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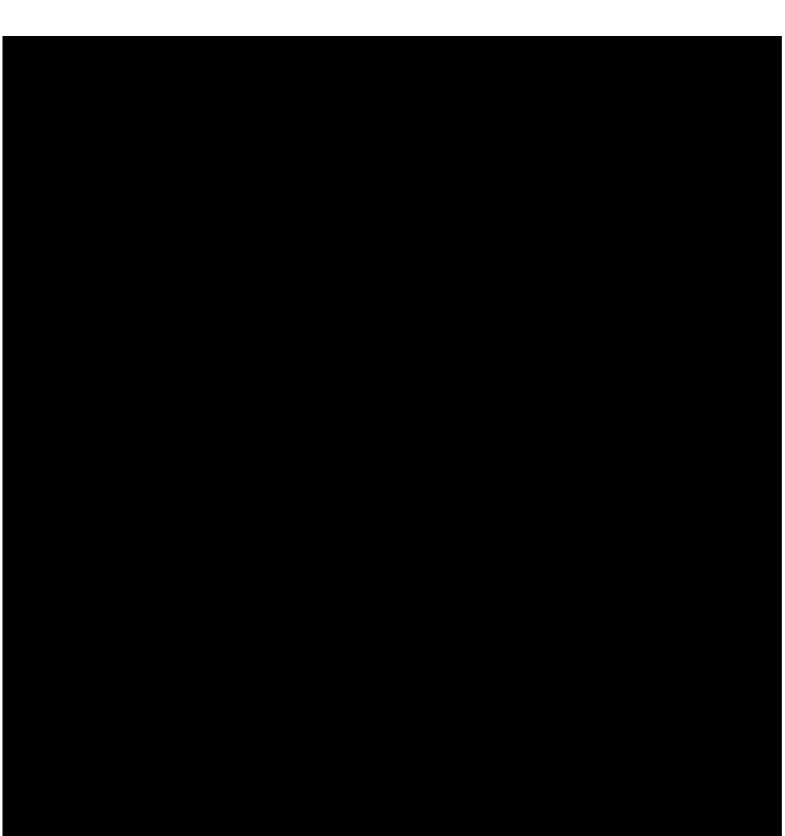

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Margaret POUNDERS *v.* TRINITY COURT NURSING HOME, INC. et al

78-198 576 S.W. 2d 934

Opinion delivered February 5, 1979
(In Banc)

Laster & Lane, Ltd., for appellant.

Gannaway, Darrow & Hanshaw, for appellees.

GEORGE ROSE SMITH, Justice. The appellant, Margaret Pounders, aged 75, a widow, brought suit for false imprisonment against the two appellees, Trinity Court Nursing Home and Gloria Gaines, who is a niece of Mrs. Pounders's late husband. At the close of a jury trial the judge directed a verdict in favor of both defendants. The only question is whether there is any substantial evidence presenting a prima facie case of false imprisonment. We find no such evidence in the record.

We state the facts in the light most favorable to Mrs. Pounders. For some time she had lived with Mr. and Mrs. Gaines, who, in Mrs. Pounders's words, were wonderful to her. Mr. Gaines, however, became dissatisfied with the arrangement and directed that Mrs. Pounders be placed in a nursing home. Mrs. Pounders did not own a place of her own.

On July 14, 1976, Mrs. Gaines took Mrs. Pounders to Trinity Court, a nursing home occupying a two-story building in Little Rock. Mrs. Pounders, understandably, did not want to enter a nursing home, but she testified that she went without protest. There is no imprisonment when one agrees to surrender her freedom of motion. *Faulkinbury* v. *U.S. Fire Ins. Co.,* 247 Ark. 70, 444 S.W. 2d 254 (1969). Mrs. Gaines's commitment of her aunt to the nursing home obviously did not amount to false imprisonment, because no force or threats were used, and there was actually consent.

Mrs. Pounders remained in the nursing home for two months. She testified that she was not allowed to have any visitors (except, apparently, Mrs. Gaines), that she was not allowed to use the telephone, and that she was not allowed to write to anyone. Her room was on the second floor. There was a nearby stairway by which she could have left the building any time she wanted to. Her reason for not leaving was that the nursing home had her shoes, and she did not want to go out in bedroom slippers. She also said that one of the aides (unidentified and not shown to have had any authority to speak for the nursing home) told her that if she tried to run away, "they'd get you before you'd get anywhere and they would just bring you back." Mrs. Pounders admits that Mrs. Gaines visited her once or twice a week. She does not say that she ever spoke to Mrs. Gaines about the possibility of going somewhere else.

Again, there was obviously no false imprisonment during Mrs. Pounders's stay at Trinity Court. To make a defendant liable for false imprisonment, the plaintiff's confinement within boundaries fixed by the defendant must be *complete.* Restatement of the Law, Torts (2d), § 36 (1965). Here there is no evidence whatever either of physical force or of any threat of physical force. To the contrary, Mrs. Pounders could have left the nursing home at will, but she simply had nowhere to go and chose to stay.

Finally, there remain the events that led to her departure. Mrs. Pounders sent word to Laura Fulmer, the wife of a nephew of Mrs. Pounders's husband, that she wanted to leave the nursing home. Mrs. Fulmer testified that she telephoned Trinity Court to ask about visiting hours and was told that Mrs. Pounders was not allowed to have any visitors. On the afternoon of July 13 Mrs. Fulmer went to the nursing home and had no difficulty in going up to the second floor and visiting with Mrs. Pounders in her room. She then went downstairs to the office and talked to Mrs. Brummett, the wife of the manager. When Mrs. Fulmer explained that she was Mrs. Pounders's niece by marriage and wanted Mrs. Pounders to come live with her, Mrs. Brummett said that no one could get her out but Mrs. Gaines. No effort was ever made to get Mrs. Gaines's consent to the release, and there is no indication that she would not have agreed. Mrs. Brummett's statement certainly did not amount to the physical restraint that constitutes false imprisonment.

Mrs. Fulmer went directly from Trinity Court to a lawyer, J. H. Berry. Berry testified that, "as I told Mrs. Fulmer, I wanted to get some idea whether I felt that [Mrs. Pounders] was really able to make her own decision. And also, I wanted to see, to ascertain myself, whether she wanted to go or stay." Berry went to the nursing home and, with no difficulty, went upstairs to Mrs. Pounders's room and talked with her for some time. He was satisfied that she was in full possession of her faculties and wanted to leave.

Berry then went downstairs to see the manager, Mr. Brummett. Berry explained in his testimony just what happened:

A. . . . Mr. Brummett came in very shortly and told me that it was their custom that the people in the nursing home be released only to those who brought them in, and I told him that, in my opinion, since she wanted to leave, that they had no right to hold her. I also told him that if she wasn't released, well, we would have no alternative but to apply for a writ of habeas corpus.

Q. The purpose of which is what?

A. The purpose of which is to determine whether there is a legal basis for holding someone. And which, if it had been successful, would have brought about her release.

Q. What was Mr. Brummett's response to this statement?

A. Well, of course, Mr. Brummett was very courteous throughout. He said, Well I will talk with — and he—I can't remember who specifically he said he would talk with, but he said he would talk with one of the nieces of Mrs. Pounders, who had brought her there and see if it would be all right. And he tried to call. I can't remember whether he called one or made one or two attempts to call one or two different people. But, when he couldn't locate them, he said, "Well, I'll tell you what I'm going to do, I'm just going to go ahead and release her." And he did immediately. He said she could go any time someone came to pick her up. Of course, I myself wanted someone to pick her up, you know, some member of the family. And Mrs. Fulmer had always said to let her know and she would come and get her. So, I notified Mrs. Fulmer and assume she was immediately released to Mrs. Fulmer.

Mrs. Pounders in fact left with Mrs. Fulmer and was living with the Fulmers at the time of the trial.

Again, it is obvious that there was no false imprisonment in its proper sense of compulsory physical confinement. The nursing home's rule that a patient be released to the person

who arranged for her admission certainly does not amount to false imprisonment. That Berry saw fit to suggest the possibility of an application for a writ of habeas corpus did not somehow have the effect of physically imprisoning Mrs. Pounders, who was upstairs in her room and could have walked out by herself if she had chosen to do so. We agree with the trial judge's conclusion that there was no substantial evidence of false imprisonment either by Trinity Court or by Mrs. Gaines.

Affirmed.

BYRD and PURTLE, JJ., dissent.

JOHN I. PURTLE, Justice, dissenting. This is a very close question and no doubt of little consequence to anyone other than Margaret Pounders. She is a 75 year old disabled widow who was relegated to the confines of a nursing home against her wishes. As it is with a large number of our senior citizens, she dreaded the thought of being placed in a nursing home. Appellant had been living with Gloria Gaines and her husband until one day Harold Gaines told Gloria Gaines when he returned from work he wanted her to have appellant out of the house. Appellee Gloria Gaines found a room at Trinity Court Nursing Home, Inc., the other appellee in this action, and made arrangements to move appellant to the nursing home that same day, July 14, 1976. Appellee Gaines signed appellant Pounders into Trinity, where she remained until September 14, 1976.

There is much testimony concerning the shabby treatment appellant received and even more evidence on the excellent care and treatment she received during her two-month stay in the facility. Which version is true, if either, is beside the question for the purpose of this opinion. In order to reach the point of whether the appellant was falsely imprisoned, we must necessarily look at some of the facts. At some point in time, Laura Fulmer, a relative by marriage, found that appellant was staying at Trinity and proceeded to try to get the appellee (Trinity) to release Mrs. Pounders to her care as she intended to take her into her home to live. Trinity rejected the request of Mrs. Fulmer and informed her it was the

policy of Trinity to release residents of the home only to the party who entered them into the facility. Mrs. Fulmer finally consulted attorney J. Harrod Berry about getting Mrs. Pounders released to Mrs. Fulmer. The following day, Mr. Berry called Mr. Brummett at Trinity and told him he felt Mrs. Pounders had a right to leave the home if she was able to leave, especially if she appeared competent. He finally stated that, in his opinion, appellant was entitled to be released, period. Brummett again explained to the lawyer that it was the practice of the facility not to release a resident to anyone without the approval of the party who brought them to the nursing home. Mr. Berry then talked with appellant in person in the nursing home and understood clearly she wanted to leave the place. Mr. Berry felt she was in full possession of her faculties. Again he went to see Mr. Brummett, who still refused to release Mrs. Pounders without the approval of Mrs. Gaines. After the attorney threatened to file a petition for a writ of habeas corpus, Trinity decided to release appellant. She was released to Mrs. Fulmer on the same date, after Mrs. Gaines came and approved it. There is little, if any, dispute on the above-stated facts.

It should be noted that the appellant had not been adjudicated as an incompetent, nor had a guardian been appointed for her. In other words, all the activities involved in this matter were outside the judicial process. Those parties were as encumbered or unencumbered from the law as the other free citizens of the state.

Ark. Stat. Ann. § 41-1704(1)(Repl. 1977) states:

> "(1) A person commits the offense of false imprisonment in the second degree if, without consent, and without lawful authority, he knowingly restrains another person so as to interfere substantially with his liberty."

This, of course, was not a criminal proceeding. However, it is an accurate description of what constitutes false imprisonment. In false imprisonment cases the primary right involved is the liberty of the citizen, which is guaranteed by the state and federal Constitution. Except for prohibition by law,

a person is free to come and go, or stay, if he/she is not violating the rights of others. Mrs. Pounders was entitled to be free from restraint and to leave the nursing home if she chose to do so. There was no legal right for either of the appellees to restrain the appellant against her will. Imprisonment has been defined in *Watkins* v. *Oaklawn Jockey Club,* 86 Fed. Supp. 1006, and quoted with approval in *Pettyjohn* v. *Smith, et al,* 255 Ark. 780, 502 S.W. 2d 618 (1973) as:

> "Every confinement of the person is an imprisonment, and any express or implied threat or force whereby one is deprived of his liberty or compelled to go where he does not wish to go is an imprisonment."

In other jurisdictions, *Griffin* v. *Clark,* 42 P. 2d 297, the Idaho Supreme Court stated:

> "In false imprisonment or unlawful restraint, the primary right involved is the liberty of the citizen; the right of freedom of locomotion; the right to come and go or stay, when or where one may choose . . . There need be no actual force or threats, nor injury done to the individual's person, character, or reputation. Neither is it necessary that the wrongful act be committed with malice or ill will, or even with the slightest wrongful intention. . ."

If appellant was prevented against her will from going from the Trinity Court Nursing Home, Inc. at any time she so desired, she was falsely imprisoned. There was ample evidence in the record from which the jury could have found she was prevented from leaving the home at the time she wanted to leave. It may have been for only a few hours duration but, is, nevertheless, detention against her will, if her testimony is believed.

The court in this case gave the following as the definition of what constitutes false imprisonment:

> "False imprisonment means to be in custody against your will, to have restraints, such as chains, handcuffs, locked doors, barriers or keeping someone behind walls

> or within the premises, under a hidden identity or things of that nature. And in this case, there is absolutely no evidence of forced coercion, threats of any kind made to this lady to keep her there."

The trial court limited the definition of false imprisonment to the extent that, if correct, it was proper to dismiss the complaint as to both appellees. However, the definition of false imprisonment is not so limited as stated, and the evidence as to Trinity was sufficient to go to the jury. The evidence as to Gloria Gaines was insufficient to go to the jury even under the more liberal interpretation and the trial court was correct in directing a verdict in favor of appellee Gloria Gaines.

On numerous occasions this Court has decided the question as to when a directed verdict is proper. These cases all hold to the effect that, when considering whether to direct a verdict for the defendant, the evidence must be considered in the light most favorable to the plaintiff and if there is any substantial evidence on which the jury could base a finding of negligence on the part of the defendant, the verdict should not be directed. *Garrett* v. *A.P. & L.*, 218 Ark. 575, 237 S.W. 2d 895 (1951). A directed verdict should be granted for the same reasons a summary judgment should be granted. A summary judgment should not be granted if it is inconsistent with any reasonable hypothesis which might reasonably be drawn from the proper evidence before the court. *Betnam* v. *Ross,* 259 Ark. 820, 536 S.W. 2d 719 (1976).

For these reasons, the case should be affirmed as to Gloria Gaines and reversed and remanded as to Trinity Court Nursing Home, Inc.

BYRD, J., joins in the dissent.

Eddie and Patricia JOHNSON *v.*
SAFECO INSURANCE COMPANY
OF AMERICA

78-199 576 S.W. 2d 220

Opinion delivered February 5, 1979
(Division I)

Joseph A. Madey, for appellants.

Friday, Eldredge & Clark, for appellee..

GEORGE ROSE SMITH, Justice. This case is similar to another recent case in that the complaint seeks to assert the tort of bad faith. *Findley* v. *Time Ins. Co.,* 264 Ark. 647, 573 S.W. 2d 908 (1978). Here the trial court sustained a demurrer to the complaint (except for a consent judgment for $300) and dismissed the action, on the ground that the complaint failed to state facts constituting a cause of action. We affirm.

The complaint alleges that in March, 1975, the plaintiffs signed an offer for the purchase of a house and paid $400 as earnest money. The offer was not accepted, but the real estate broker and his salesman wrongfully refused to return the earnest money, except for a refund of $100. The salesman's license as a real estate agent was later revoked by the Arkansas Real Estate Commission, and the broker's license was suspended.

The complaint further alleges that the defendant, Safeco Insurance Company, was the surety upon the statutory bond filed by the broker. Ark. Stat. Ann. § 71-1305 (Supp. 1977). (Under the statute the bond is for $2,000 and is to protect persons doing business with licensed real estate brokers and salesmen.) It is asserted that over a period of more than 2 1/2 years Safeco, in bad faith, failed to adequately investigate the plaintiffs' claim and failed to pay the $300 that was due. The complaint alleges as damages unspecified economic losses, embarrassment and humiliation, and physical, mental and emotional distress. The prayer is for $25,000 as compensatory damages and $100,000 as punitive damages.

As in *Findley,* the allegation of "bad faith" is a conclusion of law referring only to the defendant's failure to adequately investigate the claim and its failure to pay the claim. There is no allegation of affirmative wrongdoing on the part of the defendant. Consequently, for the reasons stated in *Findley,* the complaint is demurrable.

Furthermore, Safeco's position is even stronger than that of the insurance company in *Findley,* for Safeco was merely a surety upon the broker's bond, not an insurance company issuing a policy directly to the plaintiffs and receiving its premiums from them. If a surety should pay a claim when there is no liability on the part of its principal, it is treated as a volunteer and cannot recover the payment from the principal. *Fireman's Fund Ins. Co.* v. *Clark,* 253 Ark. 1025, 490 S.W. 2d 447 (1973). Another possible defense, in addition to any that might be raised by the principal, could be that the $2,000 maximum liability under the bond had been discharged in the payment of other claims or had to be prorated among

various claimants. Thus the mere allegation that the broker and the salesman failed to return the plaintiffs' earnest money does not necessarily state a cause of action against the surety.

Affirmed.

We agree. HARRIS, C.J., and BYRD and PURTLE, JJ.

Carla MIDDLETON *v.* ARKANSAS EMPLOYMENT SECURITY DIVISION

78-211 576 S.W. 2d 218

Opinion delivered February 5, 1979
(In Banc)

Legal Aid Bureau of Central Arkansas, by: *Ralph Washington*, for appellant.

Thelma M. Lorenzo, for appellee.

George Rose Smith, Justice. This is an application by the appellant for unemployment compensation. The claim was denied by the local office on the ground that Ms. Middleton had voluntarily quit her job. That decision was affirmed by the Appeal Tribunal, the Board of Review, and the circuit court. As we view the case, the only question is whether the administrative finding is supported by substantial evidence.

The claimant was employed as a draftsman by AFCO Steel. She testified that on March 15, 1977, she asked for a raise in pay, which was refused on the grounds that the company was not doing well and that she was not worth more money. She told her supervisor that she would continue to work but that she would look for another job on her lunch hour. The next day she was told that she could not seek another job while she was working for the company. She accepted her wages to date, plus two weeks' severance pay, and left the company. A company witness testified that "it is better from a company's viewpoint that if a person is dissatisfied with the company and does want to find another job then it is better, we go ahead . . . and pay them for two extra weeks and let them, you know, find it on their own if they can." Upon the testimony the Appeals Tribunal made this finding of fact:

> The claimant quit her job with the above employer

> March 16, 1977, after she had requested a raise in pay. She was informed that the employer did not wish to grant her a raise in pay. She felt there was no future for her with this company, and informed the employer that she would be seeking other employment. She advised him she would do this during her off hours or during the noon hour. The employer accelerated the separation date by accepting the claimant's resignation at that time.

The Employment Security Act provides that an individual shall be disqualified for benefits "[i]f he voluntarily and without good cause connected with the work, left his last work." Ark. Stat. Ann. § 81-1106 (a) (Supp. 1977). The preamble to the statute refers to involuntary unemployment and to persons unemployed through no fault of their own. § 81-1101 (Repl. 1976).

Upon the testimony we think it was a disputed question of fact whether the claimant voluntarily left her job or was discharged. Even though the claimant did not say flatly, "I quit," the trier of fact could find that she said, in effect, "I'm quitting as soon as I am able to find another job." The Appeal Tribunal's specific finding that the employer *accepted* the claimant's resignation implies that the claimant acted voluntarily in deciding to take the proffered separation pay and look for work elsewhere.

The Vanderbilt Law Review for February, 1955, had a symposium on unemployment insurance. We quote this statement from one of the articles, Sanders, Disqualification For Unemployment Insurance, 8 Vanderbilt L. Rev. 307, 317:

> Although "voluntary leaving" literally means giving up work of one's own volition or will, the scope of the phrase has been extended to include voluntary action indicating an intention to terminate employment, notwithstanding that the immediate cause of separation was discharge or replacement.

in the case at bar the impetus leading to the separation cer-

tainly came from the employee, not from the employer. Upon the testimony reasonable persons may differ about whether the claimant's departure from her job was voluntary or involuntary. That being true, there is substantial evidence to support the administrative decision, which concludes our inquiry.

Affirmed.

HICKMAN, J. and PURTLE, J., dissent.

JOHN I. PURTLE, Justice, dissenting. The majority has again displayed clairvoyant powers which I, as of this date, have been unable to achieve. They have held that appellant voluntarily left her work without good cause. The first thing we should do is look at the facts.

Appellant had been employed for the appellee for almost four years when she approached the appellee, her employer, on March 15, 1977, and requested a raise because she was making a salary different from the other employees and stated she needed more money. Appellee denied her request for a wage increase and thereupon she informed appellee that she would begin to look for a new job on her off-hours and during her lunch break. She specifically stated she wanted to continue to work while she sought new employment. The next afternoon, March 16, 1977, appellant was informed by appellee that she could not search for a new job while employed by them. Her contract of employment was terminated and she was given two weeks severance pay.

Appellant made claim for unemployment benefits, and the Arkansas Employment Security Division denied her claim on the grounds that she had voluntarily left her last employment without good cause.

Ark. Stat. Ann. § 81-1106 states:

Disqualification for benefits. — For all claims filed on and after July 1, 1973, if so found by the Director an individual shall be disqualified for benefits:

(a) Voluntarily leaving work. If he voluntarily and

> without good cause connected with the work, left his last work, such disqualification shall continue until, subsequent to filing his claim, he had had at least thirty (30) days of covered employment.
>
> Provided no individual shall be disqualified under this subsection if, after making reasonable efforts to preserve his job rights, he left his last work due to a personal emergency of such nature and compelling urgency that it would be contrary to good conscience to impose a disqualification. . .

Disqualification, under this statute, is conditioned upon the employee voluntarily and without good cause connected with the work leaving the employment. It is true appellant expressed dissatisfaction with her wages and indicated she intended to look elsewhere for a better paying job. So far as I have been able to determine, there is no statutory prohibition against looking for another job. It may be true that her employment would have developed into an unsatisfactory relationship and she could have subsequently been fired for cause in such event; however, if we are going to speculate, as the majority do, we might as well speculate that she would have cooled down, changed her mind, and continued the job which she had held for almost four years. There is no evidence that her work had been unsatisfactory up until this time.

The majority in this case simply fail to construe the law in accordance with its plain meaning and go so far as to penalize appellant for being honest and truthful with her employer. The very foundation and purpose of the Act is to allow a person, who is discharged without good cause connected with the work, to be able to draw a meager subsistence while seeking other employment. Appellant has been denied that right in this case.

In my opinion, the majority clearly disregards the plain meaning of the words and the intent of this statute. Therefore, I would reverse and remand with directions to allow appellant to collect her unemployment benefits.

HICKMAN, J., joins in the dissent.

MOHAWK RUBBER COMPANY et al
v. Jerry THOMPSON

78-232 576 S.W. 2d 216

Opinion delivered February 5, 1979
(In Banc)

Wright, Lindsey & Jennings, for appellants.

Youngdahl, Larrison & Agee, for appellee.

GEORGE ROSE SMITH, Justice. This is a worker's compensation case, turning upon the statute of limitations. On August 31, 1971, the claimant sustained a work-connected injury to his foot. Various benefits were paid until the original claim was terminated by a lump sum settlement on June 2, 1972, the claimant having returned to work. In early 1975 the claimant elected to undergo surgery on his foot for the relief of pain. There was no new injury or aggravation of the original condition, but it is conceded that the need for surgery arose out of the original injury.

When the claimant informed his employer of his plan to undergo surgery he was told that benefits under the worker's compensation law were barred by limitations, but the operation would be paid for under a sickness and accident policy covering employees. After the surgery the claimant filed the present claim, on May 27, 1975, for the cost of the surgery and for temporary and permanent disability benefits. The Commission, whose decision was affirmed by the circuit court, held that the claim was not barred by limitations, because within a year the insurance carrier had furnished orthopedic shoes to the claimant. The Commission recognized that the furnishing of such shoes would not revive a claim already barred, but the Commission held that the running of the statute had been interrupted as to a claim for additional compensation. We are unable to agree with the Commission's reasoning.

Here is the chronological sequence of the events that are pertinent to the question before us:

> August 31, 1971: Claimant's foot was injured.
>
> August 24, 1972: Expiration of the temporary and permanent benefits paid in the lump sum settlement.
>
> August 10, 1973: (1) Claimant was seen by Dr. Chakales and released from treatment. (2) Claimant was furnished with orthopedic shoes.
>
> November 8, 1973: Carrier paid for the shoes.

December 13, 1973: Carrier paid Dr. Chakales.

August 28, 1974: Claimant was furnished with a second pair of orthopedic shoes.

January 23, 1975: Carrier paid for the second pair.

May 27, 1975: Present claim for additional benefits was filed.

It is obvious that when the statute is tolled by the actual furnishing of services, such as medical treatment or orthopedic shoes, the statute is not tolled again when the services are paid for. One transaction cannot interrupt the statute twice. That was essentially our holding in *Heflin* v. *Pepsi Cola Bottling Co.,* 244 Ark. 195, 424 S.W. 2d 365 (1968), where we said: "The decision is not in any respect based on the time at which the medical bills were paid. This holding is sound because the claimant is 'compensated' by the furnishing of the services and not by the payment of the charges therefor."

When mere payments for previous services are disregarded, it will be seen from the above sequence that there was no interruption of the statute between August 10, 1973, and August 28, 1974. Thus both the two-year statute from the date of the injury and the one-year statute from the last payment of compensation had run when the claimant was furnished a second pair of shoes on August 28, 1974. The Commission held, however, that the furnishing of the second pair again tolled the statute, so that an additional claim arising out of the original injury was not barred. The Commission cited *Ragon* v. *Great American Indemnity Co.,* 224 Ark. 387, 273 S.W. 2d 524 (1954), where we quoted the statutory definition of compensation, which includes the medical and orthopedic allowances enumerated in § 11 of the act. Ark. Stat. Ann. §§ 81-1302 (i) and -1311 (Repl. 1976).

The Commission failed, in our opinion, to give correct significance to a 1968 initiated act that added a second sentence to § 18 (b) of the act, which now reads:

> (b) Additional Compensation. In cases where compensation for disability has been paid on account of injury, a claim for additional compensation shall be barred unless filed with the Commission within one year from the date of the last payment of compensation, or two years from the date of the injury, whichever is greater. The time limitations of this subsection shall not apply to claims for replacement of medicine, crutches, artificial limbs and other apparatus permanently or indefinitely required as the result of a compensable injury, where the employer or carrier previously furnished such medical supplies. [Ark. Stat. Ann. § 81-1318 (b).]

The manifest purpose of the 1968 amendment was to extend the statute with respect to an employee's right to obtain the *replacement* of medicine, crutches, artificial limbs, and other apparatus that would be *permanently or indefinitely required* as a result of the original compensable injury. This case illustrates the beneficent purpose of the amendment, for without it this claimant would not have been able to obtain a second free pair of orthopedic shoes on August 28, 1974, because both the two-year and the one-year statutes had already run. Thus the new sentence is actually an exception to the basic rule of limitations. The exception cannot fairly be broadened to mean, for example, that simply because a crutch furnished by the employer happens to break and need replacement ten years after the injury, a new period of limitations should begin to run with respect to claims for surgery, permanent partial or total disability, and all the other benefits provided by the act. The scope of a reasonable and logical exception to the rule of limitations should not be extended beyond the defect that it was evidently designed to correct. Even a liberal construction of a statute must still be consistent with its basic intent. *Whetstone* v. *Daniel,* 217 Ark. 899, 233 S.W. 2d 625 (1950).

Reversed.

PURTLE, J., dissents.

Michael Brett MOORE and William Roger BONNELL *v.* STATE of Arkansas

CR 78-145 576 S.W. 2d 211

Opinion delivered February 5, 1979
(In Banc)
[Rehearing denied February 26, 1979.]

McArthur & Lassiter and *Solloway & Jackson, P.A.*, by: *Lanny K. Solloway,* for appellants.

Bill Clinton, Atty. Gen., by: *Ray Hartenstein,* Asst. Atty. Gen., for appellee.

CONLEY BYRD, Justice. The trial court upheld the search of appellants' U-Haul trailer on the basis of consent and sentenced appellants to five years each for violating the Uniform Controlled Substances Act, Acts 1971, No. 590. The issue on this appeal is whether the evidence is sufficiently

clear and positive to sustain the State's contention that appellants consented to the search.

The record shows that the burglar alarm went off at the Toll Manufacturing Company, 3700 Shackleford Road, Little Rock, about 4:30 a.m. on August 11, 1976. Two Pulaski County deputy sheriffs answered the burglar alarm. They were let into the plant gate by Terry McGuire, the plant superintendent. After the officers had been unable to find any exterior evidence of a break-in, they took off to investigate appellants who were driving their automobile on a public road some 100 to 200 yards behind the plant on 36th street.

Sergeant Rocky Woods testified that he was driving behind the Toll Manufacturing Company's building when he saw the lights on appellants' vehicle come on then go off. After some discussion with Sergeant Ledbetter they jumped back in their cars, and raced around and stopped appellants. Sergeant Woods pulled in front of appellants' vehicle and Sergeant Ledbetter pulled along the side of appellants' vehicle for purposes of blocking it. After ordering appellants out of the vehicle and placing them under arrest for burglary, Sergeant Woods made inquiry as to what was in the trailer. He states that in answer to his question to appellant Moore as to whether Moore cared whether the officer looked in the trailer, that appellant Moore stated: "No, not at all" and handed him the keys to the Slaymaker lock that secured the trailer. In further cross-examination he stated that he and Ledbetter never got out of their cars before taking off to investigate appellants. It was also established that the burglar alarm turned out to be a false alarm. Although Sergeant Woods had consent to search forms in his vehicle, he did not bother to get one signed. Sergeant Woods stated that when he stopped the appellants he had advised them to turn the ignition off, remove the keys and get out of the car.

Sergeant Ledbetter testified that after he saw the lights on appellants' vehicle come on, he never saw them go off. He says that when Officer Woods asked if he could look in the trailer, that appellants handed him the keys. He states that appellants were under arrest at the time. On cross-examination he admits that he and Sgt. Woods did not know

that a burglary had in fact been committed and that all of the officers had answered many false alarms in the past. Their only reason for arresting appellants was a presumption from the burglar alarm. Sgt. Ledbetter was not sure whether appellants had the keys in their hand when Sgt. Woods asked to look in the trailer or whether appellants reached back in the car and took them from the ignition.

Robert J. Raley, Sr., plant manager for Toll Manufacturing Company, stated that Officers Woods and Ledbetter had made their periphery search of the outside of the building and were standing on the porch of the office ready to go search the inside of the building when Terry McGuire noticed a car turning around on 36th Street. He suggested to the officers that someone that was involved in the burglary was over there.

Terry McGuire, the plant superintendent, testified that he was the first person to call the officers' attention to the appellants' car. He says the lights were not blinked off and or or anything like that. The car was in a turn around spot on 36th Street when he saw it.

Appellant Moore testified that he was advised by Sgt. Woods that they were under suspicion of burglary, that Sgt. Woods had a right to search the vehicle and that Sgt. Woods demanded the key. Moore says that, at the time, he was outside the car but the car was still running. When Officer Woods told him to give him the key, he replied that he did not have the keys and that Sgt. Woods reached in the car, turned the ignition off and took the key. He states that the officers never asked permission to look in the trailer.

Appellant Bonnell says that he was told to stay in front of the car which he obeyed. He could not quite comprehend everything that was said but after hearing the officers making some statement to the effect that they had a right to search, Officer Woods reached in the car and took the keys.

We have consistently held that when the State relies upon a consent to make a search the burden is upon the State to show such consent by "clear and positive testimony," *Hock*

v. *State,* 259 Ark. 67, 531 S.W. 2d 701 (1976), *White* v. *State,* 261 Ark. 23-D, 545 S.W. 2d 641 (1977) and *Rodriquez* v. *State,* 262 Ark. 659, 559 S.W. 2d 925 (1978). To permit a consent to search to be shown by any less quantum of proof would permit the fact finder to issue in effect an ex post facto search warrant. Upon the record before us, we hold that the State has not sustained its burden of proof to show that the search of appellants' U-Haul trailer was with their consent, *State* v. *Osborn,* 263 Ark. 554, 566 S.W. 2d 139 (1978).

The State to sustain the verdict suggests that the search was proper under the automobile exception set out in *Chambers* v. *Maroney,* 399 U.S. 42, 90 S. Ct. 1975, 26 L. Ed. 2d 419 (1970). We disagree. Under the facts here, the officers, being informed of nothing more than a mere possibility that a burglary might have been committed, could not have had "reasonable cause to believe that [appellants] had committed a felony." Without reasonable cause to believe that appellants had committed a felony, the officers had no authority to arrest appellants, Ark. Crim. Proc. Rule 4.1, and consequently, no authority to make a search incident to an arrest, Ark. Crim. Proc. Rule 12.4(b). See also, *Sibron* v. *State of New York,* 392 U.S. 40, 88 S. Ct. 1889, 20 L. Ed. 2d 917 (1968).

Reversed and remanded.

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

JOHN A. FOGLEMAN, Justice, dissenting. I agree that the search made in this case cannot be upheld as an automobile search, or as a search incident to a lawful arrest. It appears to me that it was too broad in scope and extent to be justified as incidental to the arrest of appellants. I do not agree that there was no probable cause for arrest, however. I disagree on the question of consent to search and I draw inferences from the testimony that are decidedly different from those drawn by the majority. I do not think that the trial court's holding can be said to be clearly against the preponderance of the evidence, as we must say, in order to reverse that holding. *State* v. *Osborn,* 263 Ark. 554, 566 S.W. 2d 139. I would also point out that, in order to be clear and positive, it is not

necessary that evidence be undisputed.[1] *State* v. *Sherrick,* 98 Ariz. 46, 402 P. 2d 1 (1965), cert. den. 384 U.S. 1022, 86 S. Ct. 1938, 16 L. Ed. 2d 1024 (1966). Even if we equate "clear and positive" testimony with "clear and convincing evidence" (which I do not), the fact that the evidence is disputed is not determinative of the question. *Kelly* v. *Kelly,* 264 Ark. 865, 575 S.W. 2d 672 (1979). We said in *Kelly* that the latter degree of proof lies somewhere between a preponderance of the evidence and proof beyond a reasonable doubt, and is simply that degree of proof that will produce in the trier of fact a firm conviction as to the allegation sought to be established.

If we made appropriate allowances for the superior position of the trial judge in evaluating the credibility of the witnesses, it is clear to me that the "clear and positive" test was met and that we cannot say that the finding of the trial court was clearly against the preponderance of the evidence.

