. 452, 408 S.W. 2d 504; *Mack Trucks of Arkansas, Inc.* v. *Jet Asphalt & Rock Co.,* 246 Ark. 101, 437 S.W. 2d 459.[1] However desirable it might seem to construe § 27-608 as appellant would have us do, we must construe it in a manner that would not render it unconstitutional, if reasonably possible to do so. *Arkansas Department of Labor* v. *American Employment Agency,* 257 Ark. 509, 517 S.W. 2d 949; *Gibbs* v. *State,* 255 Ark. 997, 504 S.W. 2d 719; *Stone* v. *State,* 254 Ark. 1011, 498 S.W. 2d 634. To construe the act as appellant does would render it unconstitutional under *Power.* We must therefore adhere to the position that this statutory provision does not fix venue where a foreign corporation is authorized to do business in Arkansas.

The judgment is affirmed.

We agree. HARRIS, C.J., ROY and HICKMAN, JJ.

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[1]Dictum in this case which indicates that a foreign corporation might have been sued in a county in which it had property or there were debts owing to it should be disregarded, insofar as it may be taken to indicate that venue may be laid under it in an action in personam against such a corporation which has been authorized to do business in Arkansas. There is also dictum in *Pacific Insurance Company of New York* v. *Droddy,* 240 Ark. 535, 400 S.W. 2d 673 which should not be considered as authority for venue in actions such as this.

William R. GROOMS *v.* STATE of Arkansas

CR 76-185 545 S.W. 2d 610

Opinion delivered January 17, 1977
(Division II)

*Robert R. White* and *W. R. Riddell,* for appellant.

*Jim Guy Tucker,* Atty. Gen., by: *B. J. McCoy,* Asst. Atty. Gen., for appellee.

DARRELL HICKMAN, Justice. William R. Grooms was charged with burglary and grand larceny in Johnson County on December 23, 1974. The bench warrant was issued that date and served on Grooms in Tulsa, Oklahoma on April 23, 1975. He was released on bail May the first. In July, 1975 he was released to the State of Florida to serve the remainder of a prison sentence. On January the 14th, 1976, shortly before he was to be released from the Florida prison, a detainer was placed on him by the State of Arkansas. He immediately filed a pro se motion to dismiss stating there was no preliminary hearing and that he was denied a speedy trial. On March 11, 1976, his counsel filed a motion to dismiss for denial of a speedy trial. Grooms did not at any time file a request for speedy trial. The court overruled these motions, proceeded to trial and Grooms was found guilty of burglary and grand larceny.

The court's order overruling the motions is the subject of this appeal.

The first allegation of error is that Grooms was denied a speedy trial as guaranteed by the Sixth Amendment to the United States Constitution. The law regarding a speedy trial is set forth in *Barker* v. *Wingo,* 407 U.S. 514, 92 S. Ct. 2182, 33 L. Ed. 2d 101 (1972). The four factors in the *Wingo* case to be considered in determining whether or not an individual receives a speedy trial are "length of delay, the reason for the delay, the defendant's assertion of his right and prejudice to the defendant."

In the recent case of *Curan* v. *State,* 260 Ark. 461, 541

S.W. 2d 923 (1976), this court examined in depth the right of a defendant to a speedy trial and the principles set forth in the *Curan* case will be applied to this case. There is no evidence that Grooms ever requested a speedy trial or filed a motion of any kind until after a detainer was placed on him in January of 1976.

Furthermore, the Interstate Agreement on Detainers, Ark. Stat. Ann. § 43-3201 (Supp. 1975), to which Florida is a party, requires that a defendant take certain steps to obtain his release or trial. There is no evidence in the record that Grooms prior to January, 1976 ever took any steps to obtain a trial or have the charges dismissed. There is no evidence that he was prejudiced by the delay in any way.

The other error cited is that Arkansas law requires an accused to be tried within three terms of court. According to Rules of Crim. Proc., Rule 28 (1976), a defendant shall be brought to trial before the end of three full terms of court from the time he is charged, excluding certain periods of delay, as set forth in Rule 28. Rule 28.3 (e) provides that "the period of delay resulting from the absence or unavailability of the defendant" shall be excluded in computing time. In this case, if Grooms was absent or unavailable before his arrest in April, his trial would have been within three terms of court. If the time begins to run from the date charges were filed in December, 1974, he would not have been tried within three full terms of court and, therefore, the charges should have been dismissed.

The sheriff testified that he did not know the whereabouts of Grooms and requested a fugitive warrant from the FBI. The warrant was served in Tulsa, Oklahoma. The appellant in his testimony did not really controvert the fact that his whereabouts or availability was unknown to the authorities. Therefore, it is clear that the time in this case runs from the time Grooms was arrested in April.

Affirmed.

We agree. HARRIS, C.J., and FOGLEMAN and ROY, JJ.

Allen Bruce WOODS *v.* STATE of Arkansas

CR 76-165 545 S.W. 2d 912

Opinion delivered January 24, 1977
(Division I)
[Rehearing denied February 28, 1977.]

*Paul Petty*, for appellant.

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

GEORGE ROSE SMITH, Justice. The appellant, charged as a habitual criminal with the offense of armed robbery (committed in a supermarket), was found guilty and sentenced to 25 years' confinement, plus 7 years for having used a firearm. Four points for reversal are argued.