Both police officers arrived at Toll Manufacturing Company within a few minutes after the burglar alarm was first sounded. Ledbetter was only a minute or two behind Woods. Woods testified that when he saw the car lights come on, the burglar alarm was still audible and that, as he came around the building, he saw the lights go off. He said that, after a period of about 30 seconds, he saw the lights come on again, in the same spot, but then their movement indicated that the vehicle was moving backwards. According to his estimate, the car was somewhere between 100 and 300 yards from the Toll Building, but on the perimeter of the Toll parking lot. Until

[1]Not all jurisdictions accept the proposition that any more than a preponderance of the evidence is required to establish consent to search. See, e.g., *People* v. *James,* 19 Cal. 3d 99, 137 Cal. Rptr. 447, 561 P. 2d 1135 (1977); *State* v. *Buckner,* 223 Kan. 138, 574 P. 2d 918 (1977); *U.S.* v. *Matlock,* 415 U.S. 164, 94 S. Ct. 988, 39 L. Ed. 2d 242 (1974). We adopted the "clear and positive" degree of proof in *Hock* v. *State,* 259 Ark. 67, 531 S.W. 2d 701. While there is some question about this degree of proof being required in every case where justification for a warrantless search is based upon an allegation of consent, I think that it is certainly the proper rule when the defendant is under arrest when the "consent" is given, or when the evidence shows no more than acquiescence to an assertion of lawful authority by the searching officers. See *Rodriquez* v. *State,* 262 Ark. 659, 559 S.W. 2d 925; *Hock* v. *State,* supra; *White* v. *State,* 261 Ark. 23-D, 545 S.W. 2d 641. Thus, I consider the "clear and positive" rule to be applicable to this case.

he arrived at the vehicle he thought the car was on the parking lot. Woods said that he called Ledbetter's attention to these lights. This officer said that, since he felt that the occupants of the car had caused the burglar alarm, he and Ledbetter went immediately to prevent this vehicle from leaving. Woods immediately noticed that the automobile bore an out-of-state license and that a U-Haul trailer was attached to it. The trailer was padlocked. Woods said that he first asked the driver and his companion to step out of the car and asked for identification. He stated that after they gave him their driver's licenses, he advised appellants that he had reason to believe that they were involved in a burglary at the Toll Manufacturing Company and that he was placing them under arrest for burglary. Woods testified that he advised appellants of their rights, and then asked them what they had in the trailer. He stated that one of them (Moore, he believed), answered that it was dental equipment he was taking to his brother. According to Woods, after Moore explained further, he asked, "Well, do you mind if I see in the dental equipment you have in the trailer because we have had the burglary alarm going off" and Moore responded, "Here's the keys, go ahead and look" and handed him the keys with which Woods unlocked the trailer.

Sgt. Ledbetter said that, upon arrival at the Toll Manufacturing Company premises, he and Woods proceeded to the building to check it, and as they "started up," he observed the headlights of the automobile come on and saw that the vehicle started moving east at a slow speed. He did not see the lights come on and go off. He said that he never did go all the way around the building and that Woods was "spotlighting" the building to see if he could find an "entry hole" in it.

Ledbetter said that the officers identified themselves when they stopped appellants and that appellants furnished identification upon request and were very cooperative. He corroborated the testimony of Woods as to the advice given to appellants, the request for permission to look inside the trailer and the obtaining of the keys. He said that he was standing up in front of the car, but that he heard Woods say something about a burglary and heard something said about dental lab chairs or dental equipment. He said that the boxes

in which the marijuana was found bore labels reading, "Four chairs per box." Ledbetter said that he suspected appellants of burglary because of the suspicious movements of the vehicle at a scene where a burglar alarm was going off about 200 yards away and, from past experience, he knew burglars used U-Haul trailers to haul away their loot.

Robert J. Raley, Sr., plant manager at Toll Manufacturing Company, was alerted and came to the plant after the officers and Terry McGuire, the plant superintendent, had arrived. He felt sure that an outside inspection of the building, which revealed that no doors were open or windows were broken, had been made, but he did not observe it. He did not think the officers had been at the scene long enough to check every lock, window and door to determine whether someone had been in the place. He said that preparations were being made for the party to go inside the building when the car was turning around and that he and McGuire told the sheriff's deputies that maybe someone that had been involved in the burglary was over there. He said that the officers left immediately. He stated that there was nothing unusual about the officers stopping a car leaving a place from which its occupants could have had access to the building.

McGuire said that the officers had driven around the building and made a visual check and reported that they did not find any visible evidence of open doors or anything showing visible entry, but that nobody had really made a check of the plant before Officers Woods and Ledbetter left, and that he and Raley had to await the arrival of another officer to come and make a visual check. McGuire did not see the lights blink on and off, but he had been looking in another direction and happened to look toward the car and saw it with the lights on. It appeared to him that the car was "backing out" because he saw the "back-up" lights on it.

The evidence that the movements of the automobile on the perimeter of the parking lot while the burglar alarm was still sounding and at a time when the check of the building had not been completed was a basis for the officers to reasonably suspect that the occupants of the automobile were committing, or had committed, a felony. Under these cir-

cumstances it was proper for the officers to stop appellants and obtain identification and determine the lawfulness of their conduct. Rule 3.1, Arkansas Rules of Criminal Procedure. The officers would have been derelict in the performance of their duties, if they had not done so. To say the very least, the officers had reasonable cause to believe that the occupants of the vehicle were witnesses to the offense of burglary, a felony, and had the right to obtain identification of these persons and to ascertain what information they had about the burglary. Rule 3.5, Arkansas Rules of Criminal Procedure. When the officers saw that the out-of-state automobile was towing a U-Haul trailer, they had reasonable cause to believe that the occupants had committed the felony of burglary, knowing that such a trailer was commonly used by burglars to conceal and haul stolen property. See *Sanders* v. *State,* 259 Ark. 329, 532 S.W. 2d 752; *Rowland* v. *State,* 263 Ark. 77, 561 S.W. 2d 304; *Perez* v. *State,* 260 Ark. 438, 541 S.W. 2d 915; *Williams* v. *State,* 258 Ark. 207, 523 S.W. 2d 377; *Johnson* v. *State,* 249 Ark. 208, 458 S.W. 2d 409, *Wickliffe* v. *State,* 258 Ark. 544, 527 S.W. 2d 640. They had the right to arrest these suspects. Rule 4.1, Rules of Criminal Procedure.

Although appellants presented a horror story about the actions of the officers, the trial court resolved the question of credibility against them, and this court is bound by that determination. *State* v. *Osborn,* 263 Ark. 554, 566 S.W. 2d 139.

I would affirm the judgment.

I am authorized to state that the Chief Justice joins in this opinion.

Kelly M. RICKETTS et al *v.*
Eugene V. RICKETTS et al

78-155 576 S.W. 2d 932

Opinion delivered February 5, 1979
(In Banc)
[Rehearing denied March 12, 1979.]

Northwest Arkansas Legal Services, Inc., by: *Marcia McIvor,* for appellants.

Davis, Douglas & Penix and *G. H. Burke,* Regional Atty., Region I, for appellees.

FRANK HOLT, Justice. Appellants, 11 1/2 year old Kelly, 10 year old Laqueta, 9 year old Patricia, and 7 year old Eugenia, are the four daughters of appellee Eugene Ricketts. The appellants were the subjects of a dependency-neglect proceeding in a *de novo* hearing in circuit court. That court reversed the juvenile court's order of custody and directed that the children be removed from their foster home and their custody vested in appellee Ricketts. Subsequently, the court

denied appellants' motion to vacate and stay the order of custody. Appellants contend for reversal that (1) they were denied due process in that they had no notice, opportunity to be heard nor independent counsel, (2) our statutory requirements for notice, hearing and appointed counsel were not followed, and therefore (3) the circuit court's denial of appellants' motion to vacate was error.

Mr. Ricketts had received custody of his children in 1975 when he and their mother were divorced. A petition seeking emergency custody of appellants was filed in juvenile court by appellee Arkansas Social Services while appellants' father was incarcerated on a charge of DWI in April, 1976. Prior to that time, appellants had been voluntarily placed in foster care three times within five years as a result of appellee's marital problems with his wife, Alberta, who has since abandoned her family. On April 2, 1976, a hearing was held at which time Mr. Ricketts and Arkansas Social Services were present and each represented by counsel. The juvenile court ordered the proceedings recessed and that Mr. Ricketts undergo treatment for alcoholism at a local guidance center. The appellant children were ordered to remain in the custody of appellee Arkansas Social Services, with it having the right to place appellants in a suitable home or institution of their choice. It appears they were placed in a foster home. Mr. Ricketts was given the right to petition the court for return of the children's custody if and when he submitted to treatment and was pronounced cured of alcoholism. In Agusut, 1976, appellee Arkansas Social Services petitioned the juvenile court to have appellants declared dependent-neglected, pursuant to Ark. Stat. Ann. § 45-401 et seq. (Repl. 1977), alleging that Mr. Ricketts had refused to submit to treatment for alcoholism, had been incarcerated numerous times since the court's earlier order and had not demonstrated that he could properly care for his children. Permanent custody of them was sought with the right to place them in a home or institution of its choice. Their custody was granted to appellee Arkansas Social Services with the right to place them in suitable foster care and petition the probate court for guardianship with the right to consent to adoption. Appellants were again placed in a foster home. On appeal to the circuit court, Ricketts and the Arkansas Social Services appeared in person

and by separate attorneys with all agreeing that it was not in the best interest of the appellant children to be present. After presentation of evidence in a *de novo* hearing, the court, on March 1, 1978, notified counsel that the judgment of the juvenile court was reversed, that Arkansas Social Services' petition for permanent custody was denied and the appellant children were to be returned to their father, Mr. Ricketts. Appellants, upon learning that they were to be removed from the protective custody of their foster home, sought the aid of present counsel. Their counsel moved the court to vacate its judgment on the grounds that appellants had no guardian *ad litem* or other representative appointed or appearing for them in the action and neither had they been heard by the court. They asked to be allowed to respond, for representation of their legal interest, to be heard and to adduce proof. Appellants, Kelly, age 11 1/2, Laqueta, age 10, and Patricia, age 9, filed affidavits citing occasions, when they were in their father's custody, of physical abuse, drunkenness, and neglect, improper conduct in their home by their father and his friends and expressions of fear of him. The court denied the motion to vacate and stay the judgment and found that the appellants' interests, although they were not present nor represented by counsel, were sufficiently represented by appellee Arkansas Social Services. Hence this appeal.

In summary appellants argue that the adjudication of their rights without notice to them and an opportunity to be heard or represented by independent counsel was a denial of due process. Numerous cases are cited. Principal authorities relied on are: *In re Gault,* 387 U.S. 1 (1967); *Roe* v. *Conn,* 417 F. Supp. 769 (M.D. Ala. 1976); Ark. Stat. Ann. §§ 45-413, 45-425 and 45-427. It is argued that *Gault,* although a delinquency proceeding, and *Roe,* a neglect proceeding, are applicable in this dependency-neglect proceeding. Also, the appellant children, who were named in the custody petition, were not notified of the proceedings as required by §§ 45-423, 45-425, 45-427, and 45-428. Appellees respond that the cited cases and our statutes are not applicable to a dependency-neglect proceeding as here. Further, the children were adequately represented on the *parens patriae* theory; namely, the Arkansas Social Services, a state agency and its attorney, whose interests were in common and not adverse to those of the

appellant children. In the circumstances, we do not reach these respective contentions. Suffice it to say, in view of the ages of the children and their affidavits, we hold that the judgment should be reversed and the cause remanded in order to accord them an opportunity to be present and heard with counsel upon their intervention. By this procedure, all constitutional requirements as asserted by appellants will be fully met. See *State ex rel. Juv. Dept. of Multnomah Cty.* v. *Wade,* O. App., 527 P. 2d 753 (1974); 9 U.L.A., Uniform Juvenile Court Act, § 26 (a) at p. 422, adopted by the National Conference on Uniform State Law and the American Bar Assn. in 1968; and cf. *Vilas* v. *Vilas,* 184 Ark. 352, 42 S.W. 2d 379 (1931).

The issue as to the consent to adoption between the Social Services and Mr. Ricketts, the father, is deemed concluded since it does not appeal. The court, however, following a hearing on appellants' intervention, is not precluded from making such disposition of their custody as is deemed appropriate and beneficial for the children.

Reversed and remanded.

Billy Neal HITT *v.* Imogene Hitt MAYNARD

78-234 576 S.W. 2d 211

Opinion delivered February 5, 1979
(Division II)

C. W. Knauts, for appellant.

Guy Brinkley, for appellee.

FRANK HOLT, Justice. Appellee was granted a divorce from appellant. The divorce decree recited that the court adopted a property settlement between the parties including appellant's agreement to pay $75 a week as support for their 6 year old child. Subsequently, appellant sought a reduction of child support to $37.50 per week, asserting a material change of circumstances and his inability to continue making the agreed payment. The court found, as a matter of law, that he was without authority to modify the child support contract. Appellant asserts this was error and we agree.

A contract between divorced parties with regard to their children's support, whether or not adopted by the court, is not binding upon the court, and therefore the agreement is subject to modification as the circumstances justify without the parties' consent. *Reiter* v. *Reiter,* 225 Ark. 157, 278 S.W. 2d 644 (1955); *Lively* v. *Lively,* 222 Ark. 501, 261 S.W. 2d 409 (1953); *Johnston* v. *Johnston,* 241 Ark. 551, 408 S.W. 2d 885 (1966); *Collie* v. *Collie,* 242 Ark. 297, 413 S.W. 2d 42 (1967); and *Williams* v. *Williams,* 253 Ark. 842, 489 S.W. 2d 774 (1973).

Here appellee argues, however, that this issue is mooted due to the fact that the chancellor ruled the appellant's circumstances or conditions had not sufficiently changed to justify withholding enforcement of the agreed child support. The record before us does not contain any evidence to justify this argument nor does the decree from which this appeal comes contain the ruling upon which the appellee relies. However, it very well may be upon remand the chancellor may have a basis from the evidence to justify his ruling.

Reversed and remanded.

We agree: HARRIS, C.J., and FOGLEMAN and HICKMAN, JJ.

MARION COUNTY RURAL SCHOOL
DISTRICT NO. 1 *v.* Phillip Leon RASTLE

78-190 576 S.W. 2d 502

Opinion delivered February 5, 1979

Donald J. Adams, of *Adams, Covington & Younes,* for appellant.

Frank H. Bailey and *Richard S. Paden* of *Bailey & Paden,* for appellee and cross-appellant.

DARRELL HICKMAN, Justice. These parties were before us in a previous case, *Rastle* v. *Marion Co. Rural Sch. Dist.,* 260 Ark. 740, 543 S.W. 2d 923 (1976). Rastle, as a school teacher, had sued two school districts seeking a mandamus to require them to pay his teacher's salary, alleging a breach of contract. We decided that an action for mandamus and one for damages could not be jointly tried and stated that an election of remedies must be made.

Rastle apparently made his election and filed another action in the Marion County Chancery Court seeking payment for two years pursuant to his teacher's contract, for the school years 1975-1976 and 1976-1977. He joined Marion County Rural School District No. 1 and Oakland School District No.. 2 as party defendants because the original district, Marion County Rural School District, had been divided into these districts on July 18; 1975.

The trial judge found Rastle's one-year contract for the school year 1974-1975 was automatically renewed due to Marion County Rural School District's failure to give written notice of nonrenewal and, therefore, Rastle was entitled to his contractual salary for the 1975-1976 school year, less some $2,185.00 which he had earned in mitigation of damages. The trial judge held Rastle was not entitled to any further relief. Oakland School District No. 2, a new district created after the school year 1974-1975, was found to have no liability. Marion County Rural School District No. 1, the appellant, did not seek any cross relief against Oakland from the trial court or appeal from the judgment as it related to the Oakland School District.

Marion County Rural School District No. 1 brings this appeal and argues that the trial court was wrong in holding Rastle's contract was automatically extended one year because no notice of nonrenewal was given by the district to Rastle.

Rastle argues on cross-appeal the trial court erred in holding the school district was liable for only one year since he has never received written notice of nonrenewal for the school year 1975-1976 or for the school year 1976-1977. Consequently, Rastle argues that the court was in error and should have awarded him compensation for the latter school year.

We find no error by the court and affirm the judgment on appeal.

Rastle had a one-year contract with the Marion County Rural School District to teach at a one-room school house

located at Oakland for one year, school year 1974-1975. Arkansas law clearly requires that a school district must give written notice to a school teacher no later than 10 days after the end of the school year if a contract is not to be renewed. Ark. Stat. Ann. § 80-1304(b) (Supp. 1977) provides in part:

> . . . Every contract of employment hereafter made between a teacher and a board of school directors shall be renewed . . . unless during the period of such contract or within ten (10) days after the termination of said school term, the teacher shall be notified by the school board in writing . . . that such contract will not be renewed for such succeeding year . . . .

It is agreed by all parties that this notice was not given to Rastle. The trial court held that under the statute the school district was liable to pay Rastle a salary for the succeeding year. We agree with the trial court that the contract was extended by operation of law for the succeeding year and the district should have been required to pay Rastle.

The appellant's argument avoids the 10 day notice statute and on examination is found to be without merit.

First, the appellant argues that Rastle did not file his teacher's certificate with the county school supervisor as required by law and, therefore, was not entitled to be paid. See Ark. Stat. Ann. § 80-1304(b) (Supp. 1977). Rastle did file his certificate in July, 1975. Ark. Stat. Ann. § 80-1227 (Repl. 1960) provides that the filing of a teacher's certificate at any time before final judgment is a defense to any action against any county treasurer; county supervisor, or superintendent of schools based on Ark. Stat. Ann. § 80-1304 (Repl. 1960 and Supp. 1977).

Next, the appellant argues that Rastle's certificate was for secondary education, he taught primary education, and no vacancy was available for him as a secondary teacher for the school year 1975-1976; since he could not be hired, the district should not be required to pay him. This argument ignores the fact that Rastle did teach elementary education,

without objection, for the prior year, was paid for his efforts and there was no objection at any time to his qualifications. The argument essentially ignores the clear import of Ark. Stat. Ann. § 80-1304(b) (Repl. 1960), and the fact that it was the school district's obligation to terminate the contract.

Finally, the appellant argues that it should not be legally liable because it was not in existence as a legal entity at the time liability accrued to Rastle.

After Rastle had taught school for one year, after the expiration of the period of time in which he should have been notified that his contract would not be renewed, and after he had filed his certificate with the county supervisor, two school districts were formed from the Marion County Rural School District, Rastle's employer. One school district was designated Marion County Rural School District No. 1, the appellant; the other school district was Oakland School District No. 2. According to the evidence at the trial court, an order of dissolution and division was entered as of July 18, 1975. Assets and liabilities were divided. Each district received a right to state benefits on a proportionate basis that would accrue to them according to geographical area. The one-room school house located at Oakland, where Rastle taught, is actually located in the Oakland School District No. 2 as it exists today.

The trial court found that Oakland was not liable because it did not exist as a legal entity at the time Rastle should have received his 10 days' notice for nonrenewal. Since no appeal was taken from this finding, nor any cross action taken by the appellant against the Oakland School District for contribution, we cannot say the court's action in this regard was incorrect. The appellant; which was a legal entity before, simply reduced in size, was found to be liable. We cannot say this finding was erroneous.

Rastle argues on cross-appeal that the trial court should have granted him judgment for his contractual salary for the school year 1976-1977. His argument is that he has never received statutory notice of nonrenewal and that contractual liability under the statute continues until he receives such

notice. He also contends that the district's failure to give written notice of nonrenewal is a violation of the due process clause of the United States Constitution. Rastle's constitutional argument implies that he has a "property" interest in his continued employment.

> (T)he Constitution does not require opportunity for a hearing before the nonrenewal of a nontenured teacher's contract, unless he can show that the decision nct to rehire him somehow deprived him of an interest in"liberty"or that he had a"property"interest in a continued employment, despite the lack of tenure or a formal contract.

Perry v. *Sindermann,* 408 U.S. 593, 92 S. Ct. 2694, 33 L. Ed. 2d 570 (1972).

Rastle offered no evidence to prove that he had a property interest which would raise the due prccess issue. Formal teacher tenure is not provided by Arkansas law. *Nethercutt* v. *Pulaski County Special School District,* 251 Ark. 836, 475 S.W. 2d 517 (1972). Nor does Ark. Stat. Ann. § 80-1304(b) create an expectation of continued employment. See *Cato* v. *Collins,* 539 F. 2d 656 (1976).

Absent constitutional considerations, notice that is required under Ark. Stat. Ann. §80-1304(b) only goes to the succeeding school year. Rastle conceded he had actual notice that his contract would not be renewed sometime during the summer of 1975 and that satisfies due process of law.

Consequently, we find Rastle's argument without merit and affirm the judgment.

Affirmed.

We agree. HARRIS, C.J., and FOGLEMAN and HOLT, JJ.

Earl McKNIGHT *v.* ARKANSAS STATE HIGHWAY COMMISSION

78-230 576 S.W. 2d 209

Opinion delivered February 5, 1979
(Division II)

W. Q. Hall, for appellant.

Thomas B. Keys and *Philip N. Gowan,* for appellee.

DARRELL HICKMAN, Justice. The summary decree granted in this case by the chancellor must be reversed because material questions of fact remain unresolved. It was incumbent upon the appellee in this case, the Arkansas State Highway Commission, to show that there was no issue of fact. *Robinson* v. *Rebsamen Ford, Inc.,* 258 Ark. 935, 530 S.W. 2d 660 (1975).

The Highway Commission filed suit in the Chancery Court of Madison County seeking a mandatory injunction against Earl McKnight, Jr., the appellant. McKnight owns

property on which is located a commercial enterprise; it is adjacent to a paved state highway, State Highway No. 68-3, in Huntsville, Arkansas. McKnight had been asked to make an application for an access driveway to his property and in conjunction with that application to build a proper and approved access to the highway. McKnight has frontage on the highway of some 250 feet or more, the exact frontage being in dispute. McKnight conceded that he had refused to apply for the permit, objected to the injunction and raised several constitutional questions.

The Highway Commission in its petition simply alleged that it had no adequate remedy at law and would suffer irreparable harm if the injunction were not granted. McKnight denied those allegations, specifically stating that only conclusions had been alleged. The Highway Commission moved for summary decree and, according to the pleadings, recited that Highway Commission regulations required adjacent owners to have properly approved access and that its only remedy at law is criminal in the nature of a fine of not less than $5.00 nor more than $100.00. Ark. Stat. Ann. § 76-201.5 (Repl. 1957).

We agree with McKnight that there are only general allegations of irreparable harm and an inadequate legal remedy which are not supported by adequate proof. McKnight has controverted these allegations by stating that he has always used his property adjacent to the highway without any danger to the public, and that because his property is level with the highway he should not be required to build an access.

The chancellor should not have granted a summary decree in view of the disputed facts that exist. The fact that McKnight refuses to apply for a permit, along with general allegations of inadequate remedies and irreparable harm, without proof, do not warrant such action.

The Highway Commission in this case sought a remedy that is certainly one of several possible remedies. In *Hickinbotham* v. *Corder,* 227 Ark. 713, 301 S.W. 2d 30 (1957), *cert. denied* 355 U.S. 841, 78 S. Ct. 61, 2 L. Ed. 2d 48 (1957), we

discussed the conditions that must exist before an injunction can be granted where legal remedies of a criminal nature exist. First, it must be shown that the remedy at law is inadequate and incomplete to affect relief. Second, it must be shown that an injury of a public nature exists that would warrant a chancery court assuming jurisdiction for purposes of granting an injunction.

We find these two conditions have not been met in this case so as to warrant a summary decree.

Reversed and remanded.

We agree. HARRIS, C.J., and FOGLEMAN and HOLT, JJ.

STATE of Arkansas *v.* Gary Lee BROWN

CR 78-164

Substituted Opinion on Denial of Rehearing
delivered March 19, 1979
(Division II)

Bill Clinton, Atty. Gen., by: *Joyce Williams Warren,* Asst. Atty. Gen., for appellee and cross-appellant.

Pearce & Robinson, for appellant and cross-appellee.

DARRELL HICKMAN, Justice. Gary Lee Brown was convicted of selling an obscene film in violation of Ark. Stat. Ann. § 41-3578, *et sequentes* (Repl. 1977), and fined $1,000,00.

Brown appeals alleging he was improperly charged with a violation of that statute which was repealed by Act 464 of 1977 (Ark. Stat. Ann. § 41-3501, *et seq.*). We agree with Brown's argument in this regard.

The State on cross-appeal alleges the trial court improperly instructed the jury. We also agree with this argument. The State properly perfected its appeal by lodging the record within 60 days after filing a notice of appeal as required by Rules of Crim. Proc., Rule 36.10 (1977).

There is no contention that the film that Brown sold was not obscene. The argument is whether the statute Brown was charged with violating was repealed by a comprehensive obscenity law enacted in 1977.

The General Assembly, by Act 464 of 1977, passed legislation titled, "An Act to Establish a Comprehensive Obscenity Law for the State of Arkansas." Part of the prohibited conduct in that Act relates to the sale of obscene material. Section 2, Subsection (8), provides:

> "Promote" means to produce, direct, perform in, manufacture, issue, sell, give, provide, lend, mail, deliver, transfer, publish, distribute, circulate, dis-

> seminate, present, exhibit, or advertise, for consideration, or to offer or agree to do any of these things for consideration.

Violation of Act 464 is a class B misdemeanor for which the punishment is a fine not to exceed $500.00 or a sentence not to exceed 90 days.

The statute Brown was charged with violating reads:

> . . . It shall be unlawful for any person knowingly to exhibit, sell, offer to sell, give away, circulate, produce, distribute, attempt to distribute or have in his or her possession any obscene film.

Violation of this law is a felony and is punishable by a fine not to exceed $2,000.00 or imprisonment for not less than one, nor more than five years, or both. Ark. Stat. Ann. §§ 41-3578 and 41-3580.

Clearly both laws prohibit one from selling an obscene film and cannot be reconciled. Since Act 464, which includes a repealing clause which repeals all laws or parts of laws in conflict therewith, was passed after the statute under which Brown was convicted, it repeals that part of Ark. Stat. Ann. § 41-3578 which deals with selling obscene films.

We recently held that Act 464 of 1977 did not repeal that portion of these statutes (Ark. Stat. Ann. § 41-3578, *et seq.*) which might relate to showing an obscene film where there was no consideration paid. *Buck* v. *Steel, Judge,* 263 Ark. 249, 564 S.W. 2d 215 (1978). Act 464, as we have referred to herein, prohibits promotion only where consideration is involved. The Arkansas statute, which Brown is accused of violating, does not mention consideration.

Consequently, Brown was improperly charged and convicted, and, therefore, the judgment is reversed and dismissed.

The State argues in its cross-appeal that the trial judge improperly instructed the jury regarding knowledge. Both

the State and Brown offered instructions on "knowingly", that is, the knowledge that one must have to be guilty of violating the law. The trial court rejected both offered instructions and instead gave an instruction based on knowledge contained in Ark. Stat. Ann. § 41-203(2) (Repl. 1977). That instruction is as follows:

> A person acts knowingly with respect to his conduct or the attendant circumstances when he is aware that his conduct is of that nature or that such circumstances exist. A person acts knowingly with respect to a result of his conduct when he is aware that it is practically certain that his conduct will cause such a result.

The State argues this was error, not only because of the content of the instruction, but because this definition of "knowingly" is to be used only in connection with the criminal code, Ark. Stat. Ann. § 41-203 (Repl. 1977). Instead, the State offered this instruction:

> The Defendant is charged with knowingly selling an obscene film. The State must prove beyond a reasonable doubt that the Defendant had knowledge of the film in issue. It is not necessary that Defendant be shown to have actually seen the film, but only that the Defendant knew the nature and character of the film. It does not matter that the Defendant did not believe the film was obscene. If the Defendant knew the nature and character of the film, *that is, knew that it was sexually explicit and contained descriptions or depictions of sexual conduct,* then the requirement of knowledge would be satisfied. [Emphasis added.]

This instruction was improper because the emphasized language could be misleading to a jury. It might leave the implication with the jury that the matter would not have to be obscene.

The State offered another instruction as an alternative instruction based on knowledge as defined in Ark. Stat. Ann. § 41-3581(g). That instruction, taken almost *verbatim* from the statute, would have been the proper instruction to be

given by the court. The reason it should have been given is because this definition of "knowledge" was to be applied to prosecutions for violation of Ark. Stat. Ann. § 41-3578.

This was a pre-criminal code prosecution and since there could be others for this same offense, we have attempted to clarify the situation for the correct and uniform administration of criminal law.

Reversed and dismissed.

We agree. HARRIS, C.J., and FOGLEMAN and HOLT, JJ.

Josephine Louise LADD *v.* Lon H. LADD, Sr.

78-142 576 S.W. 2d 178

February 5, 1979

Bass Trumbo of *Kincaid, Horne & Trumbo,* for appellant.

Charles Hanks and *Thomas Pearson, Sr.,* of *Pearson & Pearson,* for appellee.

PER CURIAM

Our attention has been called to deficiencies in the ab-

stracting of the record in this case, which have arisen because of a misunderstanding of the responsibility for abstracting certain portions of the record which appear to be pertinent to a de novo review in this chancery case. The abstract is not flagrantly deficient and affirmance for noncompliance with the rule would be unduly harsh. Appellant's attorneys are allowed 30 days within which to file a substituted abstract and brief pursuant to Rule 9 (e) (2) of the Rules of the Supreme Court, which shall include, but not necessarily be limited to, an abstract of any and all agreements between the parties which are pertinent to trial de novo on appeal. Appellee is allowed 21 days within which to revise or supplement his brief. The expense of the substituted brief of appellant and of any revision or supplement to appellee's brief made necessary by the substituted abstract and brief shall be borne by appellant's attorneys. When these briefs have been filed, the case will be set for oral argument in banc.

Ardia V. McCREE *v.* STATE of Arkansas

CR 78-227

Motion for Rule on Clerk granted February 5, 1979.

PER CRUIAM. **Motion for Rule on Clerk to lodge transcript is granted.**

JOHN A. FOGLEMAN, **Justice, concurs.**

DARRELL HICKMAN, **Justice, dissents.**

JOHN A. FOGLEMAN, Justice, concurring. I join in the granting of this motion solely because appellant has been sentenced to life imprisonment without parole.

I am authorized to state that the Chief Justice joins in this opinion.

DARRELL HICKMAN, Justice, dissenting. The majority granted a rule on the clerk in this case. We routinely review numerous motions weekly and ordinarily grant or deny them without issuing a written opinion. Usually it is a case of clearly being a matter of merit or no merit.

I feel compelled in this case to voice a dissent consistent with my position in the case of *Harkness* v. *State*, 264 Ark. 561, 572 S.W. 2d 835 (1978). In that case the majority permitted the record to be filed, which was tendered late, and in my opinion was not subject to being lodged because it was a violation of Rules of Crim Proc., Rule 36.9 (Repl. 1977).

That rule reads:

> . . . The Supreme Court may act upon and decide a case in which the notice of appeal was not given or the transcript of the trial record was not filed in the time prescribed, when a good reason for the omission is shown by affidavit. . . .

The majority in the *Harkness* case alluded to the fact that allegations had been made in the motion which were not denied by the state. By implication, I suppose, the majority was saying that our rule had not been violated because a "good reason" was given for failing to lodge the record. I stated my objections, emphasizing mainly that our rule was a good and proper rule and that rather than circumvent it, if necessary, it should be amended.

The decision in this case clearly flies in the face of Rule 36.9. The motion for the rule on the clerk filed by the retained attorney for this criminal defendant recites:

> That due to the length of the trial record and the heavy case load of the court reporter, an extension of time to lodge was not filed.

This is not a reason which could be considered good cause for failing to file a transcript on time. There is no explanation whatsoever why counsel did not seek an extension

of time in order to have the record prepared.

Presumably the majority acts as it does because this case involves a sentence of life without parole. Such action is admirable but still ignores and evades the problem. Notice of appeal was filed June 12, 1978. The record was tendered November 7, 1978, 58 days late. According to our rule such a record cannot be lodged.

There should be a means of accountability of counsel who fail to comply with our rules. I might add that an attorney has an obligation to his client to comply with our rules because a timely appeal no doubt inures to the benefit of the criminal defendant anxiously awaiting the outcome of the appeal.

At least we owe it to the bar to repeal the rule because obviously we are not going to enforce it.

Noah SIMMONS a/k/a Noah
Hancock SIMMONS Jr. *v.* STATE of Arkansas

CR 78-173 578 S.W. 2d 12

Substituted opinion delivered March 5, 1979
(Division II)

[redacted]

John W. Achor, Public Defender, for appellant.

Bill Clinton, Atty. Gen., by: *Joyce Williams Warren,* Asst. Atty. Gen., for appellee.

JOHN A. FOGLEMAN, Justice. Appellant filed a motion for the withdrawal of his plea of guilty to a charge of breaking and entering. The circuit court denied the motion without a hearing. Appellant contends that the court erred in summarily denying the motion without a hearing. We disagree and affirm.

At the outset, appellant argues that the court should have considered the motion under Rule 37.3(a), Arkansas Rules of Criminal Procedure, and made written findings specifying those parts of the files or records relied upon to arrive at a decision that they show conclusively that the petitioner was not entitled to relief. Although petitioner labelled his pleading as "Motion to Withdraw Plea of Guilty" and specifically relied upon Rule 26, Arkansas Rules of Criminal Procedure, appellant is correct in his contention.

We have held that a motion to withdraw a guilty plea must necessarily be made under Rule 37, if it is filed after the sentence has been carried into execution. *Shipman* v. *State,* 261 Ark. 559, 550 S.W. 2d 424.

It is true, as appellant points out, that Rule 37.3 (a) requires that, if the motion and the files and records show conclusively that the petitioner is entitled to no relief, the trial court shall make written findings to that effect, specifying any parts of the files and records that are relied upon to sustain the court's findings. We have held that the procedure requiring written findings should be followed in all cases when an evidentiary hearing is held (*Orman* v. *Bishop,* 243 Ark. 609, 420 S.W. 2d 908), and that the procedure is mandatory in such cases. *Fuller* v. *State,* 256 Ark. 133, 505 S.W. 2d 755. The obvious reason for making this requirement mandatory in cases where the judge is a trier of facts is that he determines the credibility of witnesses, resolves contradictions and conflicts in the testimony, and draws inferences from, and weighs, it.[1]

Although we have reversed a judgment denying an evidentiary hearing where there had been a guilty plea in *Robinson & Williams* v. *State,* 264 Ark. 186, 569 S.W. 2d 662, the reversal was not based on this ground alone. Our problem there was that the record filed in this court was so scant, we could not understand how the trial court could determine that the motion was without merit. Even in *McIntyre* v. *State,* 242 Ark. 229, 412 S.W. 2d 826, where we held that the appellant was entitled to a new trial on his motion for post-conviction relief because appellant had entered a plea of guilty without the assistance of counsel, the reversal of the trial court's denial of the motion was not based on the failure of the judge to make the required written finding alone. We pointed out this defect, but also pointed out that there was no evidence of record upon which he could have based his finding.

There are numerous cases in which the record before us shows conclusively that the motion or petition for post-

[1]A demonstration is found in *Fuller* v. *State,* supra, and its sequel, *Fuller* v. *State,* 256 Ark. 998, 511 S.W. 2d 474.

conviction relief is without merit and that no evidentiary hearing is required. See, e.g., *Moore* v. *State,* 262 Ark. 27, 553 S.W. 2d 29. In many such cases we have upheld the denial of a hearing on a motion to grant relief where a plea of guilty had been entered, on the basis of a record which showed conclusively that the motion was without merit. See, e.g., *Calhoun* v. *State,* 249 Ark. 978, 462 S.W. 2d 849; *Stone* v. *State,* 254 Ark. 566, 494 S.W. 2d 715; *Stallins* v. *State,* 254 Ark. 137, 491 S.W. 2d 788; *Robertson* v. *State,* 252 Ark. 333, 478 S.W. 2d 878.

Rule 26.1 (a) provides that the court shall allow a defendant to withdraw his plea of guilty upon a timely motion and proof to the court that withdrawal is necessary to correct a manifest injustice. Appellant alleged that the plea, entered on October 27, 1976, was the result of a savage beating administered to him by two "county sheriffs" on October 18, 1976, and that he had entered the plea in order to avoid further harassment and violent treatment in the jail in which he was being held.

The trial court's order was made upon a finding that the motion was without merit, based upon the files and records in the case. These files and records sustain the trial court's holding. Withdrawal of a plea of guilty on the ground alleged by appellant required that the defendant prove to the satisfaction of the court that the plea was involuntary. The files in the case included a plea statement signed by appellant, acknowledging that he had read the entire statement, that he understood what his rights were and the questions asked, and his answer to all four questions on the statement was "yes." The following statement appears immediately above his signature in capital letters:

> I KNOW WHAT I AM DOING AND AM VOLUNTARILY PLEADING GUILTY BECAUSE I AM GUILTY AS CHARGED.

One of the four questions was:

> Are you entering your plea of guilty on your own free will and accord without anyone causing you to do so on account of any promises or threats?

The attorney who represented appellant when his plea of guilty was entered had certified the following:

> I have carefully gone over this paper with the accused. To the best of my knowledge he understands all of it and, further, his plea of guilty is consistent with the facts he has related to me and my own investigation of the case.

A record was made of the proceedings when the plea of guilty was entered. The plea was a negotiated plea. During the course of that hearing appellant acknowledged in open court that he had signed the statement and that he understood it. Other questions and answers were:

> THE COURT: Do you understand it?
>
> DEFENDANT SIMMONS: Yes, sir.
>
> THE COURT: Do you have any questions about it?
>
> DEFENDANT SIMMONS: No, sir, none whatsoever.
>
> THE COURT: Are you pleading guilty because you are guilty?
>
> DEFENDANT SIMMONS: Yes, sir.

This record clearly supports a finding that the plea of guilty was not involuntary. See *Moore* v. *State,* supra. It is the duty and responsibility of the trial judge to determine beyond doubt that a plea of guilty is voluntary and, in order to do so, he should inquire of the defendant personally. Rule 24.5, Arkansas Rules of Criminal Procedure; *Clark* v. *State,* 255 Ark. 13, 498 S.W. 2d 657; *Byler* v. *State,* 257 Ark. 15, 513 S.W. 2d 801. The record discloses a substantial, though not technical, compliance with these requirements.

It is essential that pleas of guilty, especially negotiated pleas, have a measure of stability. *Pettigrew* v. *State,* 262 Ark. 359, 556 S.W. 2d 880; *Stone* v. *State,* supra. The failure of the trial judge to specifically ask a defendant the precise ques-

tion, "Have any threats or force, or any promises, apart from a plea agreement, been used to induce your plea of guilty?" does not render the plea and the sentence thereon subject to collateral attack for constitutional infirmity. *Clark* v. *State,* supra. Under Rule 37, the sentence imposed upon the guilty plea was not imposed in violation of the constitution and laws of the United States or of this state, and was not in excess of the maximum authorized by law. The court imposing the sentence was not without jurisdiction. Unless the sentence was subject to collateral attack for constitutional infirmity, i.e., for being based on an involuntary plea of guilty, appellant is not entitled to relief. Rule 37 was designed to provide a method of determining whether the constitutional rights of the defendant were violated or his sentence was imposed in violation of statutes or was otherwise subject to collateral attack. *Thacker* v. *Urban,* 246 Ark. 956, 440 S.W. 2d 553. As we once said, the rule was not designed to give a person convicted of a crime a holiday from the penitentiary for a hearing, but was provided for the protection of his constitutional rights. *Evans* v. *State,* 242 Ark. 92, 411 S.W. 2d 860. See also, *Credit* v. *State,* 247 Ark. 424, 445 S.W. 2d 718.

It is significant that appellant had the advice of counsel in the plea bargaining and in the entry of his plea, because he can attack it as involuntary only by showing that the advice he received from counsel was not within the range of competence demanded of attorneys in criminal cases. *Horn* v. *State,* 254 Ark. 651, 495 S.W. 2d 152. See also, *Treat* v. *State,* 253 Ark. 367, 486 S.W. 2d 16. But he made no such allegation, and the court was limited to the allegations of appellant's petition in determining his right to a hearing. *Stanley* v. *State,* 258 Ark. 480, 527 S.W. 2d 613. It is also significant that the plea statement is similar to that set out in the opinion in *Horn* v. *State,* supra. But what is most significant is the fact that in spite of the trial judge's inquiries and appellant's personal participation in answering them, appellant never mentioned any coercion, threats or physical abuse, when he had ample opportunity to do so. *Robertson* v. *State,* 252 Ark. 333, 478 S.W. 2d 878; *Nelson* v. *State,* 252 Ark. 451, 479 S.W. 2d 556. Appellant has not given any reason for not having disclosed to the court the beating he now alleges was administered and its relationship to his plea.

What we said in *Stone* and in *Robertson* is applicable here. In *Stone* we said:

> *** If the allegations in the case at bar are sufficient to require an evidentiary hearing, in the face of the record made when the plea was entered, then it is evident that every plea of guilty, without exception, is subject to re-examination at the whim of the prisoner. The trial court was right in refusing to order a hearing.

And in *Robertson* we closed by stating:

> According to the record we have summarized, this appellant was given every opportunity to speak out, either in person or by employed counsel, and to raise any possible defense he had to the charges. If he had any such defenses it was incumbent that he raise them. In the face of the record made by the trial court and here summarized, appellant is not entitled at this late date to collaterally attack his sentence. Since appellant was in no position to attack the judgment, his presence naturally was not needed.

The record of the proceedings on appellant's plea shows so conclusively that he is not now entitled to a hearing that a remand of this case to the trial court so it could point out the record already before us as the basis for its finding would constitute such an inexcusably extravagant waste of judicial resources, that we decline to order it.

The judgment is affirmed.

We agree. HARRIS, C.J., and HOLT and HICKMAN, JJ.

Charles O. WEST *v.* STATE of Arkansas

CR 78-176 576 S.W. 2d 718

Opinion delivered February 12, 1979
(Division II)

Vincent E. Skillman, Jr., of *Skillman & Durrett,* for appellant.

Bill Clinton, Atty. Gen., by: *Jesse L. Kearney,* Asst. Atty. Gen., for appellee.

FRANK HOLT, Justice. The jury found appellant guilty of manslaughter and his punishment was assessed at 5 years in the Arkansas Department of Correction. Appellant contends for reversal that the trial court erred in permitting the prosecuting attorney to inquire of a defense witness about the character of the appellant.

Cross-examination of this defense witness reflects:

Prosecutor: Q. Have you ever known him to be involved in any violence?

Defense Atty: Your Honor, I object to that.

Prosecutor: Now, your Honor, Mr. Wilson has put the character of the deceased in issue, and I think it is only fair at this point that I question any witness as to the character of the defendant as far as his reputation for quiet and peacefulness, or his reputation for violence.

The court: Objection overruled.

Upon further cross-examination, the state was permitted to show that appellant had shot and killed an individual about 4 years previously although the record reflects he was exonerated. Appellant argues this was prejudicial error since his witness never testified as to his character and reputation.

However, the state argues that the appellant's character, as a peaceful man, had indirectly been put in issue when this and other witnesses testified that appellant had attempted to avoid confrontations or altercations whenever the decedent made threats against him. Appellee asserts the permitted cross-examination was pertinent to the issue of appellant's peaceable nature or non-aggression. Therefore, the prosecution was entitled to rebut it by the recited cross-examination, citing Ark. Stat. Ann. § 28-1001, Rule 404 (a) (1) (Supp. 1977).

Rule 404 (a) provides:

Evidence of a person's character or a trait of his character is not admissible for the purpose of proving that he acted in conformity therewith on a particular occasion, except:

(1) Evidence of a pertinent trait of his character offered by an accused, or by the prosecution to rebut the same: . . . .

This rule of evidence is an identical counterpart of the Federal Rules of Procedure. We hold the cross-examination here is not within the scope and meaning of this rule of evidence since the appellant did not place his character in issue. See *U.S.* v. *Bledsoe,* 531 F. 2d 888 (8th Cir. 1976), and 2 Weinstein's Evidence, Rules 404[05], p. 404-32, and 404[01], p. 404-11.

Appellee also justifies this cross-examination by arguing that appellant's peaceful character was an essential element to his plea of self-defense (non-aggression) and, accordingly, proof could be adduced on cross-examination as to specific instances of his conduct under Ark. Stat. Ann. § 28-1001, Rule 405 (b), which reads:

> In cases in which character or a trait of character of a person is an essential element of a charge, claim, or defense, proof may also be made of specific instances of his conduct.

To be an "essential element," "[t]he trait of character must be an operative fact which under substantive law determines the rights and liabilities of the parties." *McClellan* v. *State,* 264 Ark. 223, 570 S.W. 2d 278 (1978). Here we do not consider the peaceful nature of appellant to be an essential element of a direct substantive issue.

Pertinent to the issue here is *Owens* v. *State,* 169 Ark. 1188, 278 S.W. 3 (1925), where we said:

> Appellant offered testimony tending to show the bad reputation of deceased, but did not put his own reputation in issue. It was not proper, therefore, for the State to offer original and affirmative testimony tending to show appellant's reputation . . . . The prosecuting attorney did ask a witness for appellant what appellant's reputation was. The objection to this question should have been sustained, as appellant had not put his reputation in issue . . . .

Here the appellant's character and reputation were never placed in issue. We cannot say with certainty that the cross-

examination of his defense witnesses as to appellant's character and reputation did not have a prejudicial impact upon the jury.

We have carefully considered appellant's other contentions and find no merit in them. For the error indicated, the judgment is reversed and the cause remanded.

Reversed and remanded.

We agree: HARRIS, C.J., and FOGLEMAN and HICKMAN, JJ.

George A. LIPOVICH *v.* STATE of Arkansas

CR 78-183 576 S.W. 2d 720

Opinion delivered February 12, 1979
(Division II)

Bill Webster, for appellant.

Bill Clinton, Atty. Gen., by: *Joyce Williams Warren,* Asst. Atty. Gen., for appellee.

FRANK HOLT, Justice. Appellant was convicted by a jury of the offense of theft by receiving. Ark. Stat. Ann. § 41-2206 (Repl. 1977). His punishment was assessed at 10 years' imprisonment in the Department of Correction and a fine of $5,000. The appellant contends the trial court erred in denying his motion to suppress evidence secured from a search of a truck. He argues that the warrantless search of a U-Haul truck which he had rented was in violation of Ark. Stat. Ann. Vol. 4A, Rules of Crim. Proc., Rule 14.1 (Repl. 1977), because at the time of the search, there existed neither probable cause that the vehicle contained stolen articles nor exigent circumstances to justify the warrantless search. We hold the trial court correctly denied the motion to suppress.

Appellant had rented a U-Haul truck for overnight. Six days later the police were notified that a vehicle was causing a traffic hazard on the highway. Upon investigation they found the unoccupied truck parked about 2 feet off the pavement and apparently abandoned. They determined the identity of the driver and the U-Haul dealer or owner. The dealer and another representative of the U-Haul Company agreed to remove the truck and accompanied the police to the truck's location where the sheriff and his deputies had been watching the truck. The U-Haul representatives identified the truck as their property and considered it stolen since its return was so long overdue. They refused to move it until it was opened and its contents checked since it could contain something hazardous to them or motorists. The police refused to open it since they had no authority. The owners then took the position they had authority pursuant to the rental contract and opened the truck by breaking the lock. The police in no way participated in the initial intrusion which revealed two organs, a piano and four benches. The police observed the articles, then entered the truck, inventoried or noted the serial

numbers of the items and impounded the vehicle and its contents. By this time they had learned that appellant was wanted by other authorities. Shortly thereafter, the appellant, who had left to get gasoline for the truck, arrived and was arrested on the outstanding charges. It was learned later that the items in the truck were stolen property and appellant was then charged with theft by receiving.

A warrantless inventory search of an abandoned vehicle is reasonable under the Fourth Amendment, in the absence of probable cause and exigent circumstances, as part of the police's "community caretaking functions" where the process is aimed at securing or protecting the vehicle, its contents and the public, rather than detecting or acquiring evidence relating to a criminal violation. *South Dakota* v. *Opperman,* 428 U.S. 364 (1976); *Cady* v. *Dumbrowski,* 413 U.S. 433 (1973); *Harris* v. *United States,* 390 U.S. 234 (1968); and *Perez* v. *State,* 260 Ark. 438, 541 S.W. 2d 915 (1976). Here the actions of the officers were reasonable and followed sound police practices. They were dealing with a vehicle reported as stolen, found abandoned and a hazard on a public highway.

A motion to suppress evidence should only be granted under Rule 16.2 (e) if the court finds that a substantial violation of our rules has occurred or if the federal or state constitutions otherwise require suppression. *Pridgeon* v. *State,* 262 Ark. 428, 559 S.W. 2d 4 (1977). Here we find no substantial violation of our rules nor infringement upon any constitutional rights.

Affirmed.

We agree: HARRIS, C.J., and FOGLEMAN and HICKMAN, JJ.

Joseph H. WESTON *v.* STATE of Arkansas

CR 77-238 576 S.W. 2d 705

Opinion delivered February 12, 1979
(In Banc)

Appellant, *pro se.*

Bill Clinton, Atty. Gen., by: *James E. Smedley,* Asst. Atty. Gen., for appellee.

STEPHEN A. MATTHEWS, Special Chief Justice. Appellant seeks relief in this Court from an indictment returned against him by an Independence County Grand Jury charging him with four counts of perjury. A brief statement of the factual background follows.

Appellant, the editor and publisher of a Sharp County newspaper, published an article in the September 19, 1977 issue of his paper alleging the existence of a prostitution ring, and other vice operations and narcotics traffic in Independence County. An Independence County Grand Jury investigated the matter and concluded its activity on November 19, 1977 by returning a four-count indictment for perjury against appellant, arising out of his testimony before the Grand Jury.

Throughout the course of the Grand Jury investigation, appellant filed numerous pleadings in the Independence Circuit Court, including a Motion to Quash the Grand Jury on November 3, 1977. The thrust of this motion was that the Grand Jury was a tool of corrupt law enforcement officials and judges who had set out on a course designed to harrass and intimidate appellant and to drive him and his newspaper out of business.

Because of the pendency of a lawsuit in Lawrence County in which appellant and Circuit Judge Andrew Ponder were adversary parties, Judge Ponder recused himself, and on October 25, 1977, Chancellor Robert Dudley of Pocahontas was

assigned to

> ". . . hear All Matters Pertaining to Joseph A. Weston's Appearance Before the Independence County Grand Jury. This assignment includes all ancillary proceedings which may arise in connection with said cause and proceedings subsequent thereto."

This assignment was made by the Chief Justice of this Court pursuant to the authority of Arkansas Statute 22-142.

Appellant asserts in his Brief and in oral argument that on November 18, 1977, Judge Dudley "abandoned" the case and that Judge Ponder erroneously resumed jurisdiction and on November 19, took certain improper action, including granting immunity to a witness named Patterson and "forcing" Patterson to testify against appellant, accepting the report of the Grand Jury, ordering the arrest of appellant, and fixing the amount of appellant's bail bond. One of the troubles with appellant's contentions is that the official record before this Court does not show that Judge Ponder took this action. Only the statements of appellant in his brief and his various pleadings, and a copy of a newspaper clipping appellant lodged with this Court, indicate such action by Judge Ponder.

It is virtually impossible for us to determine the relief appellant seeks. In his Reply Brief he says:

> "An examination of my Briefs and pleadings will show that my appeal is NOT directly based upon the indictments themselves, per se.
>
> "At the risk of being rebuked for violation of various rules of court procedure, I am directly appealing the erroneous conduct of two wilful judges and a crooked prosecuting attorney. The grand jury was only the willing and ignorant tool and these two judges — and their courts — and of Blankenship."

In another place in his Reply Brief, appellant says he seeks from this Court:

"An order to quash en toto all activities of the corrupt Independence County Grand Jury from October 18, 1977 to November 19, 1977, inclusive.

"A reversal of all orders of all judges, written or otherwise, oral or otherwise, entered in the court record or not entered in the court record, issued or acted upon in open court or in secret sessions, or otherwise acted upon, lawful or unlawful, that were issued in any way in connection with or in association with activities of the Grand Jury during its entire term."

Apparently appellant hopes this Court will fashion some unspecified form of relief for him, delivering him from, and rebuking, those whom he counts as his oppressors.

It should be noted that appellant has not moved that the indictment against him be quashed. The nearest he has come to such a request is his motion to quash the Grand Jury panel filed on November 3, 1977 and denied by Judge Dudley on November 4. This took place two weeks before the indictment was returned against appellant.

We decline, at this stage of the proceedings, to disturb the indictments against appellant for three reasons.

First, there is no appealable order before us. See *Alexander* v. *State,* 260 Ark. 785, 545 S.W. 2d 606 (1976); and *State* v. *Langstaff,* 231 Ark. 736, 332 S.W. 2d 614 (1960). Appellant has been indicted, but he has not been convicted of any offense. We have been cited to no authority holding that a right of appeal exists from an indictment by a Grand Jury. Rule 36.1 of the Rules of Criminal Procedure provides in part:

"Any person convicted of a misdemeanor or a felony by virtue of a trial in any circuit court of this State has the right to appeal to the Supreme Court of Arkansas."

This provision is practically identical to Ark. Stat. 43-2701.

Because of the absence of a final order of the trial court settling some issue against appellant, or finding him guilty of some offense, an appeal to this court will not lie at this stage of the proceeding.

Second, we are committed to the rule that we will not review matters not in the record. *Harvey* v. *Castleberry,* 258 Ark. 722, 529 S.W. 2d 324 (1975); *Poindexter* v. *Cole,* 239 Ark. 471, 389 S.W. 2d 869 (1965); *Becker* v. *Rogers,* 235 Ark. 603, 361 S.W. 2d 262 (1962); and *Jernigan* v. *Pfeifer Brothers,* 177 Ark. 145, 5 S.W. 2d 941 (1928). In *Becker,* we said:

> "At the outset, let it be mentioned that the briefs contain, and make reference to, many matters that do not appear in the record. Appellee's brief, in large measure, is devoted to extraneous material, and appellants, in their reply brief, to some extent follow the same practice. The fact that we do not consider statements beyond the record is so axiomatic as to require no citation of authority."

The "record" appellant presents us pertaining to the alleged actions of Judge Ponder consists of a newspaper account of appellant's indictment and appellant's own assertions in his brief.

Nor will we afford relief which is not first sought in the trial court and denied. *Bond* v. *State,* 230 Ark. 962, 328 S.W. 2d 369 (1959); *Hicks* v. *State,* 225 Ark. 916, 287 S.W. 2d 12 (1956); and *Yarbrough* v. *State,* 206 Ark. 549, 176 S.W. 2d 702 (1944).

The only relief appellant sought in the Independence Circuit Court which he now seeks here, as far as we can ascertain, is that the Independence County Grand Jury be quashed from its inception. The *record* filed in this Court, disregarding appellant's assertions and the newspaper account, which cannot be treated as a "record," does not estabish any basis for the granting of such relief.

Third, appellant's brief is in flagrant disregard of Rule 9

of this Court. His statement of the case, instead of being a concise statement of the case, without argument, as required by Rule 9 (b) is a highly partisan account of what he believes to be injustices perpetrated upon him by those whom he perceives to be his enemies. More importantly, the abstract is in no sense an impartial condensation of the record, without comment or emphasis, as required by Rule 9(d).

Rule 9 does not exist as a snare for unwitting litigants or for those who appear before the Court, pro se. In fact, we are inclined to be more lenient in invoking Rule 9 in the cases or persons appearing pro se than in other cases. But the jurisdiction of this Court is limited to appellate jurisdiction only. Arkansas Constitution, Article 7, Section 4; Ark. Stat. 27-2101. We do not try anew all litigation or come to the assistance of appellants, pro se or otherwise, by combing the record and re-writing their pleadings for them and re-shaping their prayers into some form of relief which this Court may grant. We look only to see if the record shows that the trial court committed an error prejudicial to the appealing party. To aid in a speedy determination of appeals we, along with most other appellate courts, have promulgated Rule 9(d) placing upon appellants the burden of furnishing an abstract of the record consisting of an impartial condensation, without comment or emphasis, of only such material parts of the pleadings, proceedings, facts, documents and other matters in the record as are necessary to an understanding of all questions presented to this Court for decision.

Our refusal to afford appellant relief at this stage of the proceedings is based on all or any of the three reasons set out above, i.e., no appealable order is before us, the record does not support appellant's position and there has been no compliance with Rule 9.

We do not hold that appellant is precluded from questioning the validity of the indictment which the Grand Jury returned against him. Nothing in this opinion prejudices a proper attack on the indictment. If appellant is tried and convicted and then chooses to attack the indictment by pleadings presented first in the trial court, basing his attack on

matters reflected in the record, certainly the validity of the indictments may be examined. In fact, we take this occasion to observe that if the regular presiding Circuit Judge of Independence County, who had recused himself from taking any part in the Grand Jury proceedings involving appellant, did in fact resume jurisdiction over matters involving appellant and take discretionary action, it may well be that the indictment cannot stand if it is questioned on an appeal from a conviction. *Bolden* v. *State,* 262 Ark. 718, 561 S.W. 2d 281 (1978). If no stenographic record of the proceedings was made, our procedure permits the omission to be supplied by a bystander's bill of exceptions. *Graham* v. *State,* 264 Ark. 489, 572 S.W. 2d 385 (1978).

Affirmed.

Special Justice RICHARD H. WOOTTON joins in the opinion.

HARRIS, C.J., and FOGLEMAN, J., not participating.

PURTLE, J., dissents.

JOHN I. PURTLE, Justice, dissenting. The appellant, Joseph H. Weston, formerly published a newspaper known as the Sharp Citizen. I understand the word Sharp is used in honor of or to designate the county rather than in its ordinary meaning. There is little doubt that appellant had the ability to arouse the ire of public officials and other citizens to a degree seldom equalled by any editor or publisher. Nevertheless, he was producing a newspaper which was entitled to all the rights and protection enjoyed by other media vehicles pursuant to the state and federal Constitutions. Although his publication was not in conformity with our standard publications, it nevertheless was a "freedom of the press" product.

Ark. Const. Art. 2, § 6, states:

> Liberty of the press and of speech — Libel. — The liberty of the press shall forever remain inviolate. The free communication of thoughts and opinions is one of the invaluable rights of man; and all persons may freely write and publish their sentiments on all subjects, being responsible for the abuse of such right. In all criminal prosecutions for libel the truth may be given in evidence to the jury; and, if it shall appear to the jury that the matter charged as libelous is true, and was published with good motives and for justifiable ends, the party charged shall be acquitted.

This provision has been in full force and effect since 1874, thereby giving the distinct impression that the people of Arkansas are satisfied with it. This Article has built into it a measure of protection to the innocent people and proper restraints against abuse of the press. It provides all persons may freely write and publish their sentiments on all subjects, *being responsible for the abuse of such right*. It further provides that the truth of any such matters so published shall be a defense to any action for libel. I know of no instance where a judgment has been rendered against appellant on account of articles published by him.

Appellant is not a lawyer, and there is no question but that this Court would be justified under the normal interpretation of our rules in dismissing his appeal. However, under unusual circumstances, the Court has waived the rules. In all probability, we are going to review this case again. Nevertheless, we ought to be able to rule on it with some degree of finality the next time it comes. We will be unable to do so unless we, at least, give some guidelines to be followed before it is again before us.

It can be determined from appellant's brief that he is clearly urging he has been punished for exercising his rights as guaranteed by the Constitution. We are also able to determine that some of the events which occurred are not in the record, nor will they be in the record when it is next before us. If one judge was relieved of all responsibilities of the Joseph H. Weston matter, and another undertook to handle these same matters, then it was not proper for the judge so relieved

to assume jurisdiction again without proper authority. It is alleged by appellant, and not disputed by the state, that the recused judge happened to be in Independence County on Saturday, November 19, 1977, when the Grand Jury returned the indictments against the appellant. The recused judge granted immunity to a witness before the Grand Jury, denied a motion made by appellant, met with the Grand Jury, and accepted their report. Only the judge having jurisdiction of the case should have performed these acts, if in fact they were performed, and the record, such as it is, appears to establish these facts. When the case arrives here again, this matter will still be unresolved because it is not "officially" in the record and we will then be compelled to send it back.

Essentially, appellant is asking this Court to dismiss the indictments. The state admits an appeal will lie from the denial of a motion to dismiss an indictment. If this is the law, then we really have an appealable order before us even though the words are not expressed in those exact terms. There is no question that appellant raised every issue possible at every stage of the proceedings. His ideas are not presented for the first time on appeal.

The minutes of the Grand Jury have apparently never been furnished to appellant. If the prosecutor was in fact directing the whole proceedings and was present during the deliberation of the Grand Jury, it is a reversible error. Some parts of the record were found after this Court entered a mandate to the lower court. The record is still technically incomplete.

Appellant earnestly contends throughout every stage of the proceedings that he is being persecuted for the exercise of his freedom of speech. If only a portion of his allegations are true, he has merit to his arguments. Our Bill of Rights was instituted to end the restraints which at one time had been imposed upon the people of England. These rights have, no doubt, been a mighty force in guiding this nation to its present degree of greatness among the nations of the world and remains a cornerstone or foundation to our Republic and its democratic processes. There are times when we feel these privileges and rights are abused, but such thoughts are usual-

ly of a short duration. Although appellant may have been viewed as a pusillanimous polecat by some people, he may have been nevertheless exercising his rights as guaranteed by the Constitution.

In view of the state of the record and all of the implications and allegations, I would reverse and return this case to the lower court for a fresh start from the beginning, if there is still a desire to prosecute the appellant.

Willie RICHMOND *v.* STATE of Arkansas

CR 79-10 — S.W. 2d —

Motion for Rule on Clerk to lodge transcript granted February 12, 1979

PER CURIAM. Motion for Rule on Clerk to lodge transcript is granted.

JOHN A. FOGLEMAN, Justice, concurring. I vote to grant this motion only because petitioner has been sentenced to two sentences for life imprisonment and for a term of 20 years, all to run consecutively.

I am authorized to state that the Chief Justice joins in this opinion.

DARRELL HICKMAN, Justice, dissenting. Consistent with the position that I took in *Harkness* v. *State,* 264 Ark. 561, 572 S.W. 2d 835 and *McCree* v. *State,* 265 Ark. 46, — S.W. 2d —. I dissent to granting the rule on the clerk in this case.

There was no good cause shown for the record being tendered to our clerk three months late.

The young attorney for Willie Richmond stated that this was his first appeal and that he did not know he had only ninety days to lodge the record; he thought that he had seven

months. It is my opinion this was not for good cause. We should not presume incompetence of counsel without a hearing of some sort and I would deny the motion and let the matter take its natural course.

THE CORNING BANK *v.*
THE BANK OF RECTOR

78-236 576 S.W. 2d 949

Opinion delivered February 19, 1979
(Division II)

[redacted]

Scott Manatt, for appellant.

C. Joseph Calvin, for appellee.

JOHN A. FOGLEMAN, Justice. Appellant has failed to demonstrate error in the court's holding that the lien of a real estate mortgage given by Gerayne Poole and his wife to appellee, The Bank of Rector, is prior and superior to an earlier security agreement between the Pooles and appellant, The Corning Bank. Consequently, we affirm the decree.

Appellee contends that the decree should be affirmed because of appellant's failure to abstract the record in compliance with Rule 9, Rules of the Supreme Court. We are handicapped by the manner in which appellant has abstracted the record in this case. It is not such a flagrant violation of Rule 9 as to require an affirmance under that rule, particularly in view of the fact that appellee has supplemented the record to supply some of the deficiencies. None of the pleadings are abstracted. Some of the security instruments (particularly those in favor of appellee) were incompletely abstracted by appellant, without specific transcript references being given. Appellant did place a photocopy of one side of its security agreement in a pocket of its brief, in violation of Rules 8, 9 (d) and 11 of the rules of this court, if it was intended as a substitute for abstracting. See, Per Curiam Order, Re: Attaching Exhibits to Abstract of the Record, February 13, 1978, 262 Ark. 911; *Lewis* v. *Miller,* 263 Ark. 154, 563 S.W. 2d 435. Excerpts from appellant's security agreement are scattered throughout appellant's abstract and brief (also without transcript references), and some of them are merely footnotes to appellant's argument. The decree entered was not abstracted, but appellee has abstracted the opinion of the chancellor to the extent necessary for us to understand the court's holding. Some reference is made by appellant to estimates showing the purchase price of the property involved. These estimates are not abstracted. Appellant says they were furnished to it prior to its disbursement of the funds secured by its security agreement. No evidence to support this statement is abstracted. We will treat the matter on the merits, but it must be remembered that the record on appeal is that which is abstracted. *Williams* v. *Owen,* 247 Ark. 42, 444 S.W. 2d 237.

The controversy involves grain bins which, at least at the time of the trial, were located on real estate on which The Bank of Rector held a mortgage dated May 17, 1976, and properly filed for record on the same day. Appellant contends that its financing statement and security agreement (a single instrument) dated March 17, 1976, covering the bins, made its security interest superior to the lien of the mortgage to appellee. The financing statement and security agreement contained no description of any real property and no indica-

tion whether the property described was located on, or to be located on, any real estate. This statement was filed in the office of the Circuit Court Clerk of Clay County on March 19, 1976, where financing statements are filed only by the name of the debtor. Since there was no land description in the instrument, it was not noted or recorded in any deed, mortgage, release deed or miscellaneous record book in that office. It was filed in the Uniform Commercial Code file.

The financing statement and security agreement upon which appellant relies refers to the property described as goods. The instrument, according to appellant, contains a covenant that the Pooles would not sell, exchange, lease or otherwise dispose of the "goods" or any of the debtor's rights therein, without the written consent of appellant. It also contained the following clauses:

> Debtor, upon demand by secured party, shall assemble the goods and make them available to secured party at a place reasonably convenient to both parties.
>
> Until default hereunder, debtor shall be entitled to possession of the goods and to use and enjoy the same.

There was also a provision that the property would be retained at the place of business of Greenway Elevator Co. at P. O. Box 94, Greenway, Arkansas.

The critical issues in this case, according to appellant, are whether the property involved is a fixture and whether a "fixture filing" was required to preserve the priority of appellant's security interest. The chancellor held that each of the grain bins consisted of a floor, roof and sides and that they constituted buildings, were "permanent property" and a part of the real estate. He also held that there was nothing on file to put appellee on notice of appellant's security interest. We cannot say that the chancellor erred.

Under the Uniform Commercial Code, goods are fixtures when they become so related to the real estate that an interest in them arises under real estate law. Ark. Stat. Ann. § 85-9-313 (1) (a) (Supp. 1977). Unless the facts are un-

disputed and reasonable minds could only reach one conclusion, the question whether particular property constitutes a fixture is sometimes one of fact only, but usually is a mixed question of law and fact. See, *Thos. Cox & Sons Machinery Co.* v. *Blue Trap Rock Co.,* 159 Ark. 209, 251 S.W. 699; *Taylor* v. *Walker,* 127 Ark. 541, 192 S.W. 895; *British & American Mortgage Co.* v. *Scott,* 70 Ark. 230, 65 S.W. 936; 35 Am. Jur. 2d 759, Fixtures, § 75; 36A CJS 738, Fixtures, § 64.

In reviewing the evidence on this question, we are aided in our understanding of it by photographs reproduced by appellee. W. J. Hurst, whose occupation is selling and erecting grain bins similar to those involved, had inspected these bins. He appears to have been the only witness on the question of whether the bins were fixtures. According to him: a bin, the size of these, would require a "12-foot deep footing" and four to six inches of concrete over the balance of the surface; the bins, which have dimensions of 22 feet by 21 feet and a capacity of 7,000 bushels, are constructed on this foundation from side sheets 34 inches wide and 79 inches long; they are attached to the foundation by steel bolts and nuts; it would take three days to construct these bins; a bin can be removed from the foundation by removing the nuts from the bolts with a crescent wrench and the motor attached to the bins can be removed in the same way; the motor and a three-phase fan are detachable and can be changed readily; the bins can be removed and put in a truck and hauled away (leaving only a concrete slab with bolts sticking up) but it is not practical to do so, and special equipment, similar to house moving equipment, would be required; the bins could not be moved without being completely disassembled; a house could be removed "by the same token;" and the bins can be "taken down in reverse order in which they are erected." Hurst knew of two bins that had been moved, but they were on sand and wired to the ground, not set in concrete.