First, it is contended that Woods was denied his constitutional right to a speedy trial. He was arrested in California on May 27, 1975, and given a preliminary hearing in Arkansas on June 5. The information was filed on July 5, with a public defender being appointed to represent Woods. On November 4 the defendant's present attorney appeared for him, as retained counsel, and filed a motion for a continuance. The motion asked for additional time for preparation of the case and asserted that the State would not be prejudiced, because the defendant was then confined in the state penitentiary. The motion was granted, and there is no claim of any further delay on the part of the prosecution.

We find no denial of a speedy trial. Woods was tried within the two terms of court formerly allowed by statute, Ark. Stat. Ann. § 43-1708 (Repl. 1964), and within the time now allowed by Rule 28.1 of the Rules of Criminal Procedure (1976). There is no indication that the motion for dismissal was supported by any testimony or that it was even presented to the trial court. The motion itself recited that the defendant was already in the penitentiary rather than in jail awaiting trial. No prejudice is shown to have resulted from the delay; so the argument is without merit. See *Givens* v. *State*, 243 Ark. 16, 418 S.W. 2d 629 (1967), cert. den. 390 U.S. 956 (1968), where the facts supporting the motion were decidedly more favorable to the accused than they are here.

Secondly, the court first submitted to the jury the simple question of guilt or innocence, as the statute requires in habitual criminal cases. Ark. Stat. Ann. § 43-2330.1 (Supp. 1975). Counsel objected, on the ground that the jury would know from the absence of any reference in the verdict form to the punishment that proof of one or more prior convictions

would be forthcoming. There was no suggestion, however, as to what alternative action the court should take. The present procedure was adopted by the legislature in 1967, after the issue had been raised in this court in *Miller* v. *State*, 239 Ark. 936, 394 S.W. 2d 601 (1965). Following the enactment of the statute we rejected substantially the same argument as that now presented. *Henson* v. *State*, 248 Ark. 992, 455 S.W. 2d 101 (1970). That case is controlling here.

Thirdly, after the jury had returned a verdict of guilty, deputy circuit clerks were called as witnesses to read judgments showing six prior felony convictions. Defense counsel objected to the reading of this provision in the first judgment: "It is the further order of the Court that defendant serve one-third of said sentence before becoming eligible for parole." It is argued that the provision in question had the effect of telling the jury that the defendant might be paroled before the expiration of any sentence imposed by the jury — information that should have been withheld from the jury under our holding in *Andrews* v. *State*, 251 Ark. 279, 472 S.W. 2d 86 (1971).

In *Andrews* we did not even intimate that the barest reference to the possibility of parole would be reversible error. Our holding was that the court should not attempt to explain to the jury the law governing the parole system. We adhere to that view, but no such explanation was attempted here. The challenged clause in the judgment certainly did not tell the jurors anything unknown to them, since it is hardly possible that even one person, much less twelve, old enough to serve on a jury would not know that Arkansas has a parole system. Moreover, the statute provides that the duly certified record of a former conviction "shall be prima facie evidence . . . and may be used in evidence." Ark. Stat. Ann. § 43-2330 (Repl. 1964). No issue of a constitutional right is involved. Consequently, if the law that makes the record admissible ought to be changed, that argument should be addressed to the legislature, not to the courts.

The remaining point for reversal was not the subject of an objection in the trial court, doubtless because it was without merit.

Affirmed.

We agree. HARRIS, C.J., and BYRD and HOLT, JJ.

C. D. COTNER *v.* INTERNATIONAL HARVESTER Company

76-232 545 S.W. 2d 627

Opinion delivered January 24, 1977
(Division II)

*Jones & Petty,* for appellant.

*Bridges, Young, Matthews & Davis,* for appellee.

JOHN A. FOGLEMAN, Justice. Appellant Cotner sued International Harvester Company seeking to recover damages, alleging breach of warranties of merchantability and of fitness for a particular purpose on the sale of two new large 1972 model International Transtar trucks. He appeals from a judgment based upon a directed verdict in favor of

appellee International Harvester Company. Appellant asserts five points for reversal. Since we feel that we must affirm the judgment upon one of these points, even assuming that appellant is correct on all the others, we will discuss that point only. It is:

> THERE WAS SUFFICIENT EVIDENCE OF NOTICE GIVEN BY PLAINTIFF, WITHIN A REASONABLE TIME TO DEFENDANT OF THE BREACH OF WARRANTIES TO CONSTITUTE A JURY QUESTION ON THE ISSUE OF NOTICE.

Since we disagree with appellant and agree with the circuit judge on this point, even when we view the evidence in the light most favorable to appellant, appellant had no cause of action against appellee.

A buyer is required to notify the seller of any breach within a reasonable time after the buyer discovers it or he is barred from any remedy. Ark. Stat. Ann. § 85-2-607 (3) (a) (Add. 1961). The trucks were purchased in February, 1972 and delivered in July, 1972. Appellant testified that they ran well and served his purposes until after they had been driven a minimum of 120,000 miles. The first trouble in August, 1973, arose from a problem with air filters. The basis of appellant's claim, insofar as this appeal is concerned, however, was alleged defects in the flywheel housing and transmissions. The first problem of any significance with the truck, which appellant designates as No. 5, occurred in Ft. Worth on October 29, 1973, when the flywheel housing broke. Repairs were made at appellee's company store there.[1] It was again repaired in Amarillo, Texas, at the International Harvester store on May 25, 1974. On September 4, 1974, repairs were made in Amarillo at Quality Truck Repair (which does not appear to have had any connection with appellee). This truck was taken into the shop at Razorback International, an independent dealer, in April, 1975. It had then recorded at least 243,000 miles of travel.