In *Ozark* v. *Adams,* 73 Ark. 227, 83 S.W. 920, we reiterated the basic rules for determining whether an article remains a chattel or becomes a fixture. They are: (1) real or constructive annexation to the realty in question; (2) appropriation or adaptation to the use or purpose of that part of the realty with which it is connected; and (3) the intention

of the party making the annexation to make a permanent accession to the realty, this intention being inferred from the nature of the chattel, the relation and situation of the party making the annexation, the structure and mode of annexation and the purpose for which the annexation has been made. A consideration of the various facts in this case seems to support a finding that the property in question was intended to be a permanent accession to the land and therefore it became a fixture. The person making the annexation was the owner of the realty; the realty was being used as a grain storage facility and the chattels in question were grain storage bins; the bins were assembled and erected on the realty and this installation involved the pouring of a concrete slab with bolts imbedded in it. The inference is strong, where the party attaching the "fixture" is the owner of the soil, that it was intended to become a part of the soil and not a removable fixture, and to overturn it, there must be strong evidence of a contrary intention manifested by some act or circumstance. *Thompson & Co.* v. *Lewis,* 120 Ark. 252, 179 S.W. 343. In the case just cited, emphasis was given to the fact that the machinery involved was attached to the soil in the manner customary for the use of that type of machinery. We do not consider the case of *Cherokee Carpet Mills, Inc.* v. *Manly Jail Works, Inc.,* 257 Ark. 1041, 521 S.W. 2d 528, relied upon by appellant, as materially affecting the rules herein stated, or as being particularly favorable to appellant's position. We simply are unable to say that the finding that the property involved here constituted a fixture is clearly against the preponderance of the evidence.

If we can assume from the record before us that, at the time the security agreement was executed, the bins had not been assembled or placed on the lands described in the mortgage to appellee,[1] the decision in this case turns upon the effect of the filing by appellant as notice to appellee. In this case, we consider Ark. Stat. Ann. § 85-9-313 (Supp. 1977) as controlling.

[1]In its statement of the case appellant states that Gerayne Pool obtained financing to purchase "two grain bins on the property subsequently mortgaged to the Bank of Rector, to-wit, real property, the moneys for the purchase of the grain bins coming from the Corning Bank." No transcript reference is given and none of the abstracted evidence provides this information.

In this connection, we do not consider the fact that appellee's mortgage was taken and recorded in reliance upon a title opinion based upon an abstract which was made prior to the date of the filing of appellant's security agreement. In any event, appellee caused an examination of the records to be made by an abstractor on the day after its mortgage was filed. The issue does not turn upon the information appellee had. It depends upon what a proper search would have disclosed.

The abstractor did not find appellee's security agreement because it was not filed or recorded in the real estate records. The abstractor testified that, if the document had contained a legal description, he would have found it. The only description relied upon by appellant as a land description was the statement that the property would be located at the Greenway Elevator Company at Greenway, Arkansas, which, as we have pointed out, was identified only by a post-office box number. We do not consider this as a sufficient key to identification of real estate to meet Uniform Commercial Code requirements.

The description was sufficient only if it reasonably identified the real estate. Ark. Stat. Ann. § 85-9-110 (Add. 1961). The test is whether the description made possible the identification of the real estate. Commentary, § 85-9-110. See also *Piggott State Bank* v. *Pollard Gin Co.,* 243 Ark. 159, 419 S.W. 2d 120; *People's Bank* v. *Pioneer Food Industries, Inc.,* 253 Ark. 277, 486 S.W. 2d 24. In a financing statement filed as a fixture filing, the description of the real estate must be sufficient to have given constructive notice of a real estate mortgage under the law of this state if it had been included in a mortgage of the real estate described. Ark. Stat. Ann. § 85-9-402 (5). This description did not meet this test. It is true that a real estate mortgage will not be held void for uncertainty, even as to third persons, where the description used in the mortgage furnishes a key whereby one, aided by extrinsic evidence, can ascertain what property is covered. *Caraway Bank* v. *U.S.A.,* 258 Ark. 858, 529 S.W. 2d 351. The name and address of the mortgagor would hardly furnish that key, particularly when the address is a post-office box number. To be sufficient, the description must make reference to something *tangible* by

which the property can be located. *Snyder* v. *Bridewell,* 167 Ark. 8, 267 S.W. 561; *New England Securities Co.* v. *West Helena Consol. Co.,* 177 Ark. 849, 8 S.W. 2d 440. This requirement was not met.

On the basis of the evidence before him, the chancellor was justified in holding that appellant's collateral was goods which were, or were to become, fixtures, so that, in order to establish the priority of its security agreement, a "fixture filing" must have been made in the office where a mortgage on real estate would be filed or recorded, before the interest of a subsequent encumbrancer is placed of record. Ark. Stat. Ann. § 85-9-313 (1) (b), (4) (b). There is no indication that appellant complied or attempted to comply with the requirements for a "fixture filing." There was no recitation in the instrument that it was to be filed for record in the real estate records and it did not contain a description of the real estate sufficient to give constructive notice of a mortgage of the real estate. Ark. Stat. Ann. § 85-9-402 (5) (Supp. 1977). Thus, the circuit clerk was not called upon to index the instrument as he would have if it had been a real estate mortgage. Ark. Stat. Ann. § 85-9-403 (7) (Supp. 1977).

We do not regard appellant's argument that its priority was established under § 85-9-313 (5) as having any merit. That section provides that a security interest, whether or not perfected, has priority over the conflicting interest of an encumbrancer or owner of the real estate where the encumbrancer or owner has consented in writing to the security interest. Appellant takes the position that Poole was both encumbrancer and owner. He was not the encumbrancer. The Bank of Rector was. An encumbrancer is one who holds a burden, charge or lien on property or an estate to the diminution of the value of the fee, but which does not prevent the passing of the fee by conveyance. Webster's New International Dictionary, 2d Ed. See also, Black's Law Dictionary (DeLuxe 4th Ed.), pp. 620, 908. Since The Bank of Rector did not give its consent, appellant did not have priority over that bank's interest as an encumbrancer.

Appellant also contends that a "fixture filing" was not necessary because "trade fixtures" are not actually fixtures as

contemplated by the Uniform Commercial Code. We cannot see how these bins can be classified as "trade fixtures," and removable from the realty as such. It is commonly accepted that trade fixtures are articles erected or annexed to realty by a *tenant* for the purpose of carrying on a trade, and removable by him during his term (provided the removal does not affect the essential characteristics of the article removed or reduce it to a mass of crude materials) upon grounds of public policy and because, from the nature of the tenure, they are not presumed to have been annexed with the intention of making them permanent additions to the realty. *Field* v. *Morris,* 95 Ark. 268, 129 S.W. 543; *Barnes* v. *Jeffus,* 173 Ark. 100, 291 S.W. 990; *Bennett* v. *Taylor,* 185 Ark. 794, 49 S.W. 2d 608. Poole was not a tenant, and from the testimony of Hurst, the bins could have been removed only by reducing them to a mass of crude materials.

Appellant has failed to demonstrate error in the decree, so it is

Affirmed.

We agree. HARRIS, C.J., and HOLT and HICKMAN, JJ.

Ronald Jack CAMPBELL *v.* STATE of Arkansas

CR 78-144 576 S.W. 2d 938

Opinion delivered February 19, 1979
(Division II)

[redacted]

Paul D. Groce, for appellant.

Bill Clinton, Atty. Gen., by: *Joyce Williams Warren,* Asst. Atty. Gen., for appellee.

JOHN A. FOGLEMAN, Justice. Appellant Ronald Jack Campbell was tried on February 16, 17, 18 and 21, 1978, on a charge of murder in the first degree for the killing of Harvey Edgar White on May 17, 1972. He was found guilty and sentenced to life imprisonment. The charge was made by information filed on May 24, 1972, two days after the arrest of Campbell in Memphis, Tennessee. He entered pleas of not guilty and not guilty by reason of insanity on June 5, 1972, and was then committed to the Arkansas State Hospital for a

period of 30 days for observation and examination. On October 2, 1972, the Circuit Court of Pulaski County, upon an adjudication of insanity, committed him to the state hospital, where he was confined (except for periods between March 17, 1976 and July 16, 1976, and December 18 and December 19, 1976 when he was in "escape status") until August 31, 1977, when the circuit court ordered that he be remanded to the Pulaski County jail to be held to await trial on the charge.

For reversal, appellant relies upon the following points:

I

THE TRIAL COURT ERRED IN DENYING APPELLANT'S WRIT OF HABEAS CORPUS IN THAT SAID FIVE-YEAR DETENTION WAS UNLAWFUL IN THAT THE APPELLANT WAS CONFINED IN VIOLATION OF ARK. STAT. ANN. § 41-607(2) (REPL. 1977) WHICH REQUIRES CIVIL COMMITMENT IN COMPLIANCE WITH ARK. STAT. ANN. § 59-408 (REPL. 1971), WHEN CONFINEMENT IS IN EXCESS OF ONE YEAR.

II

THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION TO DISMISS BASED ON HIS RIGHT TO A SPEEDY TRIAL WHICH WAS ABRIDGED BY THE FIVE-YEAR DELAY.

III

THE TRIAL COURT ERRED IN PERMITTING, OVER APPELLANT'S OBJECTION, THE INTRODUCTION OF STATE'S EXHIBITS 2 AND 3, WHICH WERE PICTURES OF THE DECEASED'S BODY WHEN THEY CONTAINED ONLY SOME MATERIAL OF PROBATIVE VALUE AND WERE NOT VERY RELEVANT TO THE TESTIMONY OF ANY OF THE WITNESSES; AND THEY WERE HIGHLY PREJUDICIAL.

IV

THE TRIAL COURT ERRED IN NOT DIRECTING A VERDICT FOR THE APPELLANT AS PRAYED FOR IN APPELLANT'S REQUESTED INSTRUCTION NO. 1 BECAUSE APPELLANT ESTABLISHED BY A PREPONDERANCE OF THE EVIDENCE THAT HE HAD A MENTAL DISEASE OR DEFECT AT THE TIME OF THE ALLEGED OFFENSE.

V

THE TRIAL COURT ERRED IN NOT GIVING APPELLANT CREDIT FOR THE TIME SPENT IN CUSTODY WHILE AWAITING TRIAL IN THIS MATTER.

We find no reversible error and affirm. We will discuss appellant's points in the order listed.

I

On June 11, 1977, appellant filed a petition for writ of habeas corpus. In it, he alleged that his detention was unlawful because he was confined for more than five years in violation of Ark. Stat. Ann. § 41-607 (2) (Repl. 1977), which he contends required compliance with Ark. Stat. Ann. § 59-408 (Repl. 1971). The former section provides that any detention after one year from the date of admission be under normal civil commitment procedures. A hearing on this petition was held on July 12, 1977, but a decision was postponed until briefs were filed. In his brief, appellant invoked provisions of the Arkansas Criminal Code, which became effective on January 1, 1976. See Ark. Stat. Ann. § 41-101 (Repl. 1977). The petition was denied on August 30, 1977. On September 6, 1977, the trial was continued until a later date, in order to give appellant time to appeal to this court. Notice of appeal and a designation of record were filed September 22, 1977. Another notice of appeal, reciting that a transcript had been ordered, was given on September 27, 1977. An extension of 90 days for the filing of the transcript was granted on December

20, 1977. It was not filed here until September 18, 1978. This was more than seven months after the judgment was entered. It appears that the delay was the result of appellant's withdrawal of his earlier notice of appeal in order to include this appeal with the appeal of the judgment of conviction.

The denial of the petition for habeas corpus was a final, appealable order. See, *Fulks* v. *Walker,* 224 Ark. 639, 275 S.W. 2d 873. Neither appellant nor the trial court could extend the time for lodging the transcript to a date more than seven months after the entry of that judgment. Ark. Stat. Ann. § 27-2127.1 (Supp. 1977).

Appellant, however, contends that non-compliance with Ark. Stat. Ann. § 59-408 pursuant to § 41-607 (2) invalidates his conviction. In any event, Ark. Stat. Ann. § 41-607 (2) has no application to appellant, who was committed to the state hospital "until restored to reason," in accordance with Ark. Stat. Ann. §§ 59-411 — 59-413 (Repl. 1971) on October 2, 1972, more than three years before § 41-607 (2) went into effect. Appellant seeks to bring himself into the coverage of the act by invoking § 41-102 (4), which provides that a defendant in a criminal prosecution for an offense committed prior to the effective date of the Arkansas Criminal Code may elect to have the construction and application of any defense to the prosecution governed by the provisions of the code. He takes the position that his election made § 41-607 (2) applicable.

There is no merit to this contention. By no stretch of the imagination can it be said that the provisions of this section are a defense to the prosecution of appellant. The application of § 41-102 (4) is governed by Ark. Stat. Ann. § 41-110 (3) (Repl. 1977), defining a defense under the code. A defense is any matter: (1) so designated by the code, or (2) so designated by a statute not a part of the code, or (3) involving an excuse or justification peculiarly within the knowledge of the defendant on which he can fairly be required to introduce supporting evidence. The disposition of one found mentally unfit to proceed with a trial because of mental disease or defect cannot possibly be considered a defense under the code. Furthermore, there is nothing in Ark. Stat. Ann. § 41-

607, or the chapter of which it is a part, to indicate any legislative intent that this section should have any retroactive or retrospective effect.

II

Appellant filed a motion to dismiss the information on the ground that he had been denied his constitutional right to a speedy trial by reason of his confinement for over five years. This motion was filed on December 15, 1977. Appellant alleged that there had been a deliberate and purposeful delay by the state which had prejudiced him and prevented him from being able to properly prepare his defense. It appears that appellant's confinement was in full compliance with the law then applicable. The report from the state hospital to the circuit court made on July 17, 1972, was that appellant was insane at the time of the mental examination and probably was insane at the time of the commission of the alleged offense and requested that he be committed to the state hospital for treatment. A hearing on this report was held in the circuit court on October 2, 1972. Appellant and his court-appointed attorney were present. As a result of this hearing, appellant was committed to the Arkansas State Hospital until such time as he was restored to reason, pursuant to Ark. Stat. Ann. §§ 59-411 — 59-413.

In presenting his motion in the trial court, appellant first relied upon Ark. Stat. Ann. § 43-1308 (Repl. 1977), which provided that nothing in the act under which the circuit court committed him should prevent a trial of a defendant at an adjourned day or special term of court prior to the next regular term of court after the entry of an order for observation and examination. We agree with the trial judge that this section was inapplicable. It merely permitted a trial prior to the next regular term, in order to minimize motions for observation by defendants as a dilatory move.

It appears that some member of the staff of the state hospital had reported to the court at the hearing on the petition for habeas corpus held on July 12, 1977, that the staff was in the process of reevaluating Campbell's status and that the trial judge then requested that a copy of the evaluation be

forwarded to the court as soon as it was completed. The report was dated August 11, 1977. The following significant facts were revealed by it:

> At a psychiatric staff conference held at the hospital on July 17, 1972, the professional opinions of a majority of those present was that Campbell was psychotic and that the diagnosis should be schizophrenia, schizo-affective type. Campbell had been involved in psychotherapy and group activity programs since he had been in the hospital. Because of the feelings of some of the staff who had worked with Campbell, it was decided to reevaluate his mental status after his second successful escape in December, 1976. Outside consultation services of a psychiatrist and a psychologist in private practice who had not had any prior contact with Campbell were obtained. Thereafter, a special psychiatric staff conference was held. Both outside consultants and members of the hospital staff participated. Professional opinion was divided as to Campbell's mental status at the time of the alleged offense and at the time of the current examination and as to whether he had schizophrenia. Most of the participants agreed that Campbell had a character (personality) disorder with neurotic traits. The consensus was that Campbell was not mentally ill to the degree of legal irresponsibility at the time of the special examination and that he did have the mental capacity to understand the proceedings against him and to assist effectively in his own defense. Opinion was equally divided as to Campbell's mental illness to the degree of legal irresponsibility at the time of the commission of the alleged offense. The consensus was that he would most probably resort to aggressive or violent behavior as he had done in the past. Opinion was divided as to whether Campbell's behavior was the result of a character disorder or because of a psychotic process.

Because of the divided professional opinion and because of the many legal, social and ethical issues involved, it was recommended that Campbell be returned to a court for disposition as the best means of resolving the issues.

The procedures which resulted in the commitment of Campbell were the direct result of his plea of not guilty by reason of insanity. He has never requested that he be brought to trial, either before or after his petition for habeas corpus, or before or after the filing of his motion to dismiss. Under these circumstances, Campbell is in no position to complain about not having been tried on this charge earlier.

The constitutional right to a speedy trial is not absolute; it is necessarily relative and among the principal factors to be assessed are the reason for the delay and the good faith, or lack of it, on the part of state officials. *Randall* v. *State,* 249 Ark. 258, 458 S.W. 2d 743; *Curan* v. *State,* 260 Ark. 461, 541 S.W. 2d 923, cert. den. 434 U.S. 843, 98 S. Ct. 144, 54 L. Ed. 2d 108 (1977). The delay in this case was initiated by appellant's plea of insanity. Since the trial court followed the statutory procedures prescribed in such a case, there is no reason why the time elapsed solely as a result of following these procedures in according him due process of law should not be chargeable to the defendant. See *O'Neal* v. *State,* 253 Ark. 574, 487 S.W. 2d 618. We have said that the constitutional right to a speedy trial is violated only by vexatious, capricious and oppressive delays manufactured by the ministers of justice. *Leggett* v. *Kirby,* 231 Ark. 576, 331 S.W. 2d 267, cert. den. 362 U.S. 981, 80 S. Ct. 1073, 4 L. Ed. 2d 1018 (1960). A speedy trial is a trial conducted according to fixed rules, regulations and proceedings of law, free from vexatious, capricious or oppressive delays manufactured by ministers of justice; and what constitutes a speedy trial must be determined from the varying circumstances of each particular case with reference to the practical and efficient operation of the law. *Randall* v. *State,* supra. There is no indication that officials of the state have not acted in complete good faith. There was good reason for the denial of appellant's motion to dismiss.

III

The photographs to which appellant refers in relation to this point for reversal show the nude body of White. One of them showed White lying on his back on a hospital examin-

ing table. It showed dried blood on his chest and ribs and on the side of his face and head. The blood on the face and head of the body emanated from open wounds on the cheek and the bridge of the nose. The other photograph showed the body on its right side with an individual pointing to an entrance wound in the back of the body. It showed a considerable quantity of blood on a sheet on which the body was lying. Appellant complains of the display of blood and the prominent exposure of the buttocks of the body as inflammatory. He contends that the probative value of the photographs was substantially outweighed by unfair prejudice resulting from their inflammatory nature. Appellant's objection was made in camera, after these photographs, along with several others, had been offered through the testimony of a police detective. It was based upon Ark. Stat. Ann. § 28-1001, Rule 403 (Supp. 1977). The state offered these photographs to corroborate the testimony of Phyllis Thorne, who was present at the time of the shooting of White, as to the actual shooting and the circumstances surrounding it, and to show the wounds in order to enable the jury to understand what had taken place and the motivation and intent of the accused. The trial judge excluded five photographs on the basis of appellant's objection.

The Uniform Rules of Evidence, of which the rule on which appellant relies is a part, do not change the Arkansas law as drastically as appellant seems to think. As appellant points out, we said in *Rodgers* v. *State,* 261 Ark. 293, 547 S.W. 2d 419, the test in determining whether a photograph should be admitted or facts stipulated should always depend upon the question whether the inflammatory nature of the photograph is outweighed by its probative value, and, that, if it in some way enables the jury to understand the testimony, its admissibility lies within the sound discretion of the trial court. Appellant argued that the photographs were unnecessary because he would not contend during the trial that he did not commit the acts alleged, but would assert that he was not guilty by reason of insanity. The fact that photographic evidence is cumulative or unnecessary by reason of admission by a defendant of the facts disclosed by the photograph will not, standing alone, render it inadmissi-

ble. *Perry* v. *State,* 255 Ark. 378, 500 S.W. 2d 387.[1]

The nature, extent and location of the wounds were relevant and material, at least on the questions of intent and state of mind. Appellant's defense of insanity did not relieve the state of the burden of proving every element of the charge of murder in the first degree, including premeditation, deliberation and intent, beyond a reasonable doubt. *Leland* v. *State,* 343 U.S. 790, 72 S. Ct. 1002, 96 L. Ed. 1302 (1952). Even if the mental disease or defect did not constitute a defense, evidence of it was relevant on the question of his culpable mental state and especially on the element of premeditation. Ark. Stat. Ann. § 41-602 (Repl. 1977). Thus, it is clear that appellant's admissions, or rather his failure to contest the evidence pertaining to his acts, did not change the state's burden of proof.

The trial court's exclusion of some of the photographs is indicative of an exercise of some discretion in the matter. See *Perry* v. *State,* supra. The photographs were corroborative of Miss Thorne's testimony that the victim was shot twice and that one of the shots was fired into his back while he was lying prone. We cannot say that there was any abuse of the trial judge's discretion in weighing the probative value of the two photographs admitted against the danger of unfair prejudice, waste of time and needless presentation of cumulative evidence.

IV

Appellant contends that we should overrule such decisions as *Stanley* v. *State,* 248 Ark. 787, 454 S.W. 2d 72, through which we have held that, on appellate review of evidence relating to insanity (or mental disease or defect), this court will not attempt to determine where the preponderance lies, but will affirm the judgment if there is substantial evidence to support the jury verdict on which it is

[1]The advisability of the prosecution's introducing all persuasive evidence has been heightened, not only by the risk of failure to eliminate all reasonable doubt about every element of the offense charged, but also by the hazard of dismissal to avoid double jeopardy, if an appellate court finds the evidence insufficient to support a verdict of guilty. *Pollard* v. *State,* 264 Ark. 753, 574 S.W. 2d 656 (1978).

based. This we decline to do. In cases such as this, the jury's decision depends to a great extent upon evaluation of credibility of witnesses and determination of the weight to be accorded to their testimony, particularly when expert opinions are critical to the issue.

Appellant argues that the trial court should have directed a verdict because the state's evidence on the issue cannot be considered persuasive when compared with that offered by him. Of course, the trial judge could not have directed a verdict upon weighing the evidence and finding it to preponderate in favor of appellant. Mental disease or defect is an affirmative defense if, as a result thereof, the defendant, at the time of the offense with which he is charged, lacked the capacity to conform his conduct to the requirements of law or to appreciate the criminality of his conduct. Ark. Stat. Ann. § 41-601 (Repl. 1977). Since it is an affirmative defense, the defendant was required to establish it by a preponderance of the evidence. Ark. Stat. Ann. § 41-601, -110 (Repl. 1977) and commentary. And, as we have always held, the question of preponderance is primarily one for the jury, and a judge may direct a verdict only when no fact issue exists. *Oakes* v. *State,* 135 Ark. 221, 205 S.W. 305; *Sherman* v. *Missouri Pacific RR. Co.,* 238 Ark. 554, 383 S.W. 2d 881; *Harris* v. *State,* 262 Ark. 680, 561 S.W. 2d 69. See also, *McCully* v. *State,* 141 Ark. 450, 217 S.W. 453; *Davis* v. *Britt,* 243 Ark. 556, 420 S.W. 2d 863; *Hankins* v. *State,* 133 Ark. 38, 201 S.W. 832. If appellant's argument is taken as an assertion that the testimony on behalf of the state was not substantial in reliance upon holdings in cases such as *Arkansas Pollution Control Com'n.* v. *Coyne,* 252 Ark. 792, 481 S.W. 2d 322, that to be substantial, evidence must be valid, legal and persuasive, we disagree. The evidence appellant considers non-persuasive was the testimony of Drs. Albert F. Rosendale and W. R. Oglesby, who were permitted to express opinions as experts. It is true that we are not required, on appellate review, to accept as substantial evidence the opinion of an expert when it clearly appears that it is opposed to physical facts, common knowledge, the dictates of common sense or is pure speculation. *Easton* v. *H. Boker & Co.,* 226 Ark. 687, 292 S.W. 2d 257. See also, *Arkansas State Highway Com'n.* v. *Byars,* 221 Ark. 845, 256 S.W. 2d 738. By no stretch of the imagination can it be

said that the opinion of either of these doctors is opposed to physical facts, common knowledge, or the dictates of common sense. The infirmities alleged by appellant would seem to suggest that the opinions of these witnesses were based upon speculation because: (1) Dr. Rosendale at first accepted the contrary opinion of Dr. C. V. Taylor (who testified on behalf of appellant), but formed a different opinion some eight or ten months after the alleged crime; (2) Dr. Rosendale never administered or required any mental test to assist him in arriving at his opinion; (3) Dr. Rosendale only had contact with appellant about six times over a period of five years; and (4) Dr. Oglesby had only one brief contact with appellant before forming his opinion. As we view the testimony, these circumstances had a bearing on the weight to be given to the testimony of these witnesses, but not on its substantiality.

Before stating the reasons we find the testimony of these doctors to be substantial, we should note that there was little, if any, basis for an issue as to Campbell's ability to appreciate the criminality of his act on the day of the alleged crime. The gist of his defense is that he killed White upon his conviction that he should commit a crime or crimes so terrible that he would be apprehended, so he could be society's "guinea pig" in determining what caused people to commit horrible crimes. The opinions, then, are of greatest significance on the question of Campbell's capacity to conform his conduct to the requirements of law.

Dr. Rosendale is employed as a psychiatrist by the Arkansas State Hospital. He is in charge of Rogers Hall, where Campbell was confined. He was on leave and not present at the time of Campbell's first "staffing." When he returned, he accepted the staff diagnosis of Schizophrenia, Schizo Affective Type, Depressed. After six or eight months, he formed his own opinion that Campbell's mental condition was nothing more than a character disorder (which is non-psychotic) and a belief that, at the time of the alleged offense, Campbell was able to conform his conduct to the requirement of law or appreciate the criminality of his act. He stated that Campbell had only approached him about a half dozen times and had always gone to female personnel to

express his wants and that this information was passed on to the doctor. Based upon the general observation of Campbell, Dr. Rosendale expressed the opinion that Campbell was a very adept manipulator.

Dr. W. R. Oglesby is Deputy Commissioner for Psychiatric Services and a psychiatrist at the Arkansas State Hospital. Based upon his observation and information and data obtained from records pertaining to Campbell, including the reports of outside pscyhologists and psychiatrists hired by the hospital to interview Campbell, this witness expressed the opinion that Campbell had an antisocial personality,[2] is not a psychotic person, and that he was able to conform his conduct to the requirements of the law. He believed that a statement by Campbell as to his motivation for the killing, made to the police when he was arrested in Memphis, was not a delusional statement, but a rationalization, i.e., in psychiatric terms, a superficially reasonable or plausible excuse for his actions. He said that Campbell lacked socialization, was unable to resist urges to do violent or wrongful acts, and had no internal sense of guilt or empathy for others. He said that Campbell was able to offer plausible rationalizations in psychiatric terms because he had been psychiatrically contaminated by having undergone transactional analysis. Dr. Oglesby expressed the opinion that appellant was a "con-artist" — as are many people with antisocial personalities.

In viewing the testimony of Drs. Rosendale and Oglesby, we note that Campbell had, before the crime with which he was charged, been an outpatient at the Community Mental Health Center on the state hospital grounds. Dr. Taylor also found Campbell to be a very competent, manipulating person and the cause of considerable difficulty because of his intelligence. The governing rule of evidence permits an expert witness to base his opinion upon, or to draw an inference from, facts or data in the particular case perceived or made known to him at or before the hearing. Ark. Stat. Ann. § 28-1001, Rule 703 (Supp. 1977); Field, A Code of Evidence for Arkansas?, 29 Ark. Law Rev. 1, 29;

[2]An abnormality manifested only by antisocial conduct is not a defense for mental disease or defect. Ark. Stat. Ann. § 41-601 (2) (Repl. 1977).

Arkansas State Highway Com'n. v. *Russell,* 240 Ark. 21, 398 S.W. 2d 201; *Amos* v. *Stroud,* 252 Ark. 1100, 482 S.W. 2d 592.

V

Finally, appellant invokes Ark. Stat. Ann. § 41-904 (Repl. 1977) as a basis for reversal. The trial judge did not give credit for the time spent in custody as directed by that statute, which is a part of the Arkansas Criminal Code. This requirement is not a defense, as defined by the code, so appellant's invoking the defenses provided by the code did not bring this section into play. Under Ark. Stat. Ann. § 41-102 (3) (Repl. 1977), provisions of the code do not govern punishment. An offense is punished in accordance with law as it existed when the offense was committed.

The governing law at the time of the offense of which appellant was found guilty provided that the sentencing judge might, in his discretion, credit time already served in jail or other place of detention. Ark. Stat. Ann. § 43-2813 (Supp. 1975). There is no abuse of discretion here, and appellant has not asserted that there was.

Appellant also relies upon *Smith* v. *State,* 256 Ark. 425, 508 S.W. 2d 54, in which we held that the court must give credit for pretrial incarceration where a defendant was held in custody on a bailable charge and was prevented from posting bail solely because of his indigency. Appellant's being held in custody was not attributable to his indigency. Even if appellant were otherwise entitled to credit for the time he was held in custody, there is simply no way to credit this time against a life sentence. Life less five years is a period not susceptible of prognostication. A life sentence is for the natural life of the person sentenced and is not based upon mortality tables or any other formula. Furthermore, the record does not disclose that appellant asked in the trial court that he be given credit against his sentence. We will not consider such a question for the first time on appeal. *McCoy* v. *State,* 259 Ark. 607, 535 S.W. 2d 439.

OTHER MATTERS

We agree with appellant's attorney that the court's holding that a minister was not qualified as an expert on the ques-

tion of appellant's mental disease or defect was not reversible error because it was not abuse of the court's discretion.

Appellant has not pointed out any other objections made by him and not sustained in the trial court. The Attorney General has given transcript references to others, which he did not consider of sufficient merit to treat by legal argument, but did not otherwise identify them. We have examined the record and find no error to the prejudice of appellant. Specifically, we find no reversible error in the following:

1. Denial of appellant's motion to conduct a voir dire examination of prospective jurors in chambers.

2. Testimony about the actions of a woman who was with appellant at the time of his arrest.

3. Objection to the testimony of this woman relating to other crimes committed by the defendant, who later took the witness stand himself and testified about the crimes committed by him.

4. Inquiry by the prosecuting attorney of a minister who testified on behalf of appellant as to whether he knew the meaning of the term "psychiatrically contaminated," in spite of the fact that the trial judge refused to permit the witness to testify as an expert witness.

5. A question of this minister by the prosecuting attorney concerning a possible statement made by appellant on the night before the commission of the offense with which appellant was charged, to which an objection was, in essence, sustained and the answer to which was not prejudicial to appellant.

6. Questioning of Dr. Taylor by prosecuting attorney about a 1977 "staffing" with reference to appellant's mental condition in 1972 over appellant's objection that the later "staffing" was irrelevant.

7. Questioning of Dr. Taylor concerning disagreement

among those who examined defendant on the diagnosis of schizophrenia.

8. The trial judge's inquiring of Dr. Taylor whether Campbell was, in the opinion of the witness, schizophrenic at the time of the trial, which was answered in the affirmative.

9. The prosecuting attorney's statement that Dr. Taylor based his opinion on statements contained in a confession by appellant at the time of his arrest, in the form of a question which was never answered, over appellant's objection, on which appellant never obtained a ruling.

10. Appellant's attorney's objections to Campbell's testifying, after the trial judge had advised Campbell that he did not have to testify, that the jury could not draw any inference of guilt from the fact that he did not take the witness stand, and that he would be permitted to testify if he wanted to, in spite of his attorney's advice not to do so.

11. Inquiry by prosecuting attorney of appellant whether his saying that he had committed a prior offense as "self-punishment" was his idea or that of a psychiatrist who had examined him, to which appellant objected as calling for hearsay evidence. Appellant later stated that he thought of it.

12. The statement and actions of a woman who was with appellant at the time of his arrest that appellant had kidnapped her in Dallas and her testimony to that effect, after appellant had testified that he had approached her and requested, while showing her his .38 caliber pistol, that she drive him somewhere.

13. The statement of a nurse at the state hospital that, in the five years she had been in daily contact with the appellant, she had not seen signs of mental illness of appellant.

14. Objections to instructions given by the court at the request of the state, all of which were general objections.

15. Appellant's objection to the trial judge's questioning of the minister whom appellant sought to qualify as an expert.

16. The trial court's refusal to give appellant's requested instruction that a finding of not guilty by reason of insanity would not necessarily mean that the appellant would be released from confinement.

The judgment is affirmed.

We agree. HARRIS, C.J., and HOLT and HICKMAN, JJ.

WEISER-BROWN OIL COMPANY
v. Margie Gould SNEED and ARKANSAS
WESTERN OIL COMPANY

78-255 577 S.W. 2d 1

Opinion delivered February 19, 1979
(Division I)

[redacted]

Keith, Clegg & Eckert, for appellant.

Ball & Mourton, for appellees.

CONLEY BYRD, Justice. The Sneed brothers, Malcolm H., Hugh M., W. J. and Sebron Travis Sneed, Jr., entered into a partnership agreement in 1946, providing that any mineral interest theretofore or thereafter acquired in any lands, wherever located, was partnership property even though such interests may have been conveyed to only one or less than all of the partners in their individual name or names. The Partnership Dissolution Agreement of April 1967, confirmed the 1946 Partnership Agreement as to all mineral interests so acquired prior to March 1, 1967. However, the mineral interests herein involved were not included in the April 1967 Dissolution Agreement. Both the 1946 Partnership Agreement and the April 1967 Dissolution Agreement were duly recorded in Johnson County.

This litigation arises out of a deed dated January 9, 1967, wherein Curtis Kinard, et ux, conveyed to S. T. Sneed, Jr. and Margie G. Sneed, husband and wife, the minerals here in question. February 21, 1967, S. T. Sneed, Jr. conveyed the minerals to Margie G. Sneed. S. T. Sneed died on August 1, 1971, with Margie G. Sneed surviving. Margie G. Sneed leased the minerals to appellee, Arkansas Western Oil Company, on January 21, 1974. On July 16, 1974, a gas well on the mineral lease was completed with an estimated value of $1,320,000.00. Appellant, Weiser-Brown Oil Company, acquired its lease from Malcolm H. Sneed, Hugh M. Sneed and W. J. Sneed on September 23, 1975.

The three surviving Sneed brothers and appellant

Weiser-Brown Oil Company brought this action to declare that each of the three brothers owned a one-fourth interest in the Kinard minerals and that the lease to appellee, Arkansas Western Oil Company only conveyed a one-fourth interest. The chancellor found that the mineral interests purchased from Kinard were purchased with partnership funds and that each of the three surviving brothers was entitled to a one-fourth interest therein subject, however, to the lease of appellee, whom the court found to be a bona fide purchaser for value and without notice. Only Weiser-Brown Oil Company has appealed. It contends that the recordation of the 1946 Partnership Agreement and the April 1967 Dissolution Agreement constituted constructive notice that the mineral interest acquired from Curtis Kinard was partnership property. Cited in support of its argument is *Abbott* v. *Parker,* 103 Ark. 425, 147 S.W. 70 (1912).

To support the chancellor's decision that appellee's lease from Margie G. Sneed covered all of the mineral interest acquired from Curtis Kinard, appellee relies among other things on Ark. Stat. Ann. § 65-110(3) (Repl. 1966), which provides:

> "(3) Where title to real property is in the name of one or more but not all the partners, *and the record does not disclose the right of the partnership,* the partners in whose name the title stands may convey title to such property, but the partnership may recover such property if the partners' act does not bind the partnership under the provisions of paragraph (1) of Section 9 [65-109], unless the purchaser or his assignee, is a holder for value, without knowledge." (Emphasis ours.)

Appellant, to counter appellee's contention, contends that the recordation of the 1946 Partnership Agreement and the April 1967 Dissolution Agreement disclosed "the right of the partnership" within the meaning of Ark. Stat. Ann. § 65-110(3), *supra,* so as to defeat the claim of appellee. We disagree with appellant for the reasons hereinafter stated.

In *Abbott* v. *Parker,* 103 Ark. 425, 147 S.W. 70 (1912), we held:

> "A purchaser of lands takes them with constructive notice of whatever appears in the conveyance which constitutes his chain of title; if sufficient appears therein to put a prudent man on inquiry, which would, if prosecuted with ordinary diligence, lead to actual notice of right or title in conflict with what he is about to purchase, and he fails to make such inquiry, the law will charge him with the actual notice he would have received if he had made it."

As we interpret the italicized portion of Ark. Stat. Ann. § 65-110(3), *supra,* the term *record* refers back to the record of the title held in the name of one or more but not all of the partners — *i.e.* the title acquired by S. T. Sneed, Jr. and Margie G. Sneed from Curtis Kinard. To overcome this construction of the statute, appellant, relying upon *Snyder* v. *Bridewell,* 167 Ark. 8, 267 S.W. 561 (1924), contends that the 1946 Partnership Agreement was an instrument in the chain of appellee's title.

In *Snyder* v. *Bridewell, supra,* the Nashville Lumber Company had mortgaged to Lesser-Goldman Cotton Company "all property owned by the Nashville Lumber Company or afterwards acquired by it, in Howard and other counties in Arkansas." Before foreclosure the Nashville Lumber Company conveyed the property in dispute by specific and definite description to the Graysonia-Nashville Lumber Company. Lesser-Goldman Cotton Company foreclosed on the land which was purchased by Bridewell at the foreclosure sale. Bridewell brought suit to recover from Snyder the remaining purchase price due in the sale from Bridewell to Snyder. The trial court overruled Snyder's contention that, because of the specific description in the conveyance to Graysonia-Nashville Lumber Company, Bridewell acquired no title at the foreclosure sale. In upholding the trial court we pointed out that such a description was valid where a conveyance furnished a key by which the land sought to be conveyed can be identified. We there pointed out that a "description covering all the lands owned by said company in said counties is definite enough to satisfy our registration laws." From the statements in the majority and concurring opinions it appears that the property involved was owned by the

Nashville Lumber Company at the time of the execution of the mortgage — *i.e.* we do not interpret the decision as saying that such a description is sufficient to furnish a key to the description of any property acquired after the execution of the mortgage. Consequently, we cannot agree that the 1946 Partnership Agreement would be an instrument in the chain of title conveyed in 1967 by Curtis Kinard to S. T. Sneed, Jr. and Margie G. Sneed.

Furthermore, since the Kinard conveyance was to S. T. Sneed, Jr. and Margie G. Sneed, husband and wife, Margie G. Sneed was a purchaser of an estate by the entirety from Kinard and following the death of her husband became the sole owner of record for purpose of conveying title. Therefore appellee, in checking the title to the Curtis Kinard mineral interest, had every right to disregard any conveyances made by S. T. Sneed during his lifetime, *Branch* v. *Polk,* 61 Ark. 388, 33 S.W. 424 (1895), since Margie G. Sneed would at that time stand of record as the sole surviving purchaser of the Kinard mineral interest.

Affirmed.

We agree. HARRIS, C.J., and GEORGE ROSE SMITH and PURTLE, JJ.

Warren GOLDEN *v.* STATE of Arkansas

CR 78-172 576 S.W. 2d 955

Opinion delivered February 19, 1979
(Division II)
[as Modified on Denial of Rehearing March 12, 1979.]

Ed Alford, for appellant.

Bill Clinton, Atty. Gen., by: *Catherine Anderson,* Asst. Atty. Gen., for appellee.

DARRELL HICKMAN, Justice. Warren Golden was convicted of first degree battery and, having two previous felony convictions, was sentenced to 25 years in the penitentiary.

Golden alleges three errors on appeal: a continuance should have been granted because a key defense witness was absent; inflammatory photographs were admitted in evidence; and, the court commented on the evidence. We find no error and affirm the judgment.

Golden was drinking whiskey with a man named Witt

Wick, Jr. during the afternoon and night of January 8, 1977, and the next morning. They started drinking in DeQueen and ended up on a rural road. Apparently they built a fire beside the road and continued to drink and talk. They got into an argument, the subject of which is unknown, and Golden beat the other man with a rock. Thinking he had killed the man, Golden called the sheriff's office from his brother's house and said, "I had to kill a man to protect myself." Officers searched the scene and could not find a body. Later that day, Witt was found on a nearby farm, was taken to the hospital, treated and subsequently released. Witt was not a witness, his whereabouts being unknown.

Golden's defense was a lack of intent. His attorney had subpoenaed Dr. W. J. Jones, a physician, in connection with this defense. The witness, although served, did not appear at the trial and it is alleged it was error to try Golden without this witness.

After the jury was impaneled, all parties announced ready for trial. After the witnesses were called to be sworn, the defense discovered several witnesses absent. There was a conference in chambers which is not reported. At noon, after the State had presented eight witnesses, the appellant's attorney offered an objection to proceeding in the absence of the witnesses. The defense said Dr. Jones' presence was necessary. It was determined that Dr. Jones had been served but was not present. The trial judge tried to get the parties to stipulate what the doctor's testimony would be. They could not because the defense said the doctor would testify he had treated Golden for black outs, or seizures; the State, having questioned Dr. Jones, said the doctor would testify that he had only treated Golden once and there was no record of black outs. It turned out that the appellant's lawyer had not actually spoken with the doctor, did not know him, and was relying solely on what someone else told him. The court ordered the sheriff's office to continue to try to locate the doctor and ordered the trial to proceed.

At the conclusion of the State's case, the appellant did not renew his motion for a continuance. Instead, the trial

judge asked the appellant's attorney how many witnesses he would call. The lawyer said:

> It looks like I haven't got but two or one unless Dr. Jones shows up.

The trial judge remarked:

> I don't know whether you've heard this report or not, but the sheriff stated he had called his office and called his residence and was unable to locate him.

The grant or denial of a continuance is a matter within the trial court's discretion. Unless there is an abuse of this discretion we will not reverse the trial judge. *Holland* v. *State,* 260 Ark. 617, 542 S.W. 2d 761 (1976). In making such a judgment, a trial judge should consider whether there is good cause, taking into account the consent of opposing counsel, and also the public interest in a prompt disposition of the case. Rules of Crim. Proc., Rule 27.3 (1977).

The trial judge took all reasonable steps to locate and produce the witness. Golden's lawyer, not having talked to the witness, could not personally verify what the testimony would actually be. Also, at the close of the State's case, it was not insisted that the trial be continued. We conclude the trial judge did not abuse his discretion.

Photographs taken at the hospital of the victim were admitted over the appellant's objection. It is argued the photographs had no independent probative value and only served to inflame the passions of the jury. The photographs were black and white depicting the victim's bloody head. However, the charge was first degree battery, a serious offense. An element of first degree battery is the intent to inflict serious physical injury. Ark. Stat. Ann. § 41-1601 (Repl. 1977).

Again, the decision was one within the sound discretion of the trial judge. *Davis* v. *State,* 246 Ark. 838, 440 S.W. 2d 244 (1969). We find no abuse of that discretion.

The trial judge made this statement just before reading the jury instructions about confessions:

> Members of the jury, you dealt with a confession in this case . . . . .

The judge then went on to give five instructions about confessions, touching on the burden of the State to prove voluntariness, the province of the jury to accept or reject a confession, the weight to be accorded such statements, and the need for corroboration. It was not until after the instructions were given, closing arguments were completed, and the jury retired, that an objection was made to the judge's statement. It is argued it was a comment on the evidence, contrary to Ark. Const. Art. 7, § 23. The appellant should have objected at the time of the statement. Objections regarding instructions should be made before or at the time they are given. Rule 13, Uniform Rules for Circuit and Chancery Courts, Ark. Stat. Ann. Vol. 3A (Supp. 1977).

Even if this were error, it does not appear to be the kind that could not have been cured by an admonition. Also, considering the instructions given on a confession immediately thereafter, it is not obvious that a mistrial should have been declared. *Gammel & Spann* v. *State,* 259 Ark. 96, 531 S.W. 2d 474 (1976).

Warren Golden had a fair trial, free of prejudicial error and the judgment is affirmed.

Affirmed.

We agree. HARRIS, C.J., and FOGLEMAN and HOLT, JJ.

Renice SMITH *v.* STATE of Arkansas

CR 78-196 576 S.W. 2d 957

Opinion delivered February 19, 1979
(Division II)

James P. Massie, for appellant.

Steve Clark, Atty. Gen., by: *Ray Hartenstein,* Asst. Atty. Gen., for appellee.

DARRELL HICKMAN, Justice. The Pulaski County Circuit Court, sitting as a jury, found Renice Smith guilty of theft by receiving, and Smith, having been convicted of two previous felonies, was sentenced to five years in the penitentiary.

The only issue on appeal of this case is the validity of a search and seizure. The trial judge found the search lawful and admitted into evidence several items seized from Smith's residence, including a Magnavox color television set. We find on appeal the search was in violation of the Fourth Amendment of the United States Constitution and reverse the judgment of the trial court.

Two Little Rock policemen learned on November 23, 1976, that a Magnavox color television set that had been stolen in July, 1976, in a burglary, was pawned at the Square Deal Pawn Shop on November 19, 1976, by Renice Smith, and was taken out of pawn by Smith on November 20, 1976. The policemen had the serial number of the television taken in the burglary and it matched the number on the pawn ticket.

The officers routinely checked their outstanding warrants and found two hot check warrants outstanding on Smith. They proceeded to Smith's residence on November 24, 1976, at 7:30 a.m. and took with them the hot check warrants and a burglary report which listed items, including the Magnavox television set, taken in the burglary.

According to the officers' testimony, and theirs is uncommonly identical, they knocked on Smith's door and he came to the door in a state of undress. They arrested him for the hot check charges and he invited them in so he could get dressed and accompany them downtown. They asked if they could look around, and seeing a Magnavox television set, they compared the serial numbers and found it the same as the stolen one; other items reportedly stolen in the same burglary, including golf clubs, tennis rackets and a radio were also observed in the residence and listed on the burglary report, but there were no serial numbers available. A closet was searched and some clothes were seized. The officers thought, but were not certain, that the closet door was open.

Both officers insisted that Smith invited them in and they asked for permission to search the premises which was granted.

Smith's story is somewhat different. He said he went to the door and one officer flashed a warrant, told him he wanted to talk to him about some hot checks, and when the officer wanted to come in, he simply stepped aside. The officer turned around and left, came back with another officer and they informed him he was under arrest for the hot check charges and was told he was going downtown. He proceeded to get dressed and one officer talked to him while he was dressing and the other officer searched the place including all the rooms, under the bed and dresser drawers.

Smith said he never granted, nor was he asked to grant, consent to search. He was simply placed under arrest and they came in his residence.

Later, at the police station, Smith said they asked for written consent to search his residence and he declined.

The officers deny that they went to Smith's residence to search for the items taken in the burglary. They said they had no probable cause for a warrant and, therefore, they did not obtain one.

The police officers' protestations that they had no intention of searching Smith's residence belies the facts; their first interest in this matter was when they learned that Smith had pawned and redeemed a stolen television set. It was then they went to their files and found warrants outstanding for hot checks. They took with them a list of the stolen items that were taken in a particular burglary and that list included the television set in question. Smith was placed under arrest before they entered his residence, was in their custody at the time they gained entry.

There are two conceivable grounds on which the search could have been valid.

First, there is the doctrine authorizing a seizure of con-

traband in "plain view." These items were clearly in plain view once the officers were inside the residence. Items seized in plain view of an officer are lawfully seized if entry or the initial intrusion was lawful; if discovery of the object was inadvertent; and, if the incriminating nature of the object was immediately apparent. *U.S.* v. *Johnson,* 541 F. 2d 1311 (8th Cir. 1976).

It was admitted that none of the items appear to be incriminating by their nature; they were stock items available to consumers throughout commerce. Certainly there was no inadvertent discovery. The initial intrusion could only be lawful if consent was given.

Then, the only lawful basis for this search would be on the second ground, consent.

The State, as it should, bears a heavy burden to prove that a warrantless search is voluntary. *King* v. *State,* 262 Ark. 342, 557 S.W. 2d 386 (1977). That burden is to prove by clear and positive testimony that that consent was freely and voluntarily given. *Rodriquez* v. *State,* 262 Ark. 659, 559 S.W. 2d 925 (1978).

> . . . And where the defendant is under arrest, as here, that burden is particularly heavy. . . . .
>
> . . . "This burden on the Government is particularly heavy in cases where the individual is under arrest. Nonresistance to the orders or suggestions of the police is not infrequent in such a situation; true consent, free of fear or pressure, is not so readily to be found. (citations omitted)."

U.S. v. *Kowal,* 197 F. Supp. 401 (D.R.I. 1961).

We have simply the testimony of the parties and the circumstances of the case. On appeal, we make an independent determination considering the totality of the circumstances to see if the State has met its burden. We find in this case that the trial court's decision was clearly erroneous. *Pollard* v. *State,* 264 Ark. 753, 574 S.W. 2d 656 (1978).

Smith was under arrest and in custody of the officers at the time it was alleged that consent was given. Under such circumstances genuinely voluntary consent must be clearly shown. There is no doubt that one of the purposes, if not the purpose, of going to Smith's residence was to look for the stolen items. This is the reason the officers became interested in the case. They said they did not obtain a warrant because there was no probable cause. We would disagree with this assessment based on the record before us.

In conclusion we find that this search and seizure was unlawful in violation of the Fourth Amendment of the United States Constitution and the judgment of the trial court in that regard is reversed and the cause is remanded.

Reversed and remanded.

We agree. HARRIS, C.J., and FOGLEMAN and HOLT, JJ.

Linda Joyce RAINS *v.* John ALSTON
et ux

78-152 576 S.W. 2d 505

Substituted Opinion on Denial of Rehearing
delivered February 19, 1979
(In Banc)

Stephen A. White, for appellant.

Warner & Smith, by: *J. H. Evans,* for appellees.

JOHN I. PURTLE, Justice. This matter is considered upon the Petition for Rehearing filed herein by the appellant on December 14, 1978. The Petition for Rehearing is denied; however, we are at this time issuing this substitute opinion. We feel that, in the interest of justice and fairness to everyone concerned, our opinion of November 27, 1978, should have been more fully explained.

With regard to the Petition for Rehearing, the appellant relies on the "full faith and credit" of a sister state, in particular, an Order of the Domestic Relations Court of Dallas County, Texas, dated December 30, 1976, wherein custody of the minor child was awarded to the appellant. We have examined Texas law and determined that the finality of a former judgment respecting custody of children of divorced parents obtains so long as conditions remain the same, and,

in order to change or modify a former judgment, complainant must allege and prove that circumstances have so materially changed since rendition of the judgment as to render it to the best interest of the minor child to modify the judgment. *Bezner* v. *Sawyer,* 217 S.W. 2d 858 (Tex. Civ. App. 1949); *Goodman* v. *Goodman,* 236 S.W. 2d 641 (Tex. Civ. App. 1951). Even so, there is no indication in the record that the child was ever in the jurisdiction of the Domestic Relations Court of Dallas County, Texas, during the time the action was pending. However, it is clear that the child was in Franklin County, Arkansas, on December 20, 1976, the date of the divorce in Texas, and was in Arkansas on February 2, 1977, when the appellees filed the Petition for Appointment of Guardian for Sarannah Elizabeth Rains, who is at this time less than three years of age, and was physically present in Franklin County on the trial date.

The most important matter to be considered by any court in matters of this nature is the best interest of the infant child. Consideration of both parents is of great importance but must, nevertheless, be subordinated to the best interest of the child. We have always attached special weight to the findings of the trial judge who has had the opportunity of observing the witnesses as they testified under oath before the court. The chancellor in this case heard the testimony of Calvin Rains, the natural father of Sarannah Elizabeth Rains, who testified that the child was, from the beginning, very sickly and was treated by numerous doctors in Dallas, Texas. His mother came to stay with the parents for a week when Sarannah was born. He testified of the very difficult task of finding a babysitter who would sit with the child after appellant returned to work. Many times the child was taken out at night to the home of a babysitter and in many instances thereafter suffered from colds. Before the child was three months old, appellant called the appellees (her parents) and had them come to Texas and get the child and return her to Arkansas. Appellant, who is without sight, and her husband were having serious marital problems and she had recently suffered epileptic seizures which rendered her unconscious for periods up to 30 minutes and caused her to sleep for many hours thereafter. Appellant had suffered one seizure at work and was taken to the hospital from her job. She had suffered

other seizures at home. Appellant's husband testified that appellant had a hot temper and on one occasion slashed at him with a butcher knife while he was holding the baby in his arms. About two weeks after appellant sent her child to the appellees, she returned the child to her home for a period of two or three weeks after which she again asked her parents to bring the child back to Arkansas to live. Since that time, with the exception of a very short period, the child has remained in the care and custody of the grandparents in Franklin County, Arkansas.

Joann Alston, appellant's mother and grandmother of Sarannah Rains, stated she and her husband, appellant's father, went to Dallas and brought appellant and Sarannah back to Arkansas when the child was about two weeks old. Although appellant had planned to stay several weeks, she got mad and left in two or three days and took the child back to Texas. A short time later, appellant called her mother and asked her to come get the baby and bring her back to Arkansas. On this occasion the child stayed with her grandparents three weeks. The child had been sickly and the doctor advised appellant to allow Mrs. Alston to bring her to Arkansas where she could care for her. During this three-week stay, the child's health improved greatly. Three days after appellant returned the child to Dallas the second time she again called her mother and asked her to come get the baby for the third time because she simply could not cope with things or take proper care of the baby. The Alstons have paid the expenses for appellant to come visit her child on a monthly basis. At the time of the hearing, the child was healthy and well adjusted and was walking and talking. Mrs. Alston stated, in her opinion, appellant loved her child but simply could not take care of the child. The Alstons own their own home and are financially able to care for the child.

The Alstons obviously love their daughter Linda (appellant) and sincerely desire to help her and her child. No doubt, appellant loves her child as much as most mothers love their children. The grandparents are willing for the natural parents to have unlimited visitation rights with the child. They would do all they could to encourage the child to have love and affection for appellant; also, when the child is a

little older and able to help care for herself, they would be willing for Sarannah to live with appellant. However, on the last two visits appellant had appeared like a wild person.

John Alston, appellant's father, testified essentially the same as Mrs. Alston. He emphasized the child is helpless at this age and simply must have someone to care for her. He stated he had about $200,000 owed to him for land he had sold. There was no question his resources would allow them to adequately care for the child. Mr. Alston also would welcome the natural parents of the child to visit the child in his home and to spend weekends there visiting. He did condition his offer upon decent behavior by his daughter.

From the testimony of appellant's husband and parents, it is obvious appellant has a rather violent temper sometimes. Neither is there any doubt that she loves her child very dearly or that she is a good worker. These matters are not the question to be decided by this Court. It becomes necessary to look at the testimony of appellant to determine her attitude and ability at the present to care for her child.

Upon being questioned by the court, she stated she could not possibly visit peacefully in her parents' home. She expressed hatred for her father. She stated she had many relatives in Franklin County but she didn't know them and didn't care to know them; she stated if the court gave her parents custody of her child it was total, as far as she was concerned, because there was no way she would visit her child in her parents' home. She denied her parents love her (appellant). She said if she were awarded custody of the child she would have help in caring for the child from a friend and the friend's 15-year old son, who is also without sight. The boy would take care of Sarannah while appellant and her friend were at work.

The testimony of Mrs. O. G. Davis, who lives next door to appellant in Dallas, Texas, is of significance to the Court. They had been neighbors for about three years. Mrs. Davis stated appellant had refused to be friendly with her neighbors and even ordered them out of her house. Nevertheless, after the birth of appellant's child, she became a close friend of

appellant and loves her very much. When the Alstons visited appellant, they requested Mrs. Davis to help their daughter and the child and they would pay for her trouble. She visited in appellant's home at least three days a week; she prepared food and took it to appellant and the child on Monday, Wednesday and Friday and sometimes on Saturday and Sunday. This testimony relates to the times the child was staying with appellant. Mrs. Davis testified the child was sick a lot and appellant refused to follow the doctors' orders because she didn't think the doctors knew what they were doing. She observed appellant trying to feed the baby some beef which still had blood coming from it and the baby threw it up on the table. She saw food on the table literally covered with roaches. Mrs. Davis said while she fed the baby she had to fight roaches off the food. Appellant did make some progress in reducing the number of roaches but they were still plentiful. Mrs. Davis saw the child pick things up off the floor and put them in her mouth after roaches had crawled over it. There was usually a lot of "gook" on the floor, except for the two days a cleaning lady was there. The bed linens were dirty. Sometimes the child was covered with jelly, and things of that nature. One day while Mrs. Davis was writing bills for appellant, she observed the child trying to open appellant's pills which were kept in a purse within reach of the child. This happened more than once. On one occasion a bottle of pills was open. There was an open heater in the bedroom where appellant slept with the child. Several times, Mrs. Davis found clothing, toys and pillows so close to the open flame stove they were scorched. One time the fire department was called because something caught fire. On another occasion, the child got out into the street, which is a very busy one, while appellant was on the telephone. Several children have been struck by vehicles in the street near the homes of Mrs. Davis and appellant. In fact, one child was fatally injured in front of appellant's house. Appellant told her she was sure her parents had spoiled the child but it would not take her long to "beat it out of her." Sometimes the child was locked in the bedroom where the open flame stove was installed. Appellant sometimes did not know where the child slept at night because she wouldn't sleep with her. The child often hid from appellant somewhere in the house. Mrs. Davis had seen appellant out of the house on days when the housekeeper

was not there and the child would not be with her. When appellant gave the child liquid medicine, she allowed her to drink it from the bottle because she spilled it if she tried to give it to the child in a spoon. Some of the medicine was tasteful and the child would drink several swallows before appellant took it away from her. Sometimes appellant failed to turn the lights on at night. Appellant sometimes, when she isn't working, sleeps for many hours while the child is awake. The child has been observed playing with the hot water controls on the tank and crawls behind the refrigerator where electric wires are located. Mrs. Davis even observed the baby turning the pilot light off the gas stove and then turning the gas on without it being lit. The child has been out with appellant when she was suffering from diarrhea and her legs would be covered with excretion and her shoes full too. On several occasions the appellant and her child became lost in the snow in 25 degree weather; the child was bareheaded and without a coat in the sub-freezing weather.

We do not ignore the testimony which favored appellant. Although she is without sight which renders some things more difficult for her to perform than for sighted persons, this handicap is not the controlling issue at all. Appellant is to be highly commended for her determination and desire to work and provide for her child.

Appellant's neighbor, Mona Hubbard, considered her to be extremely stable. Further, she had allowed appellant to move into her home with her and would, if necessary, give financial assistance. She had never seen appellant abuse the child nor display a violent temper. Mrs. Hubbard states she definitely felt appellant could properly care for her child and that all the neighbors would be willing to help. It was Mrs. Hubbard's 15-year old son who would help with the child if she and appellant were both away from the residence. Althought the witness had never seen the child until the day of the trial, she expressed a desire to assist appellant and the child in any manner in which she could.

Mr. A. H. Lewis came from Dallas, Texas to testify on behalf of appellant. He had been her supervisor when she first came to the Lighthouse for the Blind and had been in touch

with her ever since. Mr. Lewis stated appellant was an excellent worker and willing to do more than her part; he felt she was honest and able to handle finances well. He testified that appellant's mobility was good enough to allow her to go anywhere she wanted to whenever she desired even though he would not consider her among the most mobile unsighted persons he knew. He did not consider her a violent person. Appellant always was among the top workers on any job she held.

We conclude that, for the time being, it is in the best interest of the child to affirm the decision of the trial court which has had this case under consideration for many months. The court heard all the testimony and observed the witnesses as they testified and was in a better position to evaluate their testimony then we are. Perhaps appellant should evaluate her own attitude and position, and when her child is a little older the matter will, no doubt, again be considered by the court, as well as the grandparents and the father of the child. They have all indicated when conditions have changed their attitude on the matter will be different.

Affirmed.

HARRIS, C.J., concurs.,

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

CARLETON HARRIS, Chief Justice, concurring. This case was tried by a chancellor whom I consider to be very conscientious and for whom I have a great deal of respect. Judge Bernice Kizer seems to have given unusual attention to this case, the record reflecting that several hearings were conducted. For instance, on April 6, 1977, a hearing was held and on May 6, 1977, the trial court entered an order appointing appellees (grandparents) as permanent guardians of the person of Sarannah Elizabeth Rains and awarded permanent care, custody and control of this child to the grandparents, after finding that appellant, due to permanent physical handicaps, was not capable of properly caring for the child. On November 2, 1977, another hearing was held upon motion of

the trial court itself, and an order was entered on January 3, 1978, directing that temporary custody of the said minor should be placed with the mother, though not dissolving the permanent guardianship which had previously been ordered. Again, on January 26, 1978, the trial court, on its own motion, set another hearing to consider the custody of the child, but because of bad weather this hearing was continued until February 20th, at which time the hearing was had and the trial court found that the mother, who had had the care and custody of Sarannah Elizabeth for approximately 3 1/2 months was not able to reasonably and properly care for the minor, and would not be able to render proper care in the foreseeable future. I mention these matters only to emphasize that Judge Kizer apparently gave the case a great deal of consideration.

I was somewhat concerned when this opinion was originally handed down that it might leave the impression that this Court did not feel that appellant should have custody of the child simply because of her blindness. Certainly, this was not my view, nor that of the majority, and I felt that the opinion should go into enough detail of events that occurred when Mrs. Rains had custody of the child to demonstrate that the decision was not based on the physical handicap.

I am well aware throughout eight years on the chancery bench and 22 years on this one that there are many persons handicapped by blindness who are thoroughly competent in their work and who are thoroughly competent to rear their children. It must be remembered that the polestar of a custody case is the welfare of the child, and the testimony of Mrs. O. G. Davis, who lived next door to Mrs. Rains in Dallas (and whose testimony has been set out in the majority opinion), persuaded me that Sarannah's welfare at that time required that custody be placed elsewhere. I do not understand how anyone could feel otherwise when they read the testimony of this lady. It is noticeable to me that Mrs. Rains does *not* testify that Mrs. Davis was angry with her; that they had had trouble getting along; nor is there any reason cited why this next door neighbor would deliberately prevaricate about conditions that existed. Mainly, appellant testified that the matters mentioned had been corrected.

While I have a great admiration for Mrs. Rains' willingness and ability to work and support herself and her daughter, I cannot feel that her present temperament is conducive to the best welfare of the child. Of course, the court would have preferred not to detail matters which are set out in the majority opinion, but since various organizations interested in the blind, and many other individuals, have felt that the court decision was rendered simply on the basis of Mrs. Rains' handicap, and that this court was saying that a person, solely because of blindness, was not capable of caring for his or her child, it becomes incumbent that the court make clear the basis for its decision.

As pointed out in the majority opinion, the order relating to custody is always subject to modification when circumstances have changed sufficiently to justify reconsideration.

GEORGE ROSE SMITH, Justice, dissenting. The chancellor did not find that the appellant, the mother of the child, is an unfit person to have the custody. Instead, the chancellor found that the mother, because of her physical handicaps (primarily blindness), is not able to reasonably and properly care for the child and will not be so able in the foreseeable future. Upon further consideration of the case I am convinced that the chancellor's decision to award custody to the grandparents instead of to the mother is against the preponderance of the testimony. For that reason I would grant the petition for rehearing and reverse the judgment.

FRANK HOLT, Justice, dissenting. Because of the unique facts, disputed and undisputed, and the passage of time since the hearing from which comes this appeal, I am of the view it would be to the best interest of the child for the cause to be remanded for another hearing.

For these reasons I respectfully dissent.

DARRELL HICKMAN, Justice, dissenting. These several opinions on rehearing are all an effort to correct an error on our part, or what some may feel was an error: that Linda

Rains is unfit to have custody of her child because she is blind.

Originally the case was tried as a guardianship proceeding between Linda and her parents, John and Joann Alston. We have treated it as a custody case that arises in divorce proceedings.

Linda and her husband, Calvin, were involved in a divorce proceeding in Texas, where they both live. The child, Sarannah, was about 19 months old then, and during the domestic squabble, Linda asked her parents to keep the child at their home in Ozark, Franklin County, Arkansas. The parents instituted this action to keep the child.

There were two hearings. After the first hearing, Linda was allowed to keep the child for several months with her in Texas. But at the last hearing the child was awarded to Linda's parents.

The chancellor found the one reason for denying Linda custody was ". . . because of permanent physical handicaps, to reasonably and properly care for the child, and her handicaps are such that she will not be able to reasonably and properly care for the child in the foreseeable future."

We affirmed the chancellor in an unpublished opinion (one which we feel has no precedential value) stating in part, "We must conclude, on the record, that Linda, largely owing to her blindness, is as the trial judge found, unable to look after a child as young as her daughter now is."

I feel I can safety state that this Court, without exception, feels those statements are not correct legally, or at least, are no basis alone on which to base a custody decision. Such handicaps alone are not good reasons to deprive any parent custody of a child.

Having corrected this error on the part of the chancellor, and on our part, we must then deal with our other responsibility in this case, one more important than our confession of error; and that is the future of the child, Sarannah.

The majority, on rehearing, has recited most of the unfavorable testimony about Linda, justifying the majority decision on the basis of such evidence. Since we did not recite any evidence favorable to Linda in our first opinion, and our decision now is justified by the adverse evidence, I feel I must recite the other evidence in the case.

First, it is not disputed that Linda, a college graduate, is a good worker. She works at a photo laboratory in Dallas with a bi-weekly take home pay of $266.00. She held down two jobs at one time (a fact held against her) and is careful with her money. This is her only marriage and her only child.

Her husband, Calvin, admits to one prior marriage, several common law wives — he didn't know how many — and several children besides Sarannah, none of whom he supports. He admitted that Linda paid $3,000.00 down on their house and helped him buy a taxi. (He is a taxicab driver.) He testified against Linda at both hearings. He does not want the child.

He testified Linda threatened him with a butcher knife, while he held the child in his arms; she denied it, saying that in fact it happened when she was holding the child and her husband tried to take the child from her.

Linda's parents sought custody of the child, and testified against her. In effect, they said she was not fit. Linda's main objection to the child being raised by her parents was that their marriage was unstable and violent at times. Linda said her father physically abused her at times, and regularly beat her mother after each payday. He is now retired.

Her father admitted that he had probably been violent in his relationship with Linda; he admitted striking her and spanking his wife. He confirmed that his wife once struck Linda with a rag doll when Linda tried to get her child. He said his wife had twice filed for divorce against him.

Linda's mother was critical, as mothers sometimes are, of how Linda cared for the child. She admitted that she and her husband had marital problems at times.

The majority opinion on rehearing refers to Linda as a "wild person" on two visits. This reference is to her conduct during court authorized visits with her child at her parents' home. Linda said that on one occasion her mother kicked her in the stomach and her father dragged her by the hair of the head, down the hall, beating her head on the floor.

There were several disinterested witnesses who testified. One was Mrs. O. G. Davis, a neighbor of Linda's in Dallas. The Chief Justice, in his opinion, has referred to her testimony and puts great stock in it, concluding that the chancellor's decision cannot be found to be clearly against the preponderance of the evidence. The testimony of Mrs. Davis, on its face, is indeed damaging to Linda's cause and was essentially unchallenged by her at the hearing.

Mona Hubbard, a friend of Linda's from Dallas, who has a handicapped child, has known Linda for over four years. She helped her during the domestic dispute and offered support to Linda as a friend and a witness. She said that Linda was an extremely stable person, not violent, and, absent the domestic turmoil, would have no problems.

Mrs. A. H. Lewis, an employee of the Lighthouse for the Blind in Dallas, said that Linda was very dependable in her work habits, a woman of her word, and very good at handling her personal finances. (At the first hearing she had $500.00 in savings; at the second hearing it had grown to $1,100.00.) She thought Linda was doing well and adjusting to her handicap. She said she had never known Linda to be a violent person.

Mrs. Katherine Robertson permitted her home to be used by Linda for visitation with her child during the court battle. Mrs. Robertson's description of the condition of the child contrasts with that described by the majority. The majority says that after staying with the Alstons the child was " . . . healthy and well adjusted. . . . ". Mrs. Robertson observed at that time the child had poor eating habits and appeared insecure. She said that Linda cared for the child as well as any mother would.

Janet Webb, a social worker, assigned to supervise the visitation the court allowed Linda, gave testimony favorable to Linda, and not so favorable to the Alstons. She said Mr. Alston harassed her on the phone, and once she had to hang up on him. She said Mr. Alston became angry with her and made "smart remarks" to her. She said she had never witnesseed any mistreatment or neglect of the child by Linda.

When all the testimony is evaluated, there is only one disinterested witness, Mrs. Davis, who testified against Linda.

Calvin Rains, the husband of several women, legal and otherwise, the father of several children, legal and otherwise, does not want the child; nor does he want his former wife to have the child — a common attitude.