The first problem with the other truck, No. 4, arose

[1]This truck had previously undergone considerable repairs due to damages suffered in a wreck in June, 1973.

when the flywheel housing broke in June, 1974 and repairs were made by an independent International Harvester dealer.[2] The next necessity for repair occurred in January, 1975. This was done at R & D Truckers in Pine Bluff. Repairs for piston and crankshaft trouble (problems that were not related to the flywheel or transmission) were done by Razorback International in October, 1974, and again in April, 1975, when it had traveled approximately 240,000 miles. At least a part of this work was done under the warranty.

During the time Cotner was having these problems with the trucks, he admitted that he did not write International Harvester or telephone International Harvester headquarters. He only talked with Mr. King, a salesman, who had sold him the trucks, about replacing them, some time in the give Cotner a better deal. Cotner also talked to the mechanics dependent dealership was established, thinking they would give Cotner a better deal. Cotner also talked to the mechanics at the International store in Pine Bluff about the cause of his flywheel housing problem. He said they didn't know what was causing it.

Appellant argues that notification was sufficient to meet the statutory requirement because the repairs on truck No. 5 were made in October, 1973 and May, 1974, at International Harvester stores in Ft. Worth and Amarillo, Texas; because he had talked to the salesman for International Harvester in Pine Bluff about trading the trucks because they weren't doing the job for which he had purchased them; and because he had talked to the mechanics in Pine Bluff about the flywheel housing and transmission problem. He says that since there was a statement on the Owner's Service Policy that emergency warranty service could be obtained from the nearest International Harvester dealer and that there were more than 3,000 authorized International truck service centers through 50 states, appellee had notice of the specific problem and undertook its repair. Considered either collectively or individually, we find no substantial evidence of notification in these facts.

[2]This truck had also undergone repairs for damages suffered in wrecks in June and September, 1973.

It is true that the requirements of notification are not stringent. Notice need only be sufficient to inform the seller that the transaction is claimed to involve a breach and thus to open the way for negotiation of a normal settlement. It must, however, be sufficient to let the seller know that the transaction is still troublesome and must be watched. Comment 4, § 85-2-607. The purpose of the requirement is to enable the seller to minimize damages in some way, such as correcting the defect and to give some immunity from stale claims. *L. A. Green Seed Co. of Arkansas* v. *Williams*, 246 Ark. 463, 438 S.W. 2d 717. Ordinarily, the sufficiency of notice is a question of fact for the jury based upon the circumstances. *L. A. Green Seed Co.* v. *Williams*, supra.

The intent of the provision, however, is that the seller be informed that the buyer proposes to look to him for damages for breach. Comment 4, Ark. Stat. Ann. § 85-2-607; Anderson, Uniform Commercial Code (2d Ed.) 207, § 2-607.4; *Dailey* v. *Holiday Distributing Corp.*, 260 Iowa 859, 151 N.W. 2d 477 (1967). The notice must be more than a complaint. It must, either directly or inferentially, inform the seller that the buyer demands damages upon an asserted claim of breach of warranty. *Dailey* v. *Holiday Distributing Corp.*, supra. In spite of the fact that the question of reasonableness of notice, as to time, form and substance is usually a question of fact, where all the evidence is such that it can lead reasonable minds to only one conclusion as to the sufficiency of notice, the question presented is one of law to be resolved by the court. *Dailey* v. *Holiday Distributing Corp.*, supra. Where a manufacturer or seller is never advised of a claimed breach of implied warranty or that the buyer is looking to it for compensation or reimbursement, there is not a notification sufficient to hold the manufacturer or seller liable. *Dailey* v. *Holiday Distributing Corp.*, supra; *Lynx, Incorporated* v. *Ordnance Products, Inc.*, 273 Md. 1, 327 A. 2d 502 (1974).

In this case, all indications from the skimpily abstracted evidence are that Cotner paid all repair bills relating to the defects of which he now claims, except for the last occasion, when the repairs were done by Razorback International, an independent dealer, which was not even in existence when the sale was made or when most of the problems with these defects were encountered. Conversation with a salesman

which appellant himself characterizes as relating to "trading the trucks in" could not be taken to constitute notice, even if we could say that the salesman was a person to whom effective notification could be given. Cotner's asking mechanics employed by appellee how he could stop the trouble could not constitute notification to the seller. To say the least, in no instance did Cotner ever indicate that he looked to appellee to remedy the situation or to pay any damages. *Boeing Airplane Co.* v. *O'Malley*, 329 F. 2d 585 (8th Cir., 1964); *Overland Bond & Investment Corp.* v. *Howard*, 9 Ill. App. 3d 348, 292 N.E. 2d 168; and *Morris Plan Leasing Co.* v. *Bingham Feed & Grain Co.*, 259 Ia. 404, 143 N.W. 2d 404, relied on by appellants, are readily distinguishable on the facts.

The judgment is affirmed.

We agree. BYRD, ROY and HICKMAN, JJ.

## G. W. HERROD et al *v.* The CITY OF NORTH LITTLE ROCK

76-191 545 S.W. 2d 620

Opinion delivered January 24, 1977
(Division I)

*Matthews, Purtle, Osterloh & Weber,* by: *John I. Purtle,* for appellant.

*Sam Hilburn,* City Atty., for appellee and cross-appellant.