Linda's parents, rather than supporting her in her time of need, turned on her and sought custody of her only child. She came to them for help and lost her child. It is not disputed their home is not without problems. The evidence of violence therein is too strong to ignore. It is not uncommon for grandparents to want a child, perhaps even need a child. In that context their testimony and attitude is understandable.

Linda's conduct must be considered in the light of one enduring a divorce, trying to make a living, trying to care for a small child alone — all with a handicap we do not have. Her perhaps violent reaction to her parents' taking the child can at least be understood. Even so, there is enough evidence of neglect of the child by Linda to cause concern for the child's welfare. The decision, based on the evidence, is indeed a hard one.

The chancellor found Linda unfit largely because of her handicap. We affirmed the decision on the same basis. After removing that improper premise, there remains the question of grandparents seeking custody as against a parent. The law says, as it should, a fit parent shall prevail. *Baker* v. *Durham,* 95 Ark. 355, 129 S.W. 789 (1910); *Thompson* v. *Thompson,* 209 Ark. 734, 192 S.W. 2d 223 (1946).

The majority, conceding our error, still finds Linda otherwise unfit. That is certainly an alternative. However, except for Mrs. Davis' testimony, there is very little else presented by appellees that one can accept with confidence. The home she is placed in, the home Linda was raised in, also has problems.

Considering all the favorable testimony for Linda, considering what she has done so far with her life, giving leeway for human error, we should not rush to judgment.

We make mistakes and occasionally concede them. We did so in this case. If we have regrets or second thoughts in this case, then we should give this mother the benefit of those doubts.

We have held before that a case may be remanded when a decision is based on an erroneous theory. *Lewis* v. *Lewis,* 255 Ark. 583, 502 S.W. 2d 505 (1973). The chancellor improperly applied such a principle; and, initially, so did we.

Therefore, I would remand the case for a rehearing.

RKO BOTTLERS OF FORREST CITY, INC. *v.* R. A. HALLEY

78-273 577 S.W. 2d 409

Opinion delivered February 26, 1979
(Division I)

Rieves, Rieves & Shelton, by: *Connie Lewis Mayton,* for appellant.

Ray & Donovan, for appellee.

GEORGE ROSE SMITH, Justice. The appellee, R. A. Halley, is a merchant owning a retail store in the community of Brickeys, in Lee County. On April 28, 1976, what we may refer to as a PepsiCola Bottling Company truck was being used to deliver bottled soft drinks to Halley's store. A deliveryman on the truck, whose name is not shown, got into an altercation with Halley and attacked him, inflicting severe personal injuries. This appeal is from a $10,000 personal injury judgment against the appellant, RKO Bottlers of Forrest City. RKO contends, first, that the deliveryman was not its employee and, second, that the court erred in giving an instruction requested by the plaintiff. We find merit in the second contention.

The owner and driver of the PepsiCola truck was Delmar Frames, whom the jury found to be an employee of RKO. RKO now contends that it was entitled to a directed verdict, on the ground that Frames was an independent contractor rather than an employee, which in turn would make Halley's assailant an employee of Frames. RKO relies upon a written contract between it and Frames, which contained standard language purporting to make Frames an independent contractor. It was also shown that Frames owned the truck, that he employed his own helpers, that RKO did not carry workers' compensation insurance upon Frames, and that it did not withhold social security taxes or other deductions from Frames's pay.

Other facts, however, raised a question for the jury. *Terry Dairy Co.* v. *Parker,* 144 Ark. 401, 223 S.W. 6 (1920). We enumerate some of them. RKO is identified at its place of business and in the telephone book as PepsiCola Bottling Company. Frames and his helpers wore PepsiCola uniforms. Frames was required to paint his truck with PepsiCola's colors. The truck was lettered with a PepsiCola sign. Frames was assigned a territory, to which he was restricted. He could handle only RKO's beverages. He "purchased" his daily

supply of soft drinks, in bottles that belonged to RKO, but he did not pay for the merchandise in the morning. Instead he made deliveries during the day, collecting cash or accepting charge tickets from customers approved by RKO. Those charge customers paid their accounts directly to RKO. When Frames returned to RKO in the evening he paid for what he had sold, in cash and by using the charge tickets. RKO fixed the price at which Frames bought and the price at which he sold. In selling to Halley, Frames used a sales slip provided by RKO, which had RKO's name at the top and identified Frames as a salesman. We need not detail the proof any further. It was amply sufficient to warrant the jury in finding that Frames was not an independent contractor but an employee working on a commission basis, subject to RKO's control.

The court erred, however, in giving this instruction for the plaintiff:

> The unexplained failure of a party to produce a witness with special knowledge of the transaction, if within the power of the party to do so, raises a presumption that he would testify against the party and that the testimony would have been unfavorable.

There are two reasons why the instruction should not have been given. First, the actual facts about Frames's relationship with RKO are not in dispute. The jury could only have speculated about what Frames might have testified with respect to a material fact in the case. *See Ark. State Highway Commn.* v. *Phillips,* 252 Ark. 206, 478 S.W. 2d 27, 71 A.L.R. 3d 1105 (1972). In other words, the unfavorable inference to be drawn by the witness's absence does not go indefinitely to the whole case. Wigmore, Evidence, § 290 (3d ed., 1940). Here the possible area of conflict is not pinpointed.

Second, RKO argues quite properly that there is no showing that it was in a superior position to produce Frames as a witness, Frames having left its employ before the trial. The appellee makes no effort to answer RKO's argument, but insists instead that the instruction referred to a former

RKO employe named Miller. The appellee points out that RKO obtained two continuances on the ground that Miller was an indispensable witness who was temporarily not available. The trouble is, Miller did not appear at the trial and there is no indication in the record that the members of the jury ever heard of Miller. It was patently impossible for the jury to assume that the instruction referred to someone whose identity and whose possible testimony were totally unknown to the jury.

Reversed.

We agree. HARRIS, C.J., and BYRD and PURTLE, JJ.

Albert LEWIS and Larry HIGGINBOTHAM
v. STATE of Arkansas

CR 78-41 577 S.W. 2d 415

Opinion delivered February 26, 1979
(In Banc)

John R. Henry, for petitioners.

Bill Clinton, Atty. Gen., by: *Joseph H. Purvis,* Deputy Atty. Gen., for respondent.

GEORGE ROSE SMITH, Justice. This is a petition in this court for a writ of error coram nobis to permit the trial court to investigate the existence of a fact that would assertedly have prevented the rendition of the judgment if the fact had been known. *Cf. Troglin* v. *State,* 257 Ark. 644, 519 S.W. 2d 740 (1975). We treat the petition as an application for permission to seek postconviction relief in the trial court under Criminal Procedure Rule 37.2 (a) and grant permission.

The appellants were charged with first degree murder. Their first trial resulted in a mistrial because the jury was unable to reach a verdict, but a second trial ended in a conviction and a 30-year sentence. That judgment was affirmed in *Lewis and Higginbotham* v. *State,* an unpublished opinion delivered on September 5, 1978. At that trial the State proved that the murder weapon was a pistol that had been recovered by the police from a grease pit at a service station that was formerly owned by the petitioner Lewis and was formerly the place of employment of petitioner Higginbotham.

The present petition alleges that within a few days after the trial ended in a mistrial "the retained attorney, who represented both petitioners in both trials and/or an employee hired by said attorney and working for said attorney as an investigator" communicated confidential and privileged information to various members of the local bar and to others. The information reached the prosecuting attorney's office and resulted in the discovery by the police of the murder weapon. The petition asserts that the attorney's or investigator's unauthorized release of confidential information violated the petitioners' constitutional right to counsel and other rights that we need not enumerate.

Until the facts have been completely developed in the

trial court, it would be idle for us to speculate about what rights of the petitioners may have been violated or about what relief might eventually prove to be appropriate if a violation is shown. It is enough to say that the right to counsel includes the contemporaneous necessity for making a full disclosure of all pertinent information to counsel and that such disclosures, as they relate to a past offense as distinguished from a crime that is planned for the future, are privileged. Rule 502, Uniform Rules of Evidence, Ark. Stat. Ann. § 28-1001 (Supp. 1977); see also Chamberlain, "Legal Ethics: Confidentiality and the Case of Robert Garrow's Lawyers," 25 Buffalo L. Rev. 211 (1975-76).

The petition is treated as one for postconviction relief under Rule 37.2 (a), and the petitioners are granted permission to seek relief in the trial court on the ground that the facts asserted in the petition allege a ground for relief based upon ineffective assistance of counsel.

BYRD, J., dissents.

Willie Lee PARKER *v.* STATE of Arkansas

CR 78-175 577 S.W. 2d 414

Opinion delivered February 26, 1979
(In Banc)

Robert C. Compton, of *Brown, Compton & Prewett,* for appellant.

Bill Clinton, Atty. Gen., by: *Joyce Williams Warren,* Asst. Atty. Gen., for appellee.

GEORGE ROSE SMITH, Justice. Willie Lee Parker, aged 59, was charged with second degree murder in the fatal shooting of Bubba McRae. The jury found Parker guilty of manslaughter, but were unable to agree upon the punishment. The trial judge, after considering a probation officer's report, fixed the punishment at ten years, with five years suspended. Defense counsel now argues that the court erred in directing the probation officer to interview members of the jury, that the sentence is excessive, and that we should suspend the entire sentence. A new trial is not sought.

The circuit judge, in imposing sentence, stated candidly that he had requested his probation officer to interview members of the jury about what they thought to be a proper sentence. The officer reported, in brief, that most of the jury favored a maximum of ten years, but at least two held out for a lighter sentence. The judge explained that he had considered the jurors' views in fixing the sentence.

We are unanimously of the opinion that the jurors should not have been questioned about their views, especially

after they had separated, had returned to their homes, and had been subjected to the possibility of being influenced by out-of-court occurrences. A chief objection to the procedure is that the secrecy and freedom of the jury's deliberations would be jeopardized if the jurors knew in advance that they might be questioned about their reasons for their decision. There would also be the possibility, if the practice were approved, that counsel on both sides might think it proper and advisable for them to see the individual jurors in an effort to win a favorable recommendation. Whatever slight advantage the practice may have is greatly outweighed by its disadvantages. We should add that we did not intend to approve such a practice by our opinion in *Murrah* v. *State,* 253 Ark. 432, 486 S.W. 2d 897 (1972). There the jurors themselves had raised the question whether the two sentences should be consecutive or concurrent, and there was no objection when the judge announced that he had questioned some of the jurors about their intent. If the *Murrah* case raises any doubt about our position, we make it plain now that jurors should not be questioned about their reasons for their verdict.

The appellant argues that this court should suspend the entire sentence, because he suffers from diabetes, heart trouble, an ocular tic, and tension, and has lost a leg below the knee. It is also argued that all the applicable considerations for a suspension, as enumerated in Ark. Stat. Ann. § 41-1201 (Repl. 1977), are favorable to this appellant. The propriety of suspending the execution of a sentence rests in the sound discretion of the trial court, not in this court. Commentary to § 41-1201, *supra; Smith* v. *State,* 241 Ark. 958, 411 S.W. 2d 510 (1967). The cause will therefore be remanded to the trial court for the imposition of an appropriate sentence without regard to the opinions of the jurors.

The appellant's opening statement in his brief makes it appropriate for us again to call the bar's attention to our Rule 9 (b), which requires that the opening statement be concise, ordinarily not exceeding two pages in length, and be free from argument. Here the opening statement is seven pages long, contains matters that should have been included only in the abstract of the record, and is in effect an argument for a suspended sentence. Even though no penalty is imposed for a

violation of the rule, compliance is expected.

Reversed.

C. Carlton SMITH *v.* STATE of Arkansas

CR 78-235 577 S.W. 2d 411

Opinion delivered February 26, 1979
(In Banc)

Appellant, *pro se.*

Bill Clinton, Atty. Gen., by: *Ray Hartenstein,* Asst. Atty. Gen., for appellee.

GEORGE ROSE SMITH, Justice. This is a bond forfeiture proceeding. The appellant Smith, charged with a violation of the Arkansas Securities Act, entered a plea of not guilty and was released on a $5,000 cash bond put up by his father.

Smith's attorney withdrew from the case. The prosecuting attorney, desiring to know whether an attorney should be appointed for Smith as an indigent, apparently brought about the sending of a notice by the court clerk for Smith to appear on November 22, 1977, "for arraignment[s] only." Smith, having already been arraigned, did not appear, and the court forfeited the bond. This appeal is from an order refusing to set aside the forfeiture.

We consider this case to be essentially controlled by our holding in *Central Cas. Co.* v. *State,* 233 Ark. 602, 346 S.W. 2d 193 (1961). There we said: "It is well settled that the giving of bail bonds is to be encouraged, not only because the accused is ordinarily entitled to his freedom before the trial but also because the state is relieved of the expense of maintaining the prisoner until the case can be heard." There we found that the defendant's failure to appear was partially excusable. We reduced a $7,500 forfeiture to $750, which was described as an amount sufficient to reimburse the county for various costs such as jury expenses and witness fees (some 25 or 30 witnesses having been summoned).

In the case at bar it is important to note that the case was not set for trial on November 22, the day when Smith failed to appear. The prosecutor merely wanted to know whether an attorney should be appointed. The State could not have been put to any substantial expense by Smith's absence. The notice that was sent to Smith was inaccurate, in that he had already been arraigned. He made some effort to protect himself, by telephoning from Washington, D.C., to two Arkansas attorneys, neither of whom was in a position to appear for him. Smith then made a two-day business trip to London, so that he failed to appear in court as directed.

We do not imply that Smith was blameless in the matter. The trial judge evidently believed that Smith may have been attempting to avoid the possibility of being served with process in a federal case pending in another state. The judge may have believed that Smith had previously delayed this case without cause. The judge may also have believed that Smith made inconsistent statements in connection with his attempt to have the forfeiture set aside. Even so, the case was

not set for trial on the date of Smith's default, the state has not been put to any substantial expense as in the case cited, and Smith did actually submit himself to the court's jurisdiction with promptness. In the circumstances a forfeiture of $1,-000 is sufficient and proper.

As so modified the judgment is affirmed.

FOGLEMAN, BYRD, and HICKMAN, JJ., dissent.

JOHN A. FOGLEMAN, Justice, dissenting. I would set aside the bond forfeiture. Appellant had been arraigned on April 12, 1977. Thereafter, his attorney, Richard E. Gardner, withdrew from the case. The court gave no notice to appellant to appear on November 22, 1977. The notice to appear was sent by the prosecuting attorney. The bail was to guarantee all subsequent appearances of the defendant on the charge. Rule 9.2, Arkansas Rules of Criminal Procedure. We need not consider the very dubious practice of a notice to appear by the prosecuting attorney, the charging official, who, for the purposes of trial, was appellant's adversary, because appellant never got or knew about that notice, which was addressed for delivery by certified mail to the addressee only. The only notice we have for consideration is a written notice by the clerk to an attorney who had withdrawn from the case. That notice was actually received by appellant on November 18. That notice was for arraignment only. The petition for forfeiture was filed on November 21, 1977, the day before appellant's scheduled appearance. The forfeiture was declared on the day the court had scheduled for appellant's appearance.

Appellant was justified in taking the notice at face value, and in believing that it was sent in error, or, as he put it, "administrative error," and recipient would have been justified in feeling that there was confusion for which he was not to blame. The petition for forfeiture was predicated only upon the fact that the prosecuting attorney's notice had been returned with the notation, "Return to Sender — Addressee Unknown." Before the forfeiture was declared, Gardner stated to the court (and it is not denied) that appellant had been previously arraigned and that he had always appeared

in the past when he had notice. Appellant's father, who posted the $5,000 cash bail (according to Gardner), had not been notified that appellant was to appear on November 22. There is no showing that he had. Appellant testified that Gardner only told him that he should employ an attorney and that Gardner agreed that he had already been arraigned, but did not tell him that he should appear. There is no intimation that a trial was set or anticipated on November 22. At the time the court heard appellant's motion to remit the forfeiture (July 18, 1978), there had been no trial and the trial judge gave notice that the case would be tried no later than the following September.

It is quite possible that the court was justified in considering appellant to be of dubious credibility and in giving his testimony little weight. I am confident, although the record does not reflect it, that the trial judge correctly found that appellant was doing whatever he could to avoid being tried on the charge. I simply think that a forfeiture should not be declared on this record.

DARRELL HICKMAN, Justice, dissenting. I would affirm the judgment of the trial court ordering a forfeiture of the bond.

The appellant had actual notice that he was supposed to be in court. He called two lawyers who had represented him before and asked them to appear for him; both of them refused. The trial judge, after a hearing, decided that Smith made a deliberate choice after being advised by counsel of the possible consequences of his failure to appear. The trial court's characterization of the appellant's testimony and demeanor is the reason I would affirm the judgment:

> . . . I have never heard such conflicting testimony in my life, Mr. Smith, and I'm not sure which time you were lying. Whether it was in the letter you wrote on November 18, or by way of the testimony you first offered to the Court or the testimony you later offered to the Court. I just can't believe that your memory is that bad. I think that it was a deliberate effort on your part to come into this Court and try to tell me a bald-faced lie

> so I would return your bond money. You were concerned about that bond money last November 18th . . . . You knew good and well that it would be called if you didn't appear. I think one of the reasons you elected not to appear is because you didn't want to go to trial. The record indicates that you have successfully stalled this case since March 3rd of last year and I'm not going to take any more stalls on this. I'm informing your counsel to get prepared. It won't do you any good to fire this man like you fired the others at the last minute and come in here at the last minute and say that you are not ready to go to trial. You are presumed to be innocent of the charges and the jury will perhaps find you to be innocent. Nevertheless, there is going to be a trial. . . . .

One reason for the crowded docket problem is that cases are postponed and valuable court time is wasted. One way of preventing such dilatory tactics is imposition of bonds and forfeiture of the bond. The trial court was in a position to judge the matter, which he did; I would not substitute my judgment for his in this case.

I am authorized to state that Justice Byrd joins in this dissent.

Carl David WILBURN and E. J. JENNINGS, JR. *v.* TOPEKA CORPORATION, INC.

78-228 577 S.W. 2d 406

Opinion delivered February 26, 1979
(In Banc)

Robert S. Blatt, for appellants.

Daily, West, Core, Coffman & Canfield, for appellee and cross-appellant.

JOHN A. FOGLEMAN, Justice. Appellants were charged with the robbery of employees of the Fort Smith Sheraton Inn on April 17, 1977. After they had entered pleas of guilty and had been sentenced on March 4, 1978, appellants moved that $1,557.24 taken from them when they were arrested by Fayetteville police on April 18, 1977, be returned to them. After $650 of the money was turned over to the Fort Smith Sheraton Inn, appellants amended their request to ask that the remaining $907.24 be returned to them. On April 5, 1978, appellee, the operator of the Sheraton Inn of Texarkana, Arkansas, moved that this remaining money be turned over to it, alleging that this money was the proceeds of a robbery of the Texarkana Sheraton Inn on April 14, 1977. After a hearing on the motions, the trial court ordered that $157.24 be returned to appellants and $750 turned over to appellee. Appellants seek reversal on the ground that there was no substantial evidence to support the judgment. We agree and reverse the judgment.

It must be remembered that this is not an action by Topeka Corporation, Inc. to obtain a judgment for a civil

liability of appellants for money taken by robbery and to collect that judgment by garnishment of moneys held by the Fort Smith Police Department. It is a motion for the return of seized property filed pursuant to Rule 15.2, Arkansas Rules of Criminal Procedure. Appellee was entitled to a return or restoration of the money seized only if it had a valid claim to the rightful possession of the *things seized* because these *things* had been stolen and it was the owner or the rightful possessor. We find no substantial evidence in the record before us to show that the Topeka Corporation was the owner of the things seized, i.e., the specific money then in the hands of the Fort Smith police.

We are somewhat handicapped in our review by reason of the fact that the record does not disclose things which appellee considers essential to the issues. Appellee filed a motion to dismiss the appeal, alleging that in spite of its designation of the entire record before the Circuit Court of Sebastian County, appellants had filed only a partial record of the proceedings below. This did not include the record of the criminal proceedings against appellants in the Circuit Court of Sebastian County, which appellee had designated, on the ground that the trial court, at its request, had taken judicial notice of those proceedings. Appellee asserted that these proceedings established a nexus between the two Sheraton Inn robberies, one at Texarkana and the other at Fort Smith. Appellee prayed that the appeal be dismissed, but that, in the alternative, its motion be treated as a motion for an extension of time within which the additional transcript proceedings could be prepared, in order that this court could render its decision upon the full record that was before the Sebastian Circuit Court. So far as we can tell from the affidavit of the Clerk of the Circuit Court of Sebastian County, these criminal proceedings consisted of a brief of the prosecuting attorney relating to the validity of a search by the Fayetteville police when appellants were arrested, and their seizure of the money found on appellants, and a letter from appellee's attorneys addressed to the Judge of the Circuit Court of Sebastian County, requesting that the judge determine the content of the record, if appellant's attorney desired that he do so.

We did not grant appellee's motion to dismiss, but

granted its alternate prayer. We have not found any additional transcript that has been filed here, in spite of our giving appellee the opportunity to file one. If nothing more than the prosecuting attorney's brief was omitted, the record filed by appellant was not deficient, because that brief is not evidence, much less admissible evidence, on the issues here and, if this constituted the "proceedings" of which the trial court took judicial notice, it did so improperly. It appears, however, that there were certain pleadings in the criminal proceedings. Appellee has abstracted several pleadings, presumably from the criminal proceedings against appellants on the Sebastian County charge. None of these seem to have any relevance to the issues in this case. One of the pleadings abstracted is the brief of the prosecuting attorney, which, as we have said, could not be considered as evidence, unless the parties stipulated that it be. We find no such stipulation.

The evidence, viewed in the light most favorable to appellee, discloses that James Langford, an employee of appellee, who witnessed the Texarkana robbery, had subsequently identified Wilburn as one of the two robbers. Langford also testified that a weapon he had seen on this occasion looked like the weapon used in the Texarkana robbery. He described the vehicle in which the robbers came and left as a '70 or '71 model Torino, beige in color. He was unable to identify or recognize any of the money still held by the Fort Smith police as having been taken in the Texarkana robbery, four days before appellants were arrested.

When appellants were arrested, Jennings had $200 in $20 bills and $1.63 in change on his person. Wilburn had $180 in $20 bills, $25 in $5 bills and 95 cents in change on his person. A white plastic bag and a yellow paper bag were found in the rear of the gray Ford Torino occupied by appellants when they were arrested. These two bags contained money in the following denominations:

$20 bills	$ 260
$10 bills	290
$5 bills	220
$1 bills	301
Change	146.85
	$1217.85

Somehow a total of $1192.85 was calculated as the amount found in the rear of this vehicle. By an equally mysterious process, the total amount taken from these appellants and the vehicle was stated as $1557.24 and that amount was turned over to the Fort Smith police by the Fayetteville police.

The shortage reported by appellee's accountants after the robbery included $750 in cash, which was made up of five "house banks." The "front desk bank" amounted to $350, and each of four restaurant banks consisted of $100. The balance represented cash proceeds from the morning and evening shifts. Langford was the night clerk. He said that some $1 bills, some $5 bills, some $10 bills, some $20 bills and one or two $50 bills were taken from him. In addition to his $350 bank, three $100 bills were taken. He also said that there were quarters, dimes and nickels in rolls. Three rolls of dimes were wrapped in paper of the First National Bank of Fort Smith, with which appellee did no business. He had never seen a roll of nickels in a tan colored package, but had used rolls of quarters in orange and white wrappers, similar to some of those in question. There were coins in blue wrappers, which Langford said were commonly furnished by all banks. At the time of the robbery, none of the money taken had been in either of the bags found in appellants' vehicle, although Langford said that he had seen a bag in the safe which contained the proceeds of the evening shift which preceded his shift and that the robbers took this bag.

Although appellee is probably correct in its contention that Rule 15.2 (f) and Ark. Stat. Ann. § 41-1401 (Repl. 1977) must be considered in conjunction with each other, the statute simply says that seized property must be returned to its rightful owner. There is no conflict between the statute and the rule, and the latter is simply the procedural implementation of the former. There simply is no evidence that any of the *things* seized from appellants were *things* of which appellee was the owner.

The judgment awarding appellee $750 of the money seized is reversed.

The Chief Justice would affirm the judgment as to Wilburn.

HICKMAN, J., dissents.

DARRELL HICKMAN, Justice, dissenting. I would affirm the judgment of the trial court in view of two standards we apply on review of trial judgments. First, we will not reverse if there is substantial evidence to support the trial court's finding. Second, we view the evidence in the light most favorable to the appellee.

One of the appellants, Carl David Wilburn, was identified as an armed robber of the Texarkana Sheraton Inn. Both Wilburn and Jennings pleaded guilty to the charge of aggravated robbery of the Fort Smith Sheraton Inn which occurred several days after the Texarkana robbery. Apparently the appellants favor Sheraton Inns. These gentlemen were apprehended near Fayetteville with over $1,000.00 in the trunk of the vehicle. The description given by an employee of the Sheraton Inn at Texarkana of the vehicle used by Wilburn is similar to that of the vehicle the appellants were driving in Fayetteville.

Wilburn refused to open the trunk and, in fact, ran and threw the keys away.

The trial judge ordered a return of some $650.00 to the Fort Smith Sheraton Inn in a separate proceeding, and in this proceeding ordered $750.00 turned over to the Texarkana Sheraton Inn.

The majority finds that the money could not be identified as belonging to the Texarkana Sheraton Inn. Rarely can money which is taken from merchants be identified. However, this is a civil case, not a criminal case, and I feel that the appellee has made a prima facie showing that these gentlemen robbed it and still had some of the money. The fact that it was not in the exact denominations several days later does not impress me. The appellants put on no evidence whatsoever to indicate their occupation nor the source of the money, and I suppose we can assume they are in the business

of robbing people for money. At least that is what the record indicates.

I would affirm the judgment of the trial court.

Lester HOSTO et al *v.*
Leonard Edward BRICKELL

78-266 577 S.W. 2d 401

Opinion delivered February 26, 1979
(Division II)

[redacted]

[redacted]

Wright, Lindsey & Jennings, for appellants.

Paul D. Groce, for appellee.

JOHN A. FOGLEMAN, Justice. This is an appeal from the order of the circuit court reversing the suspension by the Arkansas State Board of Pharmacy of the license of Leonard Edward Brickell to practice pharmacy. All charges against appellee Brickell were dismissed. The reversal was based upon a finding that an inspection made by representatives of the State Board of Pharmacy upon the premises of Medix Pharmacy (owned and operated by Brickell) in Jacksonville,

was in excess of the agency's statutory authority. The basis for this holding was that the "inspection" was made without a warrant and without the consent of appellee. Since we do not agree that the appellee's constitutional rights were violated or that the action taken was in excess of the powers of the Board of Pharmacy, we reverse.

We cannot say that the court's finding that Brickell did not consent to the actions taken by the board's representatives was clearly against the preponderance of the evidence. Lester Hosto, Executive Secretary of the Arkansas State Board of Pharmacy, who was accompanied by Hugh Perkins and Woodrow Little, inspectors for the board, and Larry Martin, a drug investigator with the Division of Drug Control with the Arkansas Department of Health, visited the Medix Pharmacy on February 8 and 9, 1978, for the purpose of conducting an accountability audit. Brickell was not present when they arrived. They awaited Brickell's arrival so he could know that the audit was going to be conducted and have the opportunity to be present while it was going on. Brickell said that when Hosto stated the purpose of the visit, he asked if they had a search warrant and received the response that the State Board of Pharmacy did not need a search warrant. Brickell answered that there was not much he could do and went to telephone his lawyer, who was out of his office for an hour or two. After the lawyer was available, Brickell went to talk to him. Brickell said that he did not acquiesce in the "search."

We cannot reverse the trial court's finding on the question of consent unless it is clearly against the preponderance of the evidence. *State* v. *Osborn,* 263 Ark. 554, 566 S.W. 2d 139. We cannot say that there is a preponderance of the evidence to show that Brickell's actions were more than an acquiescence to an assertion of lawful authority under the circumstances shown to exist. Such acquiescence does not constitute consent. *Hock* v. *State,* 259 Ark. 67, 531 S.W. 2d 701. See also, *U.S.* v. *Biswell,* 406 U.S. 311, 92 S. Ct. 1593, 32 L. Ed. 2d 87 (1972); *U.S.* v. *Kramer Groc. Co.,* 418 F. 2d 987 (8 Cir., 1969).

The real issue in this case is the propriety of the actions

of appellants' agents without a warrant. The statute relied upon by appellee is Ark. Stat. Ann. § 82-2626 (Repl. 1976). It deals with administrative inspection warrants. The act does not prohibit inspection of books and records without warrant, pursuant to administrative subpoena, nor does it prevent entries and administrative inspections without a warrant in any situation in which a warrant is not constitutionally required. § 82-2626 (4). The act of which § 82-2626 is a part contains an express disavowal of any legislative intent to limit or restrict the investigatory, *inspection,* or disciplinary powers of any licensing and disciplining board. Ark. Stat. Ann. § 82-2625.1 (Repl. 1976). Consequently, § 86-2626 must be read as an act authorizing administrative inspection warrants and regulating their issuance and execution when constitutionally required, and not as a limitation on actions where a warrant is not required. In other words, a warrant is not required for inspection of premises or books and records unless it is constitutionally required. We must direct our inquiry to the effect of constitutional restraints on the actions of the representatives of the State Board of Pharmacy.

Appellee's petition for review in the circuit court characterized the action of Hosto as an audit, which was not supported by a search warrant. The circuit court's order from which this appeal is taken calls it an inspection. The abstracted record does not elaborate upon the particular action, but it is clear that Hosto and those accompanying him made a rather comprehensive audit of appellee's records pertaining to prescription drugs.

The constitutional prohibitions against searches are contained in Amendment 4 to the Constitution of the United States and in Art. 2, § 15, of the Constitution of Arkansas. Protection is afforded only against *unreasonable* searches. *South Dakota* v. *Opperman,* 428 U.S. 364, 96 S. Ct. 3092, 49 L. Ed. 2d 1000 (1976); *Wickliffe* v. *State,* 258 Ark. 544, 527 S.W. 2d 640; *Milburn* v. *State,* 260 Ark. 553, 542 S.W. 2d 490; *Young* v. *State,* 254 Ark. 72, 491 S.W. 2d 789; *Thomas* v. *State,* 262 Ark. 83, 553 S.W. 2d 41. See also, *Bedell* v. *State,* 257 Ark. 895, 521 S.W. 2d 200, cert. den., 430 U.S. 931, 97 S. Ct. 1552, 51 L. Ed. 2d 775 (1977); *Wyman* v. *James,* 400 U.S. 309, 91 S. Ct. 381, 27 L. Ed. 2d 408 (1971). This does not mean that a

search without a warrant is necessarily unreasonable and there are many well recognized types of warrantless searches that do not violate these constitutional protections. See *Milburn* v. *State,* supra; *Norris* v. *State,* 259 Ark. 755, 536 S.W. 2d 298; *Wickliffe* v. *State,* supra; *Cady* v. *Dombrowski,* 413 U.S. 433, 93 S. Ct. 2523, 37 L. Ed. 2d 706 (1973). The basic and essential purpose of these provisions is to protect the individual against unreasonable governmental intrusions into his privacy, whenever and wherever his expectation of privacy is legitimate. *U.S.* v. *Chadwick,* 433 U.S. 1, 97 S. Ct. 2476, 53 L. Ed. 2d 538 (1977); *South Dakota* v. *Opperman,* supra; *Camara* v. *Municipal Court,* 387 U.S. 523, 87 S. Ct. 1727, 18 L. Ed. 2d 930 (1967); *Warden* v. *Hayden,* 387 U.S. 294, 87 S. Ct. 1642, 18 L. Ed. 2d 782 (1967); *Jones* v. *U.S.,* 357 U.S. 493, 78 S. Ct. 1253, 2 L. Ed. 2d 1514 (1958). The reasonableness of a search in any case must be decided upon the basis of the existing facts and circumstances. *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 (1969); *Cooper* v. *California,* 386 U.S. 58, 87 S. Ct. 788, 17 L. Ed. 2d 730 (1967); *South Dakota* v. *Opperman,* supra. One of the most important factors to be considered is the existence, extent and legitimacy of the citizen's right to expectation of privacy under the circumstances. *U.S.* v. *Chadwick,* supra; *South Dakota* v. *Opperman,* supra. See *Perez* v. *State,* 260 Ark. 438, 541 S.W. 2d 915; *Gerard* v. *State,* 237 Ark. 287, 372 S.W. 2d 635. See also, *Sanders* v. *State,* 262 Ark. 595, 559 S.W. 2d 704; *Air Pollution Variance Board* v. *Western Alfalfa Corp.,* 416 U.S. 861, 94 S. Ct. 2114, 40 L. Ed. 2d 607 (1974).

Administrative inspections without a warrant were substantially restricted by decisions in *Camara* v. *Municipal Court,* supra, and *See* v. *City of Seattle,* 387 U.S. 541, 87 S. Ct. 1737, 18 L. Ed. 2d 943 (1967). In *Camara,* the decision was based upon the individual's right to be secure from arbitrary governmental invasion of his right to privacy. In *See,* it was made quite clear that an entry on commercial premises without a warrant cannot be justified purely on the basis of the difference between private residences and such premises, when the entry is upon those portions of the premises which are not open to the public. But it was made equally clear that the holding in that case did not imply that business premises may not reasonably be subject to inspections in many more

situations than private homes would be. In addition, there was a further recognition, though not in specific words, of the greatly diminished expectation of privacy in a place of business where products are marketed under state licensing programs. The public interest requires careful consideration in applying reasonableness standards, according to *Camara*. The importance of surprise as a crucial aspect of routine inspections of business establishments was also recognized in *See,* and the *Camara* court considered the likelihood of frustration of the governmental purpose of the "search" by obtaining a warrant an important factor. *See* did not consider the reach of the Fourth Amendment with reference to statutes regulating a business which is subject to close supervision and regulation in the public interest, and for which a license is required. *U.S.* v. *Biswell,* 406 U.S. 311, 92 S. Ct. 1593, 32 L. Ed. 2d 87 (1972).

In a business where there is a legitimate public interest and close regulation, such as the distribution of drugs, a procedure for the issuance of a warrant prior to an administrative inspection is not constitutionally required. See *U.S.* v. *Biswell,* supra; *State* v. *Albuquerque Publishing Company,* 91 N.M. 125, 571 P. 2d 117 (1977), cert. den. 435 U.S. 956, 98 S. Ct. 1590, 55 L. Ed. 2d 808 (1978). Where close scrutiny of traffic in commodities which are subject to close governmental supervision is of central importance for a proper governmental purpose and inspection is crucial to the regulatory scheme, if the laws are to be properly enforced and inspection made effective, unannounced inspections without a warrant must be deemed reasonable official conduct. *U.S.* v. *Biswell,* supra.

An excellent summation of the circumstances under which a warrantless search will meet the test of reasonableness was made by the Supreme Court of New Mexico in *State* v. *Albuquerque Publishing Co.,* supra. That court said:

> *** In so doing, we hold that a non-consensual, warrantless administrative inspection of business premises can be made only when: (1) the enterprise sought to be inspected is engaged in a business per-

> vasively regulated by state or federal government; (2) the inspection will pose only a minimal threat to justifiable expectations of privacy; (3) the warrantless inspection is a crucial part of a regulatory scheme designed to further an urgent government interest; and (4) the inspection is carefully limited as to time, place and scope.

This is not a case in which appellee had a reasonable expectation of privacy insofar as the inspection and audit of his books and records by Hosto and those accompanying him is concerned.

The right of the state in the exercise of its police powers to regulate the practice of pharmacy in the interest of the health and general welfare of the public is beyond doubt. *Harvey* v. *Peters,* 237 Ark. 687, 375 S.W. 2d 654. Thus, the interest of the public is clearly established. The necessity of regulation of drugs was emphasized in that case by quoting the preamble to Act 50 of 1891, the first act regulating the practice of pharmacy. In part, it read:

> WHEREAS, In all civilized countries it has been found necessary to regulate the traffic in medicines and poisons, and to provide by law for the regulation of the delicate and responsible business of compounding and dispensing the powerful agents used in medicines and

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We need not trace the history of state regulation of the dispensation and distribution of drugs in order to show the great interest of the public in a very strict supervision of that business. The creation of a board for the supervision and regulation of the business, the requirement of what is in effect a license to engage in the business (under the label of "registration"), after the board's determination of fitness, the requirement that the board keep all registered pharmacists informed of important regulations of other agencies in the field, the vesting of power in the board to revoke or suspend licenses, and the provisions for criminal sanctions for engaging in the business without a proper license or registration are

attestation to the great public interest involved. Ark. Stat. Ann. §§ 72-1002, -1004, -1004.1, -1005, -1007, -1007.1, -1011, -1011.1, -1011.3, -1011.4, -1011.7, -1011.8, -1014, -1015, -1016, -1017, -1018, -1026, -1027, -1028.1, -1028.2, -1031, -1037 (Repl. 1957); -1017.1, -1040, -1044, -1045, -1052 -1053 (Supp. 1977). The extent of state regulation in relation to the handling of narcotic drugs is a further indication that the interests of the public are great and the problem grave. See "Uniform Narcotic Drug Act" [Ark. Stat. Ann. §§ 82-1001 — 82-1023 (Repl. 1976).] Further indication of the public interest in regulation of the business and the gravity of the problem may be found in comparatively recent legislation under the general titles of "Arkansas Drug Abuse Control Act" [Ark. Stat. Ann. §§ 82-2101 — 82-2109 (Repl. 1976)] and "Uniform Controlled Substances Act" [Ark. Stat. Ann. §§ 82-2601 — 82-2638 (Repl. 1976 and Supp. 1977)]. All this legislation shows that an intense regulation of the practice of pharmacy has been undertaken by state government in the public interest. We are certainly in position to take judicial notice that abuse and misuse of drugs are serious problems in our society.

The Board of Pharmacy is charged with responsibility for enforcement of the law governing the practice of pharmacy. Ark. Stat. Ann. § 72-1033 (Repl. 1957). Pharmacists are required to keep records of all narcotic drugs received and dispensed by them and to retain the record of every transaction for a period of two years after the transaction was made. Ark. Stat. Ann. §§ 82-1001 (7), 82-1009 (3) and (5). Every prescription for narcotic drugs must be retained on file by the proprietor of the pharmacy in which it is filled for two years, so as to be readily accessible for inspection by any public officer or employee engaged in the enforcement of the Uniform Narcotic Drug Act. Records required by the act are open for inspection by state officers whose duty it is to enforce the laws of this state relating to narcotic drugs. Only a licensed pharmacist is authorized to sell and dispense narcotic drugs upon a written prescription. Ark. Stat. Ann. §§ 82-1001, -1002, -1006. Hosto, Martin and the inspectors accompanying them were entitled to inspect the records of appellee, which the law required to be kept and held for inspection. The Arkansas State Board of Pharmacy is certainly a licens-

ing and disciplining board under the provisions of Ark. Stat. Ann. § 82-2625. No element of forcible entry is present. Appellee was engaged in marketing products under a state licensing program. The practice of pharmacy, particularly in relation to the dispensation of narcotic drugs and other such commodities is subject to close scrutiny, supervision and regulation for an appropriate governmental purpose. Inspection is clearly crucial to the regulatory scheme. Unannounced inspections without a warrant are crucial to a proper enforcement of the applicable laws through effective inspections. See *U.S.* v. *Biswell,* supra. It is significant that the scope and extent of the inspection are (and were in this case) properly limited. See *U.S.* v. *Montanye,* 493 F. 2d 682 (2 Cir., 1974).

The inspection of records in this case was not such that the prior issuance of a warrant was constitutionally required. *People* v. *White,* 259 Cal. App. 2d Supp. 936, 65 Cal. Rptr. 923 (1968). See also, *Colonnade Catering Corp.* v. *U.S.,* 410 F. 2d 197 (2 Cir., 1969), reversed on ground that there had been a forcible entry, 397 U.S. 72, 90 S. Ct. 774, 25 L. Ed. 2d 60 (1970); *U.S.* v. *Montanye,* supra.

We reverse the judgment of the trial court and remand the case for further proceedings consistent with this opinion.

We agree. HARRIS, C.J., and HOLT and HICKMAN, JJ.

Gerald COSBY and Sue COSBY
v. Dwight OLIVER

78-209 577 S.W. 2d 399

Opinion delivered February 26, 1979

R. H. Mills, for appellants.

No brief for appellee.

CONLEY BYRD, Justice. Appellee Dwight Oliver sued appellants Mr. & Mrs. Gerald Cosby to recover damages to his Ford pickup that occurred as a result of the alleged negligence of appellants in permitting their horses to run loose on the highway. The Trial Court sitting as a jury in rendering judgment against appellants made the following findings:

> "In a civil case it is my duty to determine which way the evidence is balanced. I have no serious doubt in my mind that the horses involved were horses belonging to the defendants. There is no testimony that the horses had been out before, either with or without the knowledge of defendants. It is a question of whether the maintenance of the place in which the horses were kept was reasonable. The fences came to one end of the barn and the barn itself constituted part of the fence, and there was a walk through which was closed with this sign that had been propped up there and wired. When Mr. Oliver and Mr. Barnett got there the fence was down and it was not wired. The testimony was otherwise that it was wired up whenever Mr. Cosby saw it and whenever Mr. Cranston saw it. With sixteen (16) horses out there, I don't believe that that kind of a jury

rig is reasonable means of keeping horses in. This is a sort of jury rig thing and I just don't think it is adequate."

Appellee testified that he had a collision with his Ford pickup in the early morning hours about a mile and a half south of Cave Springs on Highway 112 on November 12, 1976. He saw something in the road and hit his brake but didn't stop. He just slowed down and blew his horn. He started to pull around it hoping it would go across the road on the right hand side. He didn't know that there were some more of them coming across the road and he did not see what he hit. When he opened his door to get out, he could hear horses running. The only one he saw was a white horse. Later he and Travis Barnett started looking for horses. They found the appellants' horses more than a mile and a half away from the scene of the collision up by a barn. They drove the horses back into the barn and wired up a metal sign that was lying on the ground. He assumed the metal sign was used for a gate. Because there was a white horse present and they found a brown horse limping, he assumed that the limping horse was the one he hit. When he talked to Mrs. Cosby she said somebody stole some hay out there and that's how come the fence was down.

Travis Barnett, City Marshal at Cave Springs, testified that "the horses were already at the barn when we got there and we just drove them back to the barn. There was a sign in the doorway to the barn that was laying down on the ground that had apparently been used as a gate." It had been wired at each end. Travis Barnett testified that he had never raised horses but he had raised cattle and tried to keep them fenced in. The fences which he had when he farmed were about like the gate the appellants had there. It was a make-shift gate such as he had devised many times in his own business. A make-shift gate like most people with livestock make or put together and use.

Rex Cranston, the owner of the farm, testified that he had rented the pasture but he used the barn for hay storage. The sign was not supposed to be used as a gate, it was just part of the fence line. The sign was fixed and was like part of

the fence line since it was tacked down. The only way you could utilize the sign as a gate was to unwire it. He was out there once or twice a month and the sign had been up and okay. Prior to leasing the pasture there were about 50 head of cattle out there and the sign was always up. To get into the pasture you had to use another gate.

Appellant Gerald Cosby testified that he had looked at the fence line before he rented it and felt it was sufficient to hold horses. He got into the pasture through a wire gate east of the barn. He checked the fences and gates every day and at no time did he find the fences or gates inadequate to hold horses. He had checked the fences and gates on Thursday prior to the accident on Friday. To his knowledge no horse ever got out of the pasture outside of the one incident appellee told him about. So far as he was concerned he had no injured horses and didn't lose any sales on account of an injured horse.

As can be seen from the foregoing resume, the proof that appellee struck appellants' horse is somewhat speculative. Yet, if we should assume that it was appellants' horse that appellee struck, there still is no proof that appellants were negligent in permitting their horses to run at large. Ark. Stat. Ann. § 41-2919 (Repl. 1977) provides:

> "A person commits the offense of permitting livestock to run at large if, . . . he knowingly permits such livestock to run at large."

In the construction of similar statutes in *Favre* v. *Medlock,* 212 Ark. 911, 208 S.W. 2d 439 (1948), we pointed out that it is the intentional or negligent permission of the owner for his animal to run at large which subjects him to the civil and penal consequences prescribed by the statute. We there held that the fact that an animal is at large is not prima facie negligence on the part of the owner. See also *Poole* v. *Gillison,* 15 FRD 194 (E. D. Ark. 1953).

We have been unable to find any proof in the record to show that appellants were negligent in maintaining the inclosures where the horses were kept. Neither have we found

any proof in the record to support the trial court's suggestion that the sign was only propped up. It follows that the trial court erred in refusing to direct a verdict for appellants.

Reversed and dismissed.

HARRIS, C.J., and GEORGE ROSE SMITH, J., dissent.

GEORGE ROSE SMITH, Justice, dissenting. I am unable to understand the majority's reversal of this judgment for the plaintiff. There was an abundance of substantial evidence to support the findings of the circuit court, sitting as a jury.

The majority first imply that the proof that the appellee struck the appellants' horse is "somewhat speculative." I really don't see how any other conclusion could have been reached by the trial judge. We have had a state-wide stock law for 30 years. It is common knowledge that a stray horse is hardly ever seen on a public road any more, much less a herd of six or seven horses. But that is what the appellee encountered. He found a trail of fresh droppings on the road that led to the appellants' place, where at least that many horses were free from confinement. The herd included a white horse and an injured horse, both of which corresponded to the appellee's account of the accident. How this proof can be called "somewhat speculative" is hard to understand.

The second issue is whether there is proof that the appellants were negligent in confining the horses. The front side of their large barn formed a continuation of the fence around their horse lot. A photograph in the record shows the wide front entrance into the barn, for which no doors were provided. Instead, the appellants used a large tin beer sign which, as shown by the photograph, was not quite as wide as the opening it was used to obstruct. When the appellee and the marshal arrived, the piece of tin was down. The appellee testified positively that there was nothing on the sign to hold it up. The trial judge stated specifically that the sign was down "and it was not wired." It is really beyond question that the herd of horses actually got out onto the highway. I am at a loss to understand how it can be said, in view of the

photograph and the testimony, that there is no substantial testimony to support a finding of negligence.

HARRIS, C.J., joins in this dissent.

FARM BUREAU MUTUAL INSURANCE COMPANY OF ARKANSAS, INC. *v.* Darius PARRISH, Administrator of The Estate of Kathy Lynn PARRISH, Deceased

78-274 577 S.W. 2d 397

Opinion delivered February 26, 1979
(Division I)

Barrett, Wheatley, Smith & Deacon, for appellant.

Frierson, Walker, Snellgrove & Laser, for appellee.

CONLEY BYRD, Justice. The trial court found that the death of Kathy Lynn Parrish from carbon monoxide asphyxiation was the result of accidental means within the meaning of a policy of life insurance issued by appellant Farm Bureau Mutual Insurance Company of Ark. Inc. which provided:

> "In the event of the death of the first individual named as insured caused by automobile accident, directly and independently of any other cause, while in or upon, entering or alighting from, or through being struck by any automobile, the sum of $5,000 less any payments otherwise made hereunder on account of such injury."

From a judgment entered for the face amount of the policy together with penalty and attorney's fees appellant brings this appeal contending:

> "I. The Court erred in finding that the death of appellee's intestate was caused by automobile accident, directly and independently of any other cause.
>
> II. The Court erred in finding that appellant was not entitled to credit for $1,725.53 paid under the medical payments provision of the policy prior to institution of litigation."

The record shows that Kathy Lynn Parrish and her boy friend were found dead in the boy friend's car parked just off a county road. Although the engine was not running, the ignition key was still in the on-position and the automobile was out of gasoline when the bodies were found. Jim Walker who operated the wrecker that removed the automobile testified that the car was on a stump or something because the gravel guard was bent. From the way the gravel guard was bent he stated that the exhaust from the car had come up through the trunk and into the car.

POINT I. To sustain its position that the trial court erred in finding that the death was caused by an automobile accident directly and independently of any other cause, appellant points out that Kathy Lynn and her boy friend intentionally parked their car, intentionally left the motor run-

ning and intentionally remained in the car. We find no merit to this contention. To give the policy the interpretation suggested by appellant would provide coverage only in those situations in which the insured was guilty of no negligence. Furthermore, in 92 A.L.R. 164 the annotator points out:

> "Death by asphyxiation from inhaling carbon monoxide gas from the exhaust of a gasoline motor is generally regarded as accidental or from accidental means if the breathing of the gas was unintentional, at least where the evidence shows that some unforeseen or unexpected circumstances or element interrupted or changed the natural course of events voluntarily set in motion by the insured."

POINT II. To sustain the action of the trial court in holding that appellant could not deduct the $1,725.53 paid out in medical benefits from the accidental death benefits, appellee relies upon Ark. Stat. Ann. § 66-4014 (Supp. 1977), which provides:

> "REQUIRED FIRST PARTY COVERAGE. Every automobile liability insurance policy covering any private passegner motor vehicle issued or delivered in this State shall provide minimum medical and hospital benefits, income disability and accidental death benefits, under policy provisions and on forms approved by the Commissioner of Insurance, to the named insured and members of his family residing in the same household injured in a motor vehicle accident, to passengers injured while occupying the insured motor vehicle, and to persons other than those occupying another vehicle struck by the insured motor vehicle, without regard to fault, as follows:
>
> (a) MEDICAL AND HOSPITAL BENEFITS. All reasonable and necessary expenses for medical, hospital, nursing, dental, surgical, ambulance, and prosthetic services incurred within twenty-four (24) months after the automobile accident, up to an aggregate of $2,000 per person and may include any non-medical remedial care and treatment rendered in

accordance with a recognized religious method of healing. Expenses for hospital room charges may be limited to semi-private accommodations.

(b) INCOME DISABILITY BENEFITS. Seventy per cent (70%) of the loss of income from work during a period commencing eight (8) days after the date of the accident, and not to exceed fifty-two (52) weeks, but subject to a maximum of $140 per week. In the case of a nonincome earner, such benefits shall consist of expenses not to exceed $70.00 per week, or any fractional part thereof, which are reasonably incurred for essential services in lieu of those the injured person would have performed without income during a period commencing eight (8) days after the date of the accident, and not to exceed fifty-two (52) weeks.

(c) ACCIDENTAL DEATH BENEFITS. The sum of $5,000 to be paid to the personal representative of the insured, should injury, sickness or disease resulting from an automobile accident cause death within one (1) year from the date of the accident."

We agree with appellee that in construing a policy provided in accordance with the statute that the insurer cannot deduct the amount of medical payments from the accidental death benefits. Nor can we find anything in *Aetna Insurance Company* v. *Smith,* 263 Ark. 849, 568 S.W. 2d 11 (1978) to support appellants' position.

Affirmed.

We agree: HARRIS, C.J., and GEORGE ROSE SMITH and PURTLE, JJ.

John E. BOX, Jr. and Ruth M. BOX
v. R. F. DUDECK

78-265 578 S.W. 2d 567

Opinion delivered February 26, 1979
(Division II)
[Rehearing denied April 23, 1979.]

Ball & Mourton, for appellants.

Wade, McAllister, Wade & Burke, P.A., by: *Rudy Moore, Jr.,* for appellee.

DARRELL HICKMAN, Justice. John E. Box, Jr., one of the appellants, agreed in writing to sell his interest in 89 acres of land to R. F. Dudeck, appellee, for $90,000.00. The land was held in Box's name only. Ruth M. Box, John's wife, refused to sign the agreement. Dudeck decided to seek specific performance of the agreement, satisfied to take the land subject to Mrs. Box's inchoate dower interest.

The unusual, but not unprecedented, thing about this case is that specific performance of a land sale agreement was ordered even though a wife refused to sign the agreement.

The Washington County Chancery Court found that Box had agreed to sell his interest, ordered specific performance, and found the value of the inchoate dower interest to be $20,826.00. Dudeck was ordered to pay the agreed price, less an abatement of the dower interest. A lien was imposed on the land for the value of the dower interest subject to three conditions: Should John E. Box, Jr. predecease his wife, Ruth, the lien would be void; if Box is alive seven years after the deed is recorded, the abated amount will be payable to Box; if Ruth relinquishes her dower interest within seven years to Dudeck, the abated amount is payable to her.

The Boxes appeal alleging two errors, the second encompassing three arguments.

First, it is argued the agreement was conditioned on the wife signing the agreement and the chancellor erred in finding otherwise.

This issue is purely a question of credibility of the witnesses. Only two people actually knew what Box agreed to — he and the real estate broker, Phyllis Enos. Dudeck never talked to the Boxes and it is undisputed that Ruth Box never said she would, nor did she sign the agreement.

Ms. Enos, a Fayetteville real estate broker, testified she was shown the property by John E. Box a month before the sale. On April 5, 1975, Dudeck signed an offer to buy the property for $90,000.00, $15,000.00 down, the balance to be paid over ten years. Enos took the offer to Box who, after consulting with his attorney and accountant, added some provisions. An amended offer with these conditions was prepared and on the same day both Dudeck and Box signed it.

According to Ms. Enos, she asked Box if his wife's signature should not be obtained. Box replied it would not be necessary. She said she assumed Box was simply speaking for both of them. However, since it is appropriate to obtain a wife's signature, she called the next day or so to see if Ruth Box had signed or would sign the agreement. She said that Box told her his wife would not sign but that he still wanted to go through with the transaction. She said she then called Dudeck who decided that he still wanted to go through with the agreement.

Mr. Box essentially denied Ms. Enos' statement about agreeing to sell without his wife's consent. He admits he signed the agreement and had provisions added as Ms. Enos testified. He stated the sole reason he refused to sell was because his wife would not sign the agreement.

Box testified that when Ms. Enos asked him if there would be any trouble getting the signature of Ruth Box, he said he did not think so. He said that Ms. Enos replied, "I will take care of it." He testified that Ms. Enos did not call him in a day or so about Ruth's signature but instead talked to his wife. He said his wife told Ms. Enos she would not sign. He flatly denied he ever told Ms. Enos he wanted to sell anyway.

Mr. Box, a contractor who holds a real estate broker's license, admitted that in a pre-trial deposition he said Ms. Enos never asked about his wife's signature at the time he signed the agreement. He admitted that this testimony was inconsistent with his trial testimony. Also, Box testified that he did not know that the property was held in his name only

at the time he signed the agreement. He said that he and his wife had originally held the land as tenants by the entirety but as a result of some estate planning upon advice by an attorney several years before, Mrs. Box conveyed her interest to him. He said he had simply forgotten about the deed.

Mr. Dudeck testified simply that he was willing to go through with the transaction without a release of the dower interest.

Ruth Box testified that she first saw the offer and acceptance in her lawyer's office. She essentially corroborated her husband's statement that Ms. Enos called their home and she informed Ms. Enos she was not ready to sign the agreement. She remembered discussing with her husband the fact that a man named Dudeck wanted to buy the place for $90,000.00. She did not think it was enough. She did not recall her husband ever telling her that he had signed the agreement.

The question here is one of fact: Did John Box unconditionally agree to sell his interest in the land? He signed the agreement, adding conditions, saw the $15,000.00 check deposited by Dudeck with Ms. Enos, and, according to Ms. Enos, said he wanted to sell it regardless of his wife's actions. Mr. Box testified to the contrary. It was this conflict that the court resolved in favor of the appellee. Where matters of credibility are concerned, findings of those in a position to observe the witnesses, (in this case, the chancellor) are given great weight. On appeal, we only reverse such a judgment if it is clearly against the preponderance of the evidence. *Digby* v. *Digby,* 263 Ark. 813, 567 S.W. 2d 290 (1978). We cannot say in this case that the finding of the court regarding the agreement was wrong.

While specific performance in such a case is unusual, it is not unprecedented. Dudeck was satisfied to proceed with the transaction without the release of the dower interest. That was an option he had. *Reed* v. *Phillips,* 191 Ark. 58, 83 S.W. 2d 554 (1935). In the alternative, he could have elected to sue for damages for failure to deliver a merchantable title. *Vaughan* v. *Butterfield,* 85 Ark. 289, 107 S.W. 993 (1908).

The second allegation of error relates to the terms of the dower interest and the abatement order. The trial court asked for briefs and requested arguments as to the value of the dower interest. The appellants argued to the trial court, and to us on appeal, that the value of the dower interest is $10,597.44. This argument is based on an interpretation of Ark. Stat. Ann. § 50-701, *et sequentes* (Repl. 1971). This figure was arrived at by reducing the purchase price of $90,000.00 to one-third, or $30,000.00, which appellants contend is the value of the fee interest to which the wife's dower interest would attach. Next, using tables in Ark. Stat. Ann. § 50-705, they determine the annuity to be 10.7792 using Mr. Box's age of 52 years, together with the legal interest rate of 6%. This figure, multiplied by an annual income figure of $1,800.00 ($30,000.00 times 6%) produces a figure of $19,402.56. It is argued that this is the value of Mr. Box's interest in one-third of the land that is subject to the dower interest. $19,402.56 subtracted from $30,000.00 equals $10,597.44.

The chancellor, in a well reasoned memorandum, pointed out that this argument was erroneous for two reasons: First, the dower was inchoate, not vested; second, Mr. Box's age was used rather than his wife's. Using the table as a reference, the court concluded that a more reasonable value of the interest would be $20,826.00.

While the value determined by the court may not be exactly precise, it was the duty of the appellants to affirmatively show that it was erroneous. *Peoples Protective Life Ins. Co.* v. *Smith,* 257 Ark. 76, 514 S.W. 2d 400 (1974). The appellants have failed to do that.

Next, it is argued that the wife's dower interest should bear interest at the contract rate until paid under Ark. Stat. Ann. § 29-124 (Repl. 1962). This argument is based on the premise that this was a judgment and that all judgments bear interest. The appellee correctly points out that this abatement of the purchase price was not a judgment. The dower interest has not been barred or relinquished. The full amount abated is payable to Mrs. Box at any time in cash at her option.

Finally, it is argued that the court was wrong in one of the conditions it imposed on the abatement, that is, that should Mrs. Box predecease Mr. Box within the seven year period the money should be paid to Mr. Box rather than result in a reduction in the original purchase price. Although this condition was not specifically included in the chancellor's decree, we agree with appellants. We think this omission was an oversight of the court and the order is so modified.

Affirmed as modified.

We agree. HARRIS, C.J., and FOGLEMAN and HOLT, JJ.

PURTLE, J., dissents.

Allyce KROHA *v.* Daniel KROHA

78-256 578 S.W. 2d 10

Opinion delivered February 26, 1979
(Division I)
[Rehearing denied April 2, 1979.]

Patten, Brown, Leslie & Davidson, by: *Charles A. Brown,* for appellant.

Blevins & Pierce, by: *James W. Stanley,* for appellee.

JOHN I. PURTLE, Justice. Appellant was granted a divorce from appellee and cross-appellant and awarded custody of the minor child. Appellant appeals from that portion of the decree which refused to grant her one-third of the corpus of a testamentary trust of which appellee is the beneficiary. She argues she is entitled to this interest in the trust pursuant to Ark. Stat. Ann. § 34-1214 (Repl. 1962). Appellee cross appeals from the refusal of the trial court to declare Ark. Stat. Ann. § 34-1214 unconstitutional as a denial of the equal protection clause of the state and federal Constitutions.

We first discuss appellant's claim that she is entitled to one-third of the corpus of the trust. It is noted that appellee receives a monthly allowance or income from the trust and this income was apparently considered in setting the amount of support to be paid by appellee to appellant as support of the minor child. In any event, it is clear and unequivocal that the chancellor refused to grant appellant one-third of the corpus of the trust.

Ark. Stat. Ann. § 34-1214 provides as follows:

> In every final judgment for divorce from the bonds of matrimony granted to the husband, an order shall be made that each party be restored to all property not disposed of at the commencement of the action, which either party obtained from or through the other during the marriage and in consideration or by reason thereof; and where the divorce is granted to the wife the court shall make an order that each party be restored to all property not disposed of at the commencement of the action, which either party obtained from or through the other during the marriage and in consideration or by

> reason thereof; and the wife so granted a divorce against the husband, if she shall have actually personally resided in this State for a period of time next before the commencement of the action at least equal to the residence required to enable her to maintain an action for divorce, shall be entitled to one-third (1/3) of the husband's personal property absolutely and one-third (1/3) of all the lands whereof her husband was seized of an estate of inheritance at any time during the marriage for her life, unless the same shall have been relinquished by her in legal form, and every such final order or judgment shall designate the specific property both real and personal, to which such wife is entitled; . . . .

We need not cite cases to support the precedent of chancery courts awarding the wife one-third of the husband's personal property absolutely and one-third of his real property for life. The question now before us is whether the corpus of a testamentary trust is personal property of the beneficiary of the trust.

The trust in question was established in the will of Dorothy Mae Haskell of Garland County, Arkansas, which will was admitted to probate in the Garland County Probate Court on August 12, 1974. Pertinent parts of the will are set out as follows:

III

> I give, devise and bequeath all the rest of my Estate to the Trust Office of Arkansas First National Bank, Hot Springs, Arkansas, in trust, for my grand-nephew, Daniel Joseph Kroha, and direct that my said Trustee shall sell the Casa Blanca Club as soon as possible after my demise and a buyer can be found willing to pay a fair price for same. I further direct that my Trustee shall sell all other property, with the exception of the real property mentioned in paragraph two, as funds may be needed to provide for the payments hereinafter set out for my grand-nephew, Daniel Joseph Kroha.

V

> I direct that my Trustee shall pay to my grand-nephew, Daniel Joseph Kroha, the sum of $200.00 per month until all funds have been disbursed. In the event that additional money is needed for any emergency, said additional amount may be paid upon the approval of the attorney, hereafter named, and one of the directors of the Arkansas First National Bank.

VI

> In the event that my grand-nephew, Daniel Joseph Kroha, should predecease me, and die without living issue, then and in that event, I give, devise and bequeath all of my said Estate to . . . .

An order of the probate court dated October 14, 1974, held the trust to be a legal and valid trust and that the parties, Daniel Joseph Kroha and First National Bank, were bound by the terms of the trust. No appeal was taken from the order of the court.

By the very provisions of the trust the appellee is entitled to payments from the trust but is not entitled to the corpus of the trust at all during his lifetime unless it is exhausted by the monthly payments to the beneficiary. He cannot mortgage, sell, assign or otherwise dispose of the assets of the trust. His interest is paid monthly and we presume it has been used for family purposes during the marriage.

We have reviewed the cases cited by appellant and do not find in any of them where a contingent interest in an estate has been treated as subject to division pursuant to Ark. Stat. Ann. § 34-1214. We agree with appellant that a husband's out of state realty either in fee or in remainder is subject to an award pursuant to this statute, but this is a vested interest, and thus unlike the interest involved here.

Social security benefits, military retirement pay, and similar contingent interests have been rejected as proper items to be awarded a wife when she has been granted a

divorce in Arkansas. If the trust violated the rule against perpetuities, it is possible an attack on it would result in the property being vested in the settlor's estate. However, that was not done during the time these parties were married and if it is so decided now, it is too late for appellant to be entitled to a one-third interest because they are not married. Under the probate court order there is more to do than pay over the assets to the beneficiary. Therefore, the statute of uses does not apply.

Fenney v. *Fenney,* 259 Ark. 858, 537 S.W. 2d 367 (1976) has been cited by both parties. We believe *Fenney* is analogous to the instant case. Therefore, we hold the chancellor was correct in refusing to award the wife one-third of the corpus of the trust from which appellee, at least for now, is entitled only to monthly payments.

The constitutionality of Ark. Stat. Ann. § 34-1214 is of no legal interest to cross-appellant since the court did not award appellant an interest in this property. All other property was divided by agreement. Additionally, the constitutionality of the statute was not raised in the pleadings and is not even mentioned in the decree, and there is no occasion to pass on this question.

Affirmed.

We agree. HARRIS, C.J., and GEORGE ROSE SMITH and BYRD, JJ.

SEBASTIAN COUNTY ASSOCIATION FOR RETARDED CITIZENS AND INDEPENDENT LIVING, INC. *v.* BOARD OF ZONING ADJUSTMENT OF THE CITY OF FORT SMITH, ARKANSAS et al

78-261 577 S.W. 2d 394

Opinion delivered February 26, 1979
(Division I)

Morton, Gitelman and *Stephen M. Sharum,* for appellants.

Dailey, West, Core, Coffman & Canfield, for appellees.

JOHN I. PURTLE, Justice. Appellants, Sebastian County Association for Retarded Citizens and Independent Living, Inc., obtained an offer and acceptance to purchase a particular piece of property in the City of Fort Smith, Arkansas, which was zoned R-2 for single family purposes. They applied to the Planning Department of Fort Smith for permission to use the property by a married couple who wanted to keep nine moderately retarded citizens, not their natural children, in the home with them. The request was denied by the Planning Department. Appellants appealed to the Board of Zoning Adjustment of the city which affirmed the ruling by the Planning Department holding the proposal of appellants' intended use did not qualify as a single family. Thereafter appellants filed suit in chancery court in which they sought a declaratory judgment and mandatory injunction against the Board of Zoning Adjustments and the city. A nearby property owner, Frank Posey, intervened on the side of appellees. The appellants were unable to purchase the particular property because it was sold to a third party. The chancery court action was then amended to seek the same relief as to any property located anywhere in the city where only single family purposes were permitted. The appellees filed a motion to dismiss the petition as amended.

Upon hearing the motion to dismiss, the court granted the motion without prejudice on the grounds of mootness of the issues, lack of jurisdiction and non-justiciable nature of the issues as presented.

Appellants contend on appeal that the court erred in dismissing the amended complaint on the grounds of mootness and non-justiciability.

There is no dispute about the facts in this case.

Appellants' request for waiver was denied at a time when they definitely had a legal interest in a particular piece of property through the written offer and acceptance. Apparently appellees agreed at that time that a justiciable issue was before the court. However, when appellants lost the deal to purchase the particular house, an entire new ball game commenced.

Ark. Stat. Ann. § 34-2501 (Repl. 1962) reads as follows:

> 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. No action or proceeding shall be open to objection on the ground that a declaratory judgment or decree is prayed for. The declaration may be either affirmative or negative in form and effect; and such declarations shall have the force and effect of a final judgment or decree.

Therefore, a court of chancery, within its jurisdiction, has the power to consider a declaratory judgment. We held in *Jackson* v. *Smith,* 236 Ark. 419, 366 S.W. 2d 278 (1963) that if the subject matter of the declaration is within equity jurisdiction an action may be maintained in equity for a declaratory judgment. We do not ignore *Bennett* v. *N.A.A.C.P.,* 236 Ark. 750, 370 S.W. 2d 79 (1963) which was somewhat more complicated and might be considered to hold there was no legal interest held by the plaintiffs. However, the United States Supreme Court had declared similar acts unconstitutional in Virginia, and the United States District Court in Little Rock, Arkansas, had directed the plaintiffs to proceed in the state court. Further, the acts in question directly affected the plaintiffs inasmuch as they would have to register and list their names. Therefore, the plaintiffs in *Bennett* had an interest to protect at the time of the declaratory action.

We think proper considerations were present in *Arkansas Release Guidance Foundation* v. *Hummell,* 245 Ark. 953, 435 S.W. 2d 774 (1969), cited by both appellant and appellees, wherein we held that consideration of zoning ordinances was properly restricted to that part of the city where the zoned property was located. In *Hummell* we considered a class D apartment district wherein the *owner* of the property desired to use

it for a residence for exconvicts and we held the trial court was correct in restricting the ruling to the class D zone in which the parties defendant lived. We did not disturb the trial court's finding that the property owners living in the vicinity of the property were proper parties. The injunction in *Hummell* was limited to a specific address. It did not challenge an entire zone as do appellants.

McDonald v. *Bowen,* 250 Ark. 1049, 468 S.W. 2d 765 (1971) cited by appellants was a taxpayer's suit and we have always recognized a taxpayer's right to such a declaratory judgment to prevent the illegal exaction of taxes. A taxpayer definitely has standing to file suit concerning exaction of taxes. In *Culp* v. *Scurlock,* 225 Ark. 749, 284 S.W. 2d 851 (1955), also cited by appellants, the plaintiffs lived in the 300-foot zone to which the challenged statute applied. Therefore, appellants in *Culp* had a direct interest in the declaratory proceedings. They were being required, or had been directed by a public official, to place stamps on cigarettes against their wishes and by what they thought was an illegal requirement of the law.

We hold that the appellants did not have a legal interest to protect as reflected by the facts and circumstances of this particular case. They were not challenging a tax, a requirement that they act or refrain from acting, that they move or not move, or do or refrain from doing anything in particular. There is no evidence that they were even residents or citizens of the zone or the city. In fact appellants are corporations and, as such, do not require any residence in a physical sense. In a proper case they would, no doubt, have standing to maintain an action on behalf of the prople they represent.