CONLEY BYRD, Justice. The City of North Little Rock, by Ordinance #4453, sought to annex seven separate tracts of lands lying in Pulaski County which it denominated Tracts A, B, C, D, E, F and G. The Election Commission submitted the matter to a vote at the 1974 General Election on the sole issue of "For Annexation" or "Against Annexation" so that it was a take all or leave all proposition. Appellants contested the annexation with respect to Tracts A, B, C and F. After a stipulation was entered into admitting that all of the remonstrants either reside in or are property owners in Tracts A, B and C and that Tracts A, B and C did include farmlands, appellants moved for a summary judgment. The trial court granted a summary judgment voiding the annexation as to Tracts A, B and C but entered a summary judgment in favor of the City on Tract F on the theory that appellants had no standing to complain about the annexation of Tract F. Appellants appeal as to Tract F contending that if part of the annexation is ruled invalid the balance cannot stand the attack because the courts have no power to reduce the area to that which might qualify for annexation. The City has cross-appealed contending that Acts 309 and 904 of 1975 are procedural in nature and should be applied to the pending litigation.

The contention on the cross-appeal arises because Acts of Arkansas 1971, No. 298 prohibited the annexation by a city of land used only for the purpose of agriculture or horticulture. See *Saunders* v. *City of Little Rock,* 257 Ark. 195, 515 S.W. 2d 633 (1974). Following the *Saunders* opinion and the annexation attempt here, but before this litigation was tried to the lower court, Acts 309 and 904 of 1975 became effective. Those acts provide that ". . . contiguous lands shall not be annexed when they either: (1) have a fair market value at the time of the adoption of the ordinance of lands used only for agriculture or horticulture purposes and the highest and best

use of said lands is for agricultural or horticultural purposes; . . . " In contending that the 1975 Acts should be given a retroactive effect, the City argues that ". . . Acts 309 and 904 of 1975 are procedural in nature and not substantive; *i.e.*, that they change the manner in which vested interests are to be protected but that they do not violate these interests per se." The premise of the City's argument is erroneous. Under the system of government established for cities the annexation of continguous lands is a privilege extended to the cities and controlled by the General Assembly. An enlargement of the privilege is a substantive matter not affecting one's procedural rights before a judicial tribunal. It follows that we find no merit to the cross-appeal.

The trial court in entering judgment in favor of the City as to Tract "F" (on the theory that appellants had no standing to contest the annexation) apparently was misled by some language of this Court in *City of Crossett* v. *Anthony,* 250 Ark. 660, 466 S.W. 2d 481 (1971). However in that case the City of Crossett submitted separately to the voters in both the city and the proposed annexed areas the question of "For" or "Against" annexation. In the case before us the voters of both the City and the several proposed annexed areas were not given that opportunity as required by Ark. Stat. Ann. § 19-307 (Supp. 1975). Under the system here used the votes for one of the proposed areas or the votes in one of the proposed areas may have prevented a fair presentation of the contention of persons in another proposed area who may have had a more appealing cause for not being annexed. The rule that this Court has followed in such situations in the past is set forth in *City of Little Rock* v. *Findley,* 224 Ark. 305, 272 S.W. 2d 823 (1954), in this language: "Moreover, a petition like this one is properly rejected if only a part of the contemplated addition fails to meet the requirements for inclusion within the municipality; the impropriety need not extend to the whole of the territory sought. *Vestal* v. *Little Rock,* 54 Ark. 321, 15 S.W. 891, 16 S.W. 291, 11 LRA 778." It therefore follows that we must agree with appellant that the trial court erred in entering judgment in favor of the City as to Tract "F".

This disposition makes it unnecessary to reach other contentions raised by the parties.

Reversed and remanded.

We agree: HARRIS, C.J., and GEORGE ROSE SMITH and HOLT, JJ.

Jimmie Lee JONES *v.* The CIRCUIT COURT of BENTON COUNTY, Arkansas and SOUTHERN EQUIPMENT & TRACTOR CO., Inc. of Little Rock

76-204 545 S.W. 2d 621

Opinion delivered January 24, 1977
(Division I)

*Gocio & Dossey,* for petitioner.

*William J. Wynne,* of *Crumpler, O'Connor & Wynne,* and *Jerry G. James,* for respondents.

CONLEY BYRD, Justice. This petition for writ of prohibition arises out of an action filed by Southern Equipment & Tractor Co., Inc. of Little Rock against Petitioner Jimmie Lee Jones following the repossession and sale of two pieces of heavy earth moving equipment. On November 25, 1975, a jury found that Southern Equipment was not entitled to its

claimed deficiency in the amount of $26,241.26. Immediately following the jury's verdict, Southern Equipment orally moved for judgment notwithstanding the verdict which the court requested be filed in writing with brief pursuant to court rules. Southern Equipment filed its motion and brief on December 8, 1975. Responding and reply briefs were then filed with the last brief being filed on January 6, 1976. That term of court expired on the third Monday in March, 1976. However, on April 21, 1976, the trial court notified the attorneys that the motion for judgment N.O.V. was being denied but that he was treating the motion as a motion for new trial and was granting a new trial because he was of the opinion that the verdict of the jury was contrary to the evidence. Petitioner by written motion immediately objected to the jurisdiction of the court after term time to grant a new trial upon a nonverified motion. That motion and Southern Equipment's response were submitted to the trial court and in denying the Petitioner's objection to the granting of the new trial, the trial court wrote the parties as follows:

> "I have considered your Petition for Writ of Error Coram Nobis, and find that it should be denied for the following reasons:
>
> On November 25, 1975, this cause was tried by a jury, and a verdict rendered. On that day, the attorney for the Plaintiff orally moved for a Judgment N.O.V. and I directed him to prepare and file a written motion with brief, which he subsequently did on December 8, 1975. This was well within the 30-day period set by the statute referred to in both briefs.
>
> Due to the press of business of the Court, including a number of items assigned to the Court by the Arkansas Supreme Court in other parts of the state, it was impossible for the Court to conclude this matter until on April 21, 1976, the Court's order was entered treating the Motion as a motion for new trial and granting it. The term in which the case was tried was the September 1975 term of this court, and that term had expired on the day before the third Monday in March, 1976.
>
> Your Petition raises the question of whether the expira-

tion of the term, in and of itself, divested this Court of jurisdiction to enter an order granting a motion for new trial. The Court finds that such jurisdiction remained, and that the order was proper under the circumstances."

To avoid the fact that a trial court's discretionary jurisdiction to grant a new trial generally lapses with the term of court, *Reasor-Hill Corporation* v. *Golden, Judge,* 220 Ark. 100, 247 S.W. 2d 9 (1952), Southern Equipment relies upon Ark. Stat. Ann. § 27-2106.4 (Supp. 1975), which provides:

> ". . . It shall be the duty of the party filing any motion provided for in the preceding section to present the same to the trial court within thirty [30] days from the date of filing and if the matter cannot be heard by the trial court within thirty [30] days, or for any good cause either party shall not be ready for final hearing within thirty [30] days, the moving party shall, within said period of thirty [30] days, request the trial court to set a definite date certain for hearing of such motion. Unless the motion shall have been presented to the trial court and taken under advisement within thirty [30] days from the date of its filing, or the trial court shall have set a date certain thereafter for hearing on the motion, it shall be deemed, for purposes of this act [§§ 27-2106.3 — 27-2106.6], that the motion has been finally disposed of at the expiration of thirty [30] days from its filing, and time for filing of notice of appeal shall commence to run at the expiration of thirty [30] days from the filing of such motion. If the said motion shall have been *presented* to the trial court and taken under *advisement,* or the trial court shall have fixed a date certain for hearing thereof within thirty [30] days from its filing, said motion shall *not* be deemed to have been disposed of until the trial court shall enter its order granting or denying the motion. *The expiration or lapse of a term of court or commencement of a subsequent term shall not affect the power of the court to take any action herein provided, or the time for filing notice of appeal.*" (Emphasis supplied). [Acts 1963, No. 123, § 2 p. 345.]

Assuming that the motion for judgment N.O.V. could be treated by the trial court as a motion for new trial, we are un-

able to find any evidence in the record either written or oral that the motion was either presented to the trial court or that the matter was taken under advisement by the trial court within the time required by Ark. Stat. Ann. § 27-2106.4 *supra*. Because the statute places the duty of presenting the motion to the trial court upon the moving party and because we recognized in *St. Louis S.W. Ry. Co.* v. *Farrell*, 241 Ark. 707, 409 S.W. 2d 341 (1966), that situations such as has occurred here might arise, we there stated:

> "On May 25, still within thirty days after the filing of the motion, the appellant's attorney took the precaution of asking Judge Light to send him a letter stating that he had taken the matter under advisement. This request was wise; for, to avoid the uncertainties of oral testimony, it is evidently desirable that a docket entry, order, or other written, dated record be made at this point. On May 27 Judge Light wrote counsel that he had taken the motion under advisement."

Since the record does not show that the motion was presented to the trial court and taken under advisement within the time required by Ark. Stat. Ann. § 27-2106.4, *supra*, it follows that the trial court's jurisdiction to grant the motion for new trial expired with the lapse of the term of court.

Furthermore, we agree with petitioner that the trial court was without jurisdiction to treat the motion for judgment notwithstanding the verdict as a motion for new trial after the lapse of the term of court. The rule with respect to amendment of pleadings after the running of the statute of limitations was set forth in *Bridgman* v. *Drilling*, 218 Ark. 772, 238 S.W. 2d 645 (1951), in this language:

> "Our cases hold that where there is an amendment to a complaint stating a new cause of action or bringing in new parties interested in the controversy, the statute of limitations runs to the date of the amendment and operates as a bar when the statutory period of limitation has already expired. In other words, if the plaintiff amends his complaint after commencement of the suit by introducing a new cause of action, the statute con-

> tinues to run until the filing of the amendment which does not relate back to the commencement of the suit. *Wood* v. *Wood,* 59 Ark. 441, 27 S.W. 641, 28 L.R.A. 157; *Buck* v. *Davis,* 64 Ark. 345, 42 S.W. 534; *Love* v. *Couch,* 181 Ark. 994, 28 S.W. 2d 1067. If, however, the amendment to the complaint does not set forth a new cause of action, but is merely an expansion or amplification of the cause of action already stated, then the amendment relates back and takes effect as of the date of the commencement of the original action. *Little Rock Traction & Electric Co.* v. *Miller,* 80 Ark. 245, 96 S.W. 993; *Western Coal & Mining Co.* v. *Corkville,* 96 Ark. 387, 131 S.W. 963."

The motion for judgment notwithstanding the verdict definitely stated that it was a motion for judgment in favor of Southern Equipment. Consequently, Southern Equipment could not after the lapse of the term file an amendment to the motion requesting a new trial because it would be impossible to say that such a motion was an amplification of the motion for judgment N.O.V. Since the running of the term would have prevented such an amendment by Southern Equipment, we can think of no reason to permit the trial court, after the lapse of the term, to do the same thing for any discretion which the trial court may have had at the time of trial would also have lapsed with the expiration of the term of court.

Writ granted.

We agree: HARRIS, C.J., and GEORGE ROSE SMITH and HOLT, JJ.

Betty FOSTER et al *v.* Nelma Jean SCHMIEDESKAMP, Administratrix, et al

76-214 545 S.W. 2d 624

Opinion delivered January 24, 1977
(Division II)

*Rose, Nash, Williamson, Carroll, Clay & Giroir, P.A.*, for appellants.

*Laser, Sharp, Haley, Young & Boswell, P.A.*, for appellees.

ELSIJANE T. ROY, Justice. G. D. Schmiedeskamp died intestate on October 24, 1971, survived by his widow, Nelma Jean Schmiedeskamp (appointed administratrix of his estate), two daughters by a previous marriage, Betty Foster and Judith Reed, both adults, and two daughters by his second marriage, Patricia and Cynthia Schmiedeskamp, both minors.

On February 14, 1974, appellants Betty Foster and Judith Reed filed their petition to remove the administratrix, alleging concealment of assets of the decedent and breach of fiduciary duty in the administration of the estate. The petition asked for removal of Mrs. Schmiedeskamp as administratrix and that her accounts be surcharged for any amounts improperly diverted from the estate.

The probate judge heard the petition and entered an order on April 8, 1976, removing the administratrix and requiring repayment of a $2,000 stud fee owed the estate but denying other claims for relief. Only the other claims are involved in this appeal.

Appellants first contended the court erred in holding that certain bearer bonds in a safe deposit box were held as an estate by the entirety and passed to Nelma Jean Schmiedeskamp individually on the death of her husband.

It is undisputed the deceased and Nelma Jean Schmiedeskamp had an active joint trading account with Raney Securities[1] through which were purchased various municipal bonds in excess of $89,000; that thereafter the bonds were placed in a safe deposit box at Pulaski Heights Bank. The box was leased jointly to the deceased and Nelma Jean Schmiedeskamp. Both parties had a key to the box and full and complete access at all times.

[1]The account was carried as follows: "Client: Gilbert D. and Nelma Jean Schmiedeskamp."

Prior to her husband's death, Nelma Jean Schmiedeskamp and her husband worked together and "shared everything together." She testified:

> . . . I was active in every business . . . from the time that we were married. . . . participated in every business that we had.

As to Discount Carpet Center she testified concerning her duties as follows:

> I kept all of the books, I made all of the statements, I sold a little, run all of the errands, just everything that there is to do in a carpet store.

She also testified she was not paid any salary for these duties. After testifying that the safe deposit box was in both names she stated she had a key to the box and removed the bonds, not listing them as part of the contents of the box because she thought they were hers and were not part of the taxable estate. However, after conferring with her attorney she filed an amended estate tax return listing the bonds on that return.

Appellants argue *inter alia* that since there is no explicit writing establishing a tenancy by the entirety, the presumption is against creation of such an estate. However, under Arkansas law where property is conveyed to or purchased by a husband and wife in their joint names with nothing else appearing the property is deemed to be held as an estate by the entirety with the right of survivorship. See *Black* v. *Black*, 199 Ark. 609, 135 S.W. 2d 837 (1940). The words "husband and wife" or "tenants by the entirety" are not necessary to creation of the estate, *Curtis* v. *Patrick*, 237 Ark. 124, 371 S.W. 2d 622 (1963). We upheld the application of this principle in regard to deposits of money in *Dickson* v. *Jonesboro Trust Co.*, 154 Ark. 155, 242 S.W. 57 (1922).

The fact that these bonds were placed in a safe deposit box does not defeat the estate created in them initially. At no time were these bonds ever put out of the control of Mrs. Schmiedeskamp, but to the contrary she could have removed them at any time. Here the totality of the circumstances indicates that the bonds in the safe deposit box were held as an

estate by the entirety. There is no evidence that Mr. Schmiedeskamp asserted individual ownership of the bonds or attempted in any way to have his wife divested of her right of survivorship. See *U.S.* v. *339.77 Acres of Land*, 240 F. Supp. 545 (W.D. Ark. 1965).

Appellants make various allegations concerning improper conduct of the administratrix in removing the bonds from the box, but the chancellor heard the testimony, saw the witnesses and determined the issues in favor of appellees, and we cannot say his determination is against the preponderance of the evidence.

Mr. Schmiedeskamp owned a retail business known as Discount Carpet Center and certain race horses. In liquidating the assets of the estate, Mrs. Schmiedeskamp, as administratrix, sold the carpet business as well as these horses.

The eleven horses were appraised by Sam Gray who operated a horse farm. Thereafter repeated unsuccessful attempts were made to sell these horses, with appellants taking part in the efforts to sell them as well as appellees. Eventually a sale was made to the highest bidder, Gray, for $20,000. A short time later Mrs. Schmiedeskamp repurchased one-half interest in five of these horses under an agreement with Gray that he would continue to train and care for them at his farm for the purpose of entering them in the horse races, and Gray profited approximately $1,000 on Mrs. Schmiedeskamp's repurchase. She testified that her girls liked horses so much that she changed her mind and wanted to have some interest in them.

The Discount Carpet Center was purchased by Mrs. Schmiedeskamp for $95,000 and a short time later resold to her brother-in-law, Ralph Erwin. Since Erwin had no previous experience in this type of business he hired Mrs. Schmiedeskamp under a ten-year contract whereby she agreed to work in the store four days a week for $9,000 per year. A little over a year later Erwin found Mrs. Schmiedeskamp's services unsatisfactory, and he terminated the employment contract through a settlement agreement of $10,000.

Appellants contend these actions evidenced a breach of fiduciary duty by the administratrix, but we cannot agree that repurchasing an interest in the horses indicated bad faith. Neither does the employment contract appear to be merely a device for Mrs. Schmiedeskamp to get money for herself from the sale of the business. It would seem to be a good business practice for Erwin to employ Mrs. Schmiedeskamp to work at the Discount Center because of her experience there, and the fact that the contract later was not satisfactory was only a factor for the court's determination. The sale of the horses and that of the business both were approved by the court prior to December 31, 1971, and this action was not brought until February 24, 1974. The sales were not only approved by the court but no objections were made to the sales until this action was filed. Furthermore, appellants offered no testimony that the sum paid in either sale was inadequate or unreasonable.

The burden is on the party who alleges fraud to prove to the satisfaction of the court that the questioned transaction involved bad faith. *Bush* v. *Bourland*, 206 Ark. 275, 174 S.W. 2d 936 (1943), and *Hopson* v *Buford*, 225 Ark. 482, 283 S.W. 2d 337 (1955). Further, where sales are made with the approval of the probate court, as here, to collaterally attack such orders the fraud must be shown to be extrinsic fraud and not intrinsic fraud. *Cassady* v. *Norris*, 118 Ark. 449, 177 S.W. 10 (1915); *Lambie* v. *W. T. Raleigh Co.*, 178 Ark. 1019, 14 S.W. 2d 245 (1929). In the case at bar we cannot say the trial court's determination that appellants did not satisfy the required burden of proof on the fraud issue is against the preponderance of the evidence.

After the death of Mr. Schmiedeskamp, Mrs. Schmiedeskamp filed joint state and federal income tax returns in their names for the tax year 1971. Later she received substantial income tax refunds on these returns which she retained as the surviving spouse instead of reporting them as an asset of the estate. Appellants contend the income tax refunds are property of the estate of the deceased. Ark. Stat. Ann. § 62-2131 (Repl. 1971) states:

> The survivor of spouses with respect to whom a joint federal income tax return has been filed shall, *upon the*

> *death of the other,* be entitled to receive any refund of the tax due from the Internal Revenue Service in his own right upon making proof of the death of the other. (Italics supplied.)

In construing the statute we believe it contemplates the situation where an income tax return is filed while both husband and wife are still living and *thereafter* one of them dies. In such situation the refund rightfully should go to the surviving spouse upon proof of the death of the other. We do not have such a situation presented here since the 1971 return was filed by Mrs. Schmiedeskamp in 1972 after the death of Mr. Schmiedeskamp on October 24, 1971. Although the trial court held Mrs. Schmiedeskamp was entitled to retain the refunds individually the court was not mandated to so find by the terms of the statute. Since the record does not contain sufficient information concerning the proportion of income attributable to each on the 1971 joint return we cannot determine whether the trial court reached the right conclusion on this matter. Therefore, we remand to the trial court on this issue, and affirm on all others.

Affirmed in part, remanded in part.

We agree. HARRIS, C.J., and FOGLEMAN and HICKMAN, JJ.

Debbie L. HATCHER *v.* STATE of Arkansas

CR 76-194 545 S.W. 2d 632

Opinion delivered January 24, 1977
(Division II)

*Jeff Duty*, for appellant.

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

DARRELL HICKMAN, Justice. This case involves the review of a finding by a juvenile court that a minor, Debbie L. Hatcher, was a delinquent and the judgment that she be committed to the Arkansas State Training School. The charge at the hearing was that she had committed attempted battery by trying to poison another girl.

At the proceedings before the juvenile court on the poisoning charge, records of a previous charge of shoplifting and a finding of guilt were considered by the juvenile court in finding that the minor should be committed to the training school.

The judgment was appealed and the circuit court found, de novo, that the minor was guilty of attempted battery, beyond a reasonable doubt, and should be committed to the training school. In the disposition of the case, the court considered the records and evidence regarding the shoplifting charge over the objection of counsel. The objection was the minor did not have counsel nor was the right to counsel waived at the hearing on the shoplifting charge. It is not disputed that the minor did not have counsel at the hearing on shoplifting. The circuit court made a written finding that the minor was afforded her constitutional rights, in the hearing on the

shoplifting charge, and specifically waived the right to counsel.

The record regarding the hearing on the shoplifting charge consists of a petition, a printed form-order and a voluntary supervision agreement. The printed form-order recites that the minor and the parents were advised of their right to counsel. There is no mention in the form of waiver of the right to counsel. During the circuit court hearing, the probation officer testified that the juvenile court referee had read the minor and her parent their rights, according to the rights form, after the minor failed to acknowledge them. The record is silent beyond these facts.

The law requires that a juvenile, charged with an offense which would subject the child to a finding of delinquency and a loss of liberty by incarceration in a penal institution, must be afforded the same rights to counsel that an adult has in a criminal proceeding under the Due Process Clause of the Fourteenth Amendment to the United States Constitution. *In Re Gault*, 387 U.S. 1 (1966).

In the *Gault* case the court stated:

> . . . the child and his parents must be notified of the child's right to be represented by counsel retained by them, or if they are unable to afford counsel, that counsel will be appointed to represent the child.
>
> They had a right expressly to be advised that they might retain counsel and to be confronted with the need for specific consideration of whether they did or did not choose to waive the right.

The court went on to say that acknowledgement of the right to have counsel was not a waiver.

In this case there is no evidence that the child or the parent waived the right to counsel, or were told they must waive that right, and, therefore, it was error for the juvenile court and the circuit court to consider any records or evidence regarding the previous charge. Therefore, the decision must be set aside and the case remanded.

The other allegation of error is the evidence is insufficient to adjudge this minor delinquent. There is sufficient evidence to support the findings of the juvenile court and the circuit court that Debbie L. Hatcher was guilty beyond a reasonable doubt of the act of attempted battery.

This case is remanded to the circuit court with instructions that the matter be further remanded to the county court for proceedings not inconsistent with this opinion.

Reversed and remanded.

We agree. HARRIS, C.J., and FOGLEMAN and ROY, JJ.

C & M CONSTRUCTION COMPANY, Inc. *v.* SIMMONS FIRST NATIONAL BANK of Pine Bluff

76-406 545 S.W. 2d 631

January 24, 1977

*John M. Fincher,* for appellant.

*John G. Lile, Larry C. Wallace* and *Michael G. Thompson,* for appellee.

PER CURIAM

Appellee's motion to dismiss the appeal is denied. The motion is based upon non-compliance with Ark. Stat. Ann. § 27-2127.1 (Supp. 1975) and Rule 26 A, Rules of the Supreme Court, 3 A Ark. Stat. Ann. (Supp. 1975, p. 135) in that: notice of application for extension of time for filing the record in this case was not given to appellee's attorney; the order granting the extension did not recite that a reporter's transcript of the evidence had been ordered; and the order did not recite that the extension was related to the inclusion in the record of evidence stenographically reported.

The failure of an appellant to take further steps to secure the review of a judgment or decree, after having given notice of appeal does not affect the validity of the appeal, but is ground for such action as this court may take, which may include dismissal of the appeal. Ark. Stat. Ann. § 27-2106.1 (Repl. 1962). In this case we do not deem it appropriate to dismiss the appeal.

It is clear from the affidavit of the court reporter filed with appellant's response that the extension was based upon her inability to complete the transcript due to her heavy workload and that appellant's application for extension was made upon her request. In this respect the situation is unlike that in *Perry* v. *Perry,* 257 Ark. 237, 515 S.W. 2d 640. Although it is not seriously contended that appellee's attorney was served with notice of the application, it is clear that appellee's attorney inquired of the clerk of the trial court some time after the expiration of 90 days after the notice of appeal was filed and learned that the motion had been filed and the extension granted. Yet appellee took no action in the matter until more than 150 days had elapsed after the date of filing of the notice of appeal, when notice was given to appellant's attorney that appellee would move to dismiss. We cannot agree that appellee's showing of prejudice is sufficient basis for dismissal of the appeal in view of the fact that if it had been greatly prejudiced it could have availed itself of the procedure set out in *Norfleet* v. *Norfleet,* 223 Ark. 751, 268 S.W. 2d 387.

HICKMAN, J., not participating.

Osba T. SHERRELL et al *v.* A. A. BYRAM

76-409 545 S.W. 2d 603

January 24, 1977

*Ponder & Lingo* and *Murphy & Blair,* for appellants.

*John C. Gregg,* for appellee.

PER CURIAM

The Clerk's refusal to file this appeal raises the issue of how to calculate the seven months limitation in Ark. Stat. Ann. § 27-2127.1 (Supp. 1975) for docketing appeals when a motion for new trial has been properly filed and acted upon pursuant to Ark. Stat. Ann. § 27-2106.3, § 27-2106.4 and § 27-2106.5. The record shows that the trial court announced its decision on February 24, 1976 and entered a decree thereon on April 6, 1976. The petitioner here, however, filed a motion for new trial on the basis of newly discovered evidence on March 31, 1976, and on April 29, 1976 the trial court by order set the hearing for May 21, 1976. Following the taking of additional evidence on May 21st, the trial court formally denied the motion for new trial on June 2, 1976. On that same day petitioners filed their notice of appeal from the decree of April 6, 1976 and the order denying the motion for new trial. Thereafter, the trial court properly granted an additional extension of time for the preparation of the transcript. When the record was presented to the Supreme Court Clerk for filing, the Clerk refused to file the record because more than seven months had elapsed from the time the original decree was entered on April 6, 1976.

As pointed out in *St. Louis Southwestern Ry. Co.* v. *Farrell,* 241 Ark. 707, 409 S.W. 2d 341 (1966), the provisions of Ark.

Stat. Ann. § 27-2106.3 through § 27-2106.6 (Supp. 1975), were enacted to remedy an awkward situation created by Act 555 of 1953 with reference to motions for new trial. While that case only involved the time for filing of the notice of appeal it also demonstrates the awkward situation that would be created by calculating the seven months from the date of the entry of the original decree as the Clerk has done here — *i.e.* a trial court by holding a motion for new trial under advisement for more than seven months could thwart an appeal on any matter except that involved in the motion before the court notwithstanding the fact that the complaining party's time for giving notice of appeal had not expired. When we consider the practical effect of giving a party ten days from the denial of a motion for new trial in which to file a notice of appeal, we must conclude that the seven months limitation in Ark. Stat. Ann. § 27-2127.1 (Supp. 1975), must be calculated from the date of an order denying a properly filed and presented motion for new trial pursuant to Ark. Stat. Ann. § 27-2106.3 through § 27-2106.5 (Supp. 1975).

It follows that the petition for Rule on Clerk to file the record in this case must be granted.