We held in *Andres* v. *First Arkansas Development Finance Corp.,* 230 Ark. 594, 324 S.W. 2d 97 (1959) that a declaratory judgment is not proper to decide the legal effect of laws upon contingent and uncertain or future facts which may never occur. Also, that the danger or dilemma must already exist and cannot be granted upon speculation or remote possibilities.

The chancellor dismissed the petition without prejudice; therefore, appellants may well again have standing to bring this identical action. If they do, then the court will have

to make a decision based upon the then existing facts with all interested parties having an opportunity to join in the proceedings. The other interested parties are not known at this time and pure speculation would have to be used to determine their identity.

We agree with the trial court that, after appellants lost their attempt to purchase the particular property, the issue became moot and they have no interest to protect at this time. The facts as presented in the amended petition do not present a justiciable issue for determination by the court.

Affirmed.

We agree. HARRIS, C.J., and GEORGE ROSE SMITH and BYRD, JJ.

Don E. GREEN *v.* STATE of Arkansas

CR 78-191 577 S.W. 2d 586

Opinion delivered February 26, 1979
(In Banc)
[Rehearing denied March 26, 1979.]

Robert L. Lowery, for appellant.

Bill Clinton, Atty. Gen., by: *Jesse L. Kearney,* Asst. Atty. Gen., for appellee.

JOHN I. PURTLE, Justice. Appellant and three codefendants were charged with robbery of the Brockwood Exxon Service Station and Church's Fried Chicken on 12th Street in Little Rock, Arkansas. The three codefendants pleaded guilty before the trial date of June 30, 1978. Appellant's motion to sever the two counts of robbery because no scheme or plan would be shown by the state was denied.

The trial court granted appellant's motion for dismissal of the charge relating to the Exxon Station but permitted the charge relating to Church's Fried Chicken to go to the jury.

Upon completion of the state's case appellant moved for a directed verdict relating to the Church's Fried Chicken incident. The motion was denied. The appellant did not introduce any testimony and rested after the motion was denied. The jury found appellant guilty and fixed his punishment at 6 years' imprisonment.

On appeal two points are argued: (1) The court should have granted a severance of the charges; (2) There was insuf-

ficient evidence to support the conviction.

The only evidence presented by a codefendant was that they planned to rob the Exxon Station and when it produced only $5 they subsequently decided to rob Church's Fried Chicken. The testimony relating to the robbery of the Exxon Station by David Zimmerman was that he saw four people in a car at the Exxon Station. He could not identify any of them nor could he tell if the people were black or white. Mr. Baker, the victim at the station, saw two people with stockings over their heads. He didn't see the other two people and could not identify any of them or the vehicle they were in. Appellant did not testify nor did he give a statement relating to the Exxon Station robbery. Appellant's statement to the officers with reference to the Church's Fried Chicken robbery was that he asked the codefendants to take him home. "I asked them to take me home, and on the way home I asked them to stop by Church's Chicken, and they stopped at 12th and Fair Park. I bought a box of chicken and a coke. We parked on the side of the business. I went back to the car. They had a shotgun and a rifle out and they said that they were going to rob the place. I told them to take me home first. They said, 'No. As long as we are here, we just as well do it.' They said I wouldn't have to get out of the car. I stayed in the car and Billy stayed in the car and got under the steering wheel."

Was the evidence sufficient to sustain a conviction of aggravated robbery of Church's Fried Chicken? Again the codefendant testified that the four of them decided to go rob the Exxon Station and did. They planned to split the money four ways. He also stated there never was a plan to rob another place until after the waterhaul at the Exxon Station. He testified he had pleaded guilty to the robberies of both places and had been sentenced. Other evidence tended to show the robbery occurred but none of it identified the appellant. The only other evidence was the statement of appellant wherein he steadfastly denied any part of the Church's Fried Chicken robbery. The only fact possibly connecting him with it was that he was there. In his statement appellant insisted he requested the codefendants to drive him home after he found out they planned the second robbery.

The question of evidence necessary to corroborate an accomplice's testimony to the extent of allowing a case to be submitted to a jury is necessarily governed by the facts and circumstances of each case as it is presented. Evidence which is merely suspicious in nature is insufficient, or if it is as consistent with innocence as guilt, it is not enough to submit the question of the defendant's guilt to the jury. *O'Neal* v. *State,* 192 Ark. 1178, 96 S.W. 2d 780 (1936); *Underwood* v. *State,* 205 Ark. 864, 171 S.W. 2d 304 (1943). The corroborating evidence must tend to connect the defendant to the commission of the offense. It is not sufficient to show the offense was committed and the circumstances thereof. *Pitts* v. *State,* 247 Ark. 434, 446 S.W. 2d 222 (1969). We stated in *Dunn & Whisenhunt* v. *State,* 256 Ark. 508, 508 S.W. 2d 555 (1974):

> Aside from the testimony of the accomplice Roberts, there is no other testimony at all linking the appellants with the robbery of Mr. Corley. The fact that Dunn & Whisenhunt were seen riding in the same automobile with Roberts, as related under the facts and circumstances of this case, is not sufficient corroboration to sustain their conviction.

We make the same statement regarding the facts and circumstances in this case. Appellant had the additional burden of having been exposed to the robbery evidence for which he was acquitted. We still adhere to the principle that a man is innocent until proven guilty. The mere presence of a person at the scene of a crime is not proof of his guilt, otherwise the customers or employees at Church's Fried Chicken might be in appellant's place.

Under the circumstances of this case, we are unable to find any corroborating evidence to support the codefendant's testimony.

This disposition makes the severance issue moot.

Reversed and dismissed.

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

JOHN A. FOGLEMAN, Justice, dissenting. I find the evidence corroborating the testimony of the accomplice sufficient to present a jury question. Samuel T. Bernard, an accomplice in the two robberies, testified that: he and Donald Green were together when they ran into Frank Turner and Billy Scott; they went to a North Little Rock club and Frank asked if they wanted to make some money, and said he knew the place they could knock off; all agreed and got in Bernard's car; they were to split the money four ways and go to Helena until everything blew over; Green and Bernard served as lookouts while Frank and Billy went to the Exxon station at 65th and Geyer Springs, taking a sawed-off shotgun and a rifle; when Frank and Billy returned, they said they didn't get much; all of them went to Church's Chicken Place and backed into an alley; Frank told Don to go buy something and see how much money was in the cash register; Don went and bought something and returned to the car and sat down; he said something Bernard did not hear and Frank and Bernard got out of the car, one taking the rifle and the other the shotgun; Bernard went to the back of the building and Frank to the other side; Bernard said that either Green or Billy got under the steering wheel; he heard a shotgun blast as soon as Frank went around the building; after the robbery, he and Frank jumped into the car; Green was driving, but not in a manner to suit Bernard, so he switched places with Green; they let Frank and Billy (who were talking about "hitting something else up") out of the car at 21st and Elm Streets.

Appellant made a statement which was introduced in evidence. He said that he was with the others at the club, that he asked them to stop at Church's Chicken at 12th & Fair Park, where they parked at the side of the building and that he bought a box of chicken and a coke, after which he returned to the car and "they" had a shotgun and rifle out and said "they" were going to rob the place. He stated that he asked "them" to take him home first, but "they" refused, saying that as long as they were there, "they" might as well do it. He said that he stayed in the car and that Billy got under the steering wheel and that, after Bernard and Frank came running back to the car, "they" took him straight home.

Charles Wesley Jones, an employee of Church's

Chicken, testified that after he had waited on a customer, a man came in wielding a gun and demanding that money be put in a bag. Jones slipped as he turned and the man fired a shot and ran.

It was only necessary that the evidence go beyond a showing that the crime was committed and the circumstances thereof and that it tend in some degree to connect the defendant with the crime. *Anderson* v. *State,* 256 Ark. 912, 511 S.W. 2d 151; *Olles* v. *State,* 260 Ark. 571, 542 S.W. 2d 755. The evidence may be circumstantial. *Olles* v. *State,* supra. It may be slight and not altogether satisfactory and convincing, if it is substantial. *Olles* v. *State,* supra; *Klimas* v. *State,* 259 Ark. 301, 534 S.W. 2d 202. It must be directed toward proving a fact in issue and not *merely* toward discrediting a witness or corroborating his testimony. *Olles* v. *State,* supra. But if the accomplice is corroborated as to particular material facts, the jury may infer that he spoke the truth as to all. *Olles* v. *State,* supra. The acts, conduct and declarations of the accused before or after the crime may furnish the necessary corroboration. *Olles* v. *State,* supra.

In *Ahart* v. *State,* 200 Ark. 1082, 143 S.W. 2d 23, it was held that the sufficiency of the corroborating evidence is always for the jury. Although this statement, taken out of context, appears to be an overstatement, it is significant in light of the evidence there which tended to corroborate the testimony of the accomplice in a cattle theft. The mother of the accomplice testified that the defendant came to her house with her son between 11:00 and 12:00 the night before the stolen cattle were found at her house and spent the night there. Another witness admitted having made a statement to the sheriff and deputy prosecuting attorney in which he had said that the defendant and the accomplice asked the witness to haul some cattle for him, but he refused.

The corroboration by appellant's own statement in the case at hand is at least as strong as that in *Ahart.* Appellant was present when the crime was committed. He made a purchase which, according to the accomplice, was a part of the plan. As soon as he did so, the robbery took place. Knowing that it was going to take place, he went and took his seat

in the getaway car. Those circumstances are much more consistent with guilt than innocence.

Comparison of the position of the employees of the place robbed with that of appellant will not stand under close examination. None of the employees came to the place or left it with the robbers. None of them sat in the "getaway" car knowing that a robbery was taking place and the companions with whom he came to the scene were doing it. None of them could have been expected to disassociate himself from the criminal enterprise. But if appellant were not part of it, and wanted no part of it, it would only be reasonable to expect that he would. The idea that an innocent person would wait for a robbery to be carried out so he could get a ride home with the robbers approaches ridiculosity.

The corroborating evidence here is much more incriminating than that in *Shipp* v. *State,* 241 Ark. 120, 406 S.W. 2d 361, where the question of corroboration was disposed of without difficulty, viz:

> Thus the evidence shows that the appellant admitted to Sheriff Berryman that the *particular rain suit in evidence was the one he bought;* but he claimed in his conversation with the Sheriff that he bought the rain suit for use in his business. When the appellant admitted the purchase of the identical rain suit used in the robbery, certainly the appellant admitted enough to corroborate the accomplice. The appellant seeks to leave the impression that Goolsby [the accomplice] stole the rain suit from him; but that was a fact question to go to the jury. Without the testimony of Sheriff Berryman the corroboration in this case would be like that in *Scott* v. *State,* 63 Ark. 310, 38 S.W. 339; or *Cook* v. *State,* 75 Ark. 540, 87 S.W. 1176. But with the testimony of Sheriff Berryman, the evidence of corroboration went to the particular and identical rain suit introduced in evidence, and there was evidence from which the jury could have found — and evidently did find — that appellant bought the particular rain suit which Goolsby wore at the time of the robbery; and this certainly corroborates

Goolsby's testimony to the effect that the appellant suggested and planned the robbery.

The words of our opinion in *Dyas* v. *State,* 260 Ark. 303, 539 S.W. 2d 251, are applicable here. We said:

> 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 the corroboration by circumstantial evidence. *Jackson* v. *State,* 256 Ark. 406, 507 S.W. 2d 705. ***

It might well be that were we jurors, we would say that the state had not proven appellant's guilt beyond a reasonable doubt. We are not and should not act as such. We cannot, and should not, say that a reasonable juror could not conclude that the statement of Green tended to connect him with the crime.

I am authorized to state that the Chief Justice and Mr. Justice Byrd join in this opinion.

FEDERAL EXPRESS CORPORATION and NORTH AMERICAN CAR CORPORATION *v.* Walter SKELTON, Commissioner of Revenues, Department of Finance and Administration, State of Arkansas

78-79 & 78-83 578 S.W. 2d 1

Opinion delivered February 26, 1979
(In Banc)
[Rehearing denied April 2, 1979.]

Paul F. Henson and *Frank L. Watson* of *Waring, Cox, James & Allen,* Memphis, Tenn., for appellants.

James R. Eads, Jr., Robert G. Brockmann, Joseph V. Svoboda, Barry E. Coplin and *H. Thomas Clark, Jr.,* by: *Jack East III,* for appellee.

MARION S. GILL, Special Justice. This case is a sequel to *Skelton* v. *Federal Express Corporation,* 259 Ark. 127, 531 S.W. 2d 941 (1976). Reference is made to that decision for the relevant facts concerning Federal Express Corporation. Following the decision of this Court in the foregoing case, but before the mandate was filed with the Pulaski Chancery Clerk, on February 16, 1976, the Governor signed into law Act 1237 of 1975, Extended Session, the provisions of which constitute the subject matter of this controversy. By said Act the Arkansas Compensating Tax Act, Ark. Stats. 84-3105(a) was amended to read as follows:

> Section 1. (a) There is hereby levied and there shall be collected from every person in this State a tax or excise for the privilege of storing, using or consuming, within the State, any article of tangible personal property, after the passage and approval of this Act (§ 84-3101 — 84-3128), purchased for storage, use or consumption in this State at the rate of three percent (3%) of the sales price

of such property. This tax will not apply with respect to the storage, use or consumption of any article of tangible personal property purchased, produced or manufactured outside this State until the transportation of such article has finally come to rest within this State or until such article has become commingled with the general mass of property of this State. This tax shall apply to the use, storage or consumption of every article of tangible personal property, except as hereinafter provided, irrespective of whether the article or similar articles are manufactured within the State of Arkansas or are available for purchase within the State of Arkansas, and irrespective of any other condition. *Provided however, that the tax levied in this Act shall not apply to aircraft, aircraft equipment, and railroad parts, cars, and equipment or to tangible personal property owned or leased by aircraft, airmotive or railroad companies brought into the State of Arkansas solely and exclusively for (i) refurbishing, conversion or modification within this State and is not used nor intended for use in this State, and the presence of such tangible personal property within this State shall not be construed as storage, use or consumption in this State for this Act, if such aircraft, aircraft equipment, and railroad parts, cars, and equipment or tangible personal property, is removed from this State within sixty (60) days from the date of the completion of such refurbishing, conversion, or modification, or (ii) storage for use outside or inside the State of Arkansas regardless of the length of time any such property is so stored in the State of Arkansas. If any such property is subsequently used in the State of Arkansas, the tax levied by this Act shall be and become applicable to the property so used in Arkansas. Provided further, that nothing in this subsection is intended to exempt from taxation any materials used or services furnished in the refurbishing, conversion, or modification of such property in this State which is subject to the Arkansas Gross Receipts Tax.* (Emphasis added)

Section 2. The General Assembly hereby determines that it was not the intent of Act 487 of 1949 (Ark. Stats. §§ 84-3101 — 84-3128), as amended, to impose the compensating use tax upon aircraft, aircraft equipment, and railroad parts, cars and equipment, or to any tangible personal property owned or leased by aircraft, air-

motive or railroad companies, as provided in Section 5(a) of Act 487 of 1949, as amended, and as classified by this Act, and any claim that the State of Arkansas now has for collection of compensating use taxes upon any such aircraft, aircraft equipment and railroad parts, cars and equipment, or to tangible personal property owned or leased by aircraft, airmotive, or railroad companies brought into the State of Arkansas solely and exclusively for refurbishing, conversion, or modification shall not be collected, whether the same is pending in the Revenue Services Division of the Department of Finance and Administration or is pending and unpaid as a result of any court litigation or court decision of this State, it being the intent of the General Assembly that the State of Arkansas should not pursue collection of any claim now pending or the execution of any court order with respect to any such claim for the collection of compensating use taxes upon such property. Provided, however, that no person shall have a claim against the State of Arkansas for any compensating use tax paid to the State of Arkansas on or before the effective date of this Act with respect to such tangible personal property.

On August 9, 1977, after the remand in the foregoing case to the Pulaski Chancery Court, the Commissioner of Revenues filed an "Amended Petition for Supplemental Relief" and challenged the constitutionality of Section 2 of Act 1237 of 1975. Federal Express Corporation demurred to this petition on the grounds that the Court lacked subject matter jurisdiction and that the Commissioner lacked the capacity to challenge the constitutionality of a legislative enactment. The Pulaski Chancery Court held that the Commissioner had the necessary authority to raise the constitutional issue involved, that Section 2 of Acts 1237 of 1975 violates Art. 12, Section 12, of the Constitution of Arkansas, and awarded judgment to the Commissioner pursuant to the mandate of this Court.

Appellant, North American Car Corporation, hereafter referred to as N A C, is a Delaware corporation authorized to transact business in Arkansas. It is primarily engaged in the

business of leasing various types of railroad cars to railroad companies. In order to maintain its railroad cars in proper working condition N A C operates a repair facility in Texarkana, Arkansas. N A C maintains an inventory of repair parts (consisting primarily of railroad car wheels and axles) at its Texarkana facility to make the necessary repairs to railroad cars when needed. Ninety per cent (90%) of the wheels and axles installed upon roalroad cars repaired at Texarkana are wheels and axles which have been removed from used cars. The remaining ten per cent (10%) are purchased by N A C outside of Arkansas and brought to the Texarkana facility as needed and are the subject of this action. Following the assessment of the Compensating Use Tax on parts in question, N A C instituted an action for a declaratory judgment in the Chancery Court of Pulaski County, and, among other things, alleged Appellee's assessments to be violative of Art. XVI, Section 13, Constitution of Arkansas in that the property upon which the assessment was made had been exempted, or was not subject to the Compensating Use Tax by reason of Section 2 of Act 1237 of 1975. Appellee alleged that Section 2 of Act 1237 was unconstitutional. The Chancellor found the assessment to be valid; and that the Commissioner had the "standing" to raise the constitutional issue asserted; that Section 2 of Act 1237 was unconstitutional as being violative of Section 2 of Art. 4, Section 12 of Art. 12 and Amendment 14 of the Constitution of Arkansas.

From the Chancellor's decrees in the foregoing cases, Federal Express and N A C bring this appeal. On joint motion of the parties these cases have been consolidated due to similar issues of law presented in both cases. For reversal Appellants contend:

> I. Appellee, in his capacity as Director for Revenue, is charged with the administration of the act in question and lacks the requisite standing or authority to challenge its constitutionality.
>
> II. Section 2 of Act 1237 of 1975, extended session, constitutes a valid exercise of legislative power under Article 12, Section 12, of the Constitution of Arkansas.

III. Section 2 of Act 1237 of 1975, extended session, constitutes a valid exercise of legislative power within the limitations imposed by the 14th Amendment of the Constitution of The United States.

IV. Section 2 of Act 1237 of 1975, constitutes a valid exercise of legislative power under the provisions of Article 4, Sections 1 and 2 of the Constitution of Arkansas.

V. The replacement parts were not purchased for "storage, consumption or use" in Arkansas.

VI. The railroad replacement parts were purchased for resale and therefore exempt from the tax.

VII. The replacement parts are exempt from the use tax because such property is exempt from tax under the Arkansas Gross Recepits Tax Act.

VIIII. Act 1237 of 1975 exempts railroad parts from the Use Tax Act.

IX. Act 1237 is prospective as to North American Car because no use tax was assessed against it until after Act 1237 was signed into law.

Appellants first assert that the Appellee has no standing or authority to challenge the constitutionality of a legislative enactment. This question is one of first impression for this Court. We recognize the general rule to be that public policy would prohibit an executive branch official from challenging a legislative act based upon his interest as the official charged with administering the statute. However, there is a logical exception to this rule which allows a public officer to question the constitutionality of a legislative enactment where public rights have matured and public interest is involved. *Mower Board of Commissioners* v. *Board of Trustees of P.E.R.A.*, 136 N.W. 2d 671 (Minn. 1965); *Fulton Foundation* v. *Wisconsin Department of Taxation,* 109 N.W. 2d 285 (Wis. 1961); *Blue Earth County Welfare Department* v. *Cabellero,* 225 N.W. 2d 373 (Minn. 1974); *Wachusett Regional School District Committee* v. *Erickson,* 228 N.E. 2d 62 (Mass. 1067).

In at least four previous instances, this court has held that an officer of the executive branch cannot be forced to comply with the provisions of an unconstitutional enactment of the State Legislature. *Little Rock & Fort Smith Ry.* v. *Worthen, et al,* 46 Ark. 312 (1885); Writ of error dismissed, 120 U.S. 97, 30 L. Ed. 588; *Hodges* v. *Dawdy,* 104 Ark. 583, 149 S.W. 656 (1912); *Rison et al* v. *Farr,* 24 Ark. 161 (1865); *Eason* v. *State,* 11 Ark. 481 (1851). The above cases establish the right of an executive official to disobey an unconstitutional enactment of the General Assembly. If he has the right to disobey an unconstitutional enactment, he should have the right to question the constitutionality of a statute where the public interest is involved. In *Fulton Foundation* v. *Wisconsin Dept. of Taxation,* 108 N.W. 2d 312 (Wis. 1961), the Supreme Court of Wisconsin denied that the Wisconsin Revenue Department had the necessary standing to question the constitutional validity of a particular tax exemption statute. On rehearing, however, the Wisconsin high court reversed this position and gave the following reasons:

> "In view of the forceful and persuasive arguments advanced by the attorney general in the brief filed by the department in support of its motion for rehearing, we have reconsidered our original holding that a question of whether a particular tax exemption denies the equal protection of the laws, is not of great public concern.
>
> Such original determination had been motivated by the view that, while the granting of a particular tax exemption by the legislature might be of particular interest to other taxpayers to whom the exemption was not made applicable, it was not of great interest to the public at large. Upon further reflection we are convinced such issues should be held to present a question of great public interest. This is because the extending of special privileges by way of discriminating tax exemptions, which deny the equal-protection-of-the-laws requirement of the Fourteenth Amendment, have a tendency to undermine the faith of citizens in the integrity of their state government. Therefore, we withdraw that part of the original opinion which determined that the equal-protection-of-the-laws issue was not of great public con-

> cern, and now hold that the department should be permitted to raise such constitutional issue.
>
> There is a further reason of policy for holding that the department should be permitted to raise this particular issue of constitutionality. This is that unless the department is permitted to do so there is little likelihood that any taxpayer will. The situation is different with respect to the enactment of a statute imposing a new tax which denies the equal protection of the laws. There the constitutional issue is very likely to be raised by the taxpayer against whom an attempt is made to assess and collect the tax."

As will be noted in the points discussed below, Appellee has raised certain constitutional provisions under which he is the most proper and logical party to assert their violation by the act in question.

Therefore, we hold that a public official may question the constitutionality of a legislative enactment where public interests or public rights are involved, as distinguished from individual rights, and no enabling legislation is necessary. Further, we hold the requisite public rights and public interest to exist in this case.

We find no merit in Appellants' contentions II, III and IV. Section 2 of Act 1237 of 1975 prohibits Appellee (an executive branch official) from collecting from certain specified taxpayers use taxes which accrued under the 1949 Act and prior to the enactment of this Act. Art. 12, Section 12, of the Constitution of Arkansas, provides:

> "Except as herein otherwise provided, the State shall never assume or pay the debt or liability of any county, town, city, or other corporation whatever, or any part thereof, unless such debt or liability shall have been created to repel invasion, suppress insurrection or to provide for the public welfare and defense. *Nor shall the indebtedness of any corporation to the State ever be released or in any manner discharged save by payment into the public treasury.*" (Emphasis added)

The courts of other states have been unanimous in holding that a law or ordinance which attempts to release a tax liability, obligation or indebtedness violates provisions of their constitutions. *Ollivier et al* v. *City of Houston,* 54 S.W. 943 (Tex. 1900); *Community Public-Service Company* v. *James et al,* 167 S.W. 2d 588 (Tex. 1942); *Werner* v. *Riebe et al,* 296 N.W. 422 (N.D. 1941); *Fontenot, Director of Revenues* v. *Hurwitz-Mintz Furniture Co. et al,* 7 So. 2d 712 (La. 1942); *Graham Paper Co.* v. *Gehner et al,* 59 S.W. 2d 49 (Mo. 1933); *State* v. *Pioneer Oil and Refining Co. et al,* 292 S.W. 869 (Tex. 1927); *City of Louisville* v. *Louisville Ry. Co.,* 63 S.W. 14 (Ky. 1901); *Daniels* v. *Sones,* 157 So. 2d 626 (Miss. 1962); *Sloan* v. *Calvert,* 497 S.W. 2d 125 (Tex. 1973); *Smith* v. *State,* 420 S.W. 2d 204 (Tex. 1967); *Ivester* v. *State ex rel. Gillum,* 83 P. 2d 193 (Okla. 1938). As the Texas Court stated in *Smith* v. *State,* supra:

> A tax that has been levied and has become a liability matured under a tax statute is an indebtedness or obligation within the meaning of this provision of the Constitution.

We hold a matured tax claim to be an "indebtedness" within the meaning and context of Article 12, Section 12, of the Arkansas Constitution, and that Section 2 of Act 1237 is in violation of this provision of the Arkansas Constitution.

The act in question also violates Amendment 14 to the Constitution of Arkansas, which provides:

> "The General Assembly shall not pass any local or special act. This amendment shall not prohibit the repeal of local or special acts."

In *Whittabker* v. *Carter,* 238 Ark. 1074, 386 S.W. 2d 498 (1965), we held that an enactment violates Amendment 14 when it is retrospective in nature so as to exclude persons who would otherwise be subject to the operation of the enactment.

Section 2 of Act 1237 operates retrospectively to *include* within its operation only those delinquent taxpayers who have failed and refused to pay the tax. Those who have paid the tax are excluded from the operation of the law simply

because they paid the tax. The exclusion of those who were attempting to comply with the law at the time the tax matured, in effect, penalizes them because of their compliance.

Also, we find that Section 2 of Act 1237 violates Section 2, Article 4 of the Constitution of Arkansas, which provides:

> No person, or collection of persons, being one of these departments (Legislative, executive and judicial), shall exercise *any power* belonging to either of the others, except in instances hereinafter expressly directed or permitted. (emphasis added)

Thus, the Constitution of Arkansas provides specifically that the legislature may not exercise a judicial function in any case not expressly authorized by the Arkansas Constitution. We find no provision, and no such provision has been cited, in the Arkansas Constitution which authorizes the legislature to retroactively annul a decision of this court involving matters of public interest. Certainly, the General Assembly has the power to prospectively amend a statute, and threrby render a prior judicial decision interpreting that statute inapplicable, but not retrospectively as in the case before us. In *Sidway* v. *Lawson,* 58 Ark. 117 (1893) this Court held:

> The legislature cannot, by the enactment of a retrospective statute, exercise a power in its nature clearly judicial. *It is prohibited from doing so by the constitution.* The powers of the government are divided into three distinct departments, the legislative, executive and judicial; and every "person or collection of persons, being one of these departments, is prohibited from exercising any power belonging to either of the others," except wherein it is *expressly* directed ot permitted by the constitution. (emphasis added)

Our government is composed of three separate independent branches: legislative, executive and judicial. Each branch has certain specified powers delegated to it. The legislative branch of the State government has the power and responsibility to proclaim the law through statutory

enactments. The judicial branch has the power and responsibility to interpret the legislative enactments. The executive branch as the power and responsibility to enforce the laws as enacted and interpreted by the other two branches. The "Separation of Powers Doctrine" is a basic principle upon which our government is founded, and should not be violated or abridged. Section 2 of Act 1237 reads in part as follows:

> Section 2. The General Assembly hereby determines that it *was not the intent of Act 487 of 1949,* as amended, to impose the compensating use tax upon aircraft, aircraft equipment, and railroad parts, cars and equipment, or to any tangible personal property owned or leased by aircraft, airmotive or railroad companies, as provided in Section 5 (a) of Act 487 of 1949, as amended . . . . . (emphasis added)

Section 5 of Act 1237 states in part:

> Section 5. Emergency. *It is hereby found and determined by the General Assembly that it was not the intent of Act 487 of 1949, as amended, to impose the compensating use tax upon aircraft, aircraft equipment, and railroad parts,* cars and equipment, or to tangible personal property owned or leased by aircraft, airmotive or railroad companies, brought into this State solely and exclusively for (i) the purpose of refurbishing, conversion, or modification or (ii) for storage pending shipment for use outside of the State of Arkansas regardless of the length of time any such property is stored in the State of Arkansas, that recent court decisions have construed said Act 487 of 1949, as amended, to impose and require the collection and payment of compensating use taxes upon such property; and that the immediate passage of this Act is necessary to clarify the legislative intent and to provide that any claim the State of Arkansas may now have outstanding or which is due the State of Arkansas as a result of the court decisions for the collection of any such compensating use tax upon aircraft, aircraft equipment, and railroad parts, cars, and equipment, or to tangible personal property owned or leased by any aircraft, airmotive or railroad companies.

The relevant provisions of Act 487 of 1949, the Arkansas Use Tax Act of 1949, were interpreted by this Court in *Skelton* v. *Federal Express Corporation,* 259 Ark. 127, 531 S.W. 2d 941 (1976). Sections 2 and 5 of Act 1237 are a clear attempt by the 1975 General Assembly to interpret a law enacted by the 1949 General Assembly after this Court has interpreted and applied that law. We think this violates the Separation of Powers principle. The legislature can prospectively change the tax laws of this state, within constitutional limitations, but it does not have the power or authority to retrospectively abrogate judicial pronouncements of the courts of this State by a legislative interpretation of the law. The 1975 legislature cannot state what the 1949 legislature intended when it enacted Act 487 of 1949; such interpretation falls exclusively within the province of the judicial branch. For the 1975 legislature to declare the intent of a prior legislature and make the declaration retroactive so as to affect an interpretation already rendered by the courts is an abuse of legislative power which violates the Separation of Powers Doctrine. *Richardson* v. *City of Jefferson,* 134 N.W. 2d 528 (Ga. 1965); *State ex rel. Norton* v. *Van Camp,* 54 N.W. 113 (Neb. 1893); *Carolina Glass Co.* v. *State,* 69 S.E. 391 (S.C. 1910); *Richardson* v. *Hare,* 160 N.W. 2d 883 (Mich. 1968); *Walker* v. *United States,* 83 F. 2d 103 (8th Cir. 1936); *Road Builders, Inc. of Tennessee* v. *Hawes,* 187 S.W. 2d 287 (Ga. 1972).

In addition to the preceding points for reversal, N A C also raised points V through IX, which are matters of statutory construction.

The Arkansas Compensation Tax Act (Ark. Stat. Ann. Section 84-3105 [a]) provides the following:

> There is hereby levied and there shall be collected from every person in this State a tax or excise for the privilege of storing, using or consuming, within the State, any article of tangible personal property, after the passage and approval of this Act [§§ 84-3101 — 84-3128], purchased for storage, use or consumption in this State at the rate of three per centum (3%) of the sales price of such property. This tax will not apply with respect to the storage, use or consumption of any article of

> tangible personal property purchased, produced or manufactured outside this State until the transportation of such article has finally come to rest within this State or until such article has become commingled with the general mass of property of this State. This tax shall apply to the use, storage or consumption of every article of tangible personal property, except as hereinafter provided, irrespective of whether the article or similar articles are manufactured within the State of Arkansas or are available for purchase within the State of Arkansas, and irrespective of any other condition.

The stipulation of the parties reflects that the items upon which the use tax has been assessed are railroad car parts kept in inventory at Texarkana until needed by N A C to replace work or broken parts on existing railroad cars owned by N A C. These acts constitute sufficient "use" and "storage" within Arkansas to support the Appellee's assessment. *Skelton* v. *Federal Express,* supra; *Flying Tiger Line* v. *State Board of Equalization,* 157 Cal. App. 2d 85, 320 P. 2d 552 (1958); *Pacific Telephone and Telegraph Company* v. *Gallagher,* 306 U.S. 812, 59 S. Ct. 396, 83 L. Ed. 595 (1939). Installation of the parts in the railroad cars would be a taxable "use" because it is an exercise of a right or power over tangible personal property incident to the ownership of the property. *Skelton* v. *Federal Express,* supra. Further, the parts were retained in inventory for an average of 132 days, which constitutes "storage" as that term is used in tiis Act. Following their storage, the parts were not subsequently "used" outside this State since the parts were installed in N A C's cars in Arkansas. The wheels and axles which are the subject of this litigation are new wheels and axles purchased from vendors outside of Arkansas and shipped to Arkansas for the purpose of being installed in N A C's railroad cars being repaired. The stipulated facts clearly indicate that the parts in question were purchased by N A C for "storage, use or consumption" in this State as those terms are defined in Ark. Stats. Ann. Section 84-3104.

We find no merit to Appellant's contention that these replacement parts were purchased for resale and therefore are exempt from the tax. The term "sale" is defined by Ark.

Stats. Ann. Section 84-3104(f) as "any transaction whether called leases, rentals . . .". N A C leases its railroad cars to railroad companies and it claims an exemption from the tax by virtue of these leases. To establish its claim that the repair parts were purchased for "resale" it must show that the repair parts were purchased outside this state, that it is regularly engaged in the business of reselling the goods purchased, and that the parts were purchased for resale. The railroad cars were sold or "leased", but the parts in question were not. The threshold question is whether the items purchased (and taxed) are intended for "resale" as that term is defined in Ark. Stats. Ann. Section 84-1902(c). *Hervey* v. *International Paper Company,* 252 Ark. 913, 483 S.W. 2d 199 (1972). We think not. In *Hervey* v. *Southern Wood Box, Inc.,* 253 Ark. 290, 486 S.W. 2d 65 (1972), a similar argument was made to this Court. In that case wooden cases were purchased by Coca Cola Bottling Company and used to transport beverages to its customers. Coca Cola claimed the boxes to be exempt but this Court upheld the tax assessment against Coca Cola because the boxes were intended for Coca Cola's own use and not sale. In that case this Court said:

> We do not interpret the broad statutory definition of a sale to include every transaction in which there is a transfer of possession, for a consideration. Ark. Stat. Ann. § 84-1902(c). The statute must be read as a whole. If the reference to a transfer of possession were applied literally in every instance, absurd results would follow. *For instance, a company engaged in renting automobiles would not be required to pay a sales tax upon its purchase of cars, because it would be buying them for resale. Similarly, a company selling butane gas in heavy iron bottles would be reselling the bottles, even though its customers were required to return them. It is our duty to give the statute a reasonable construction, not an absurd one.* (emphasis added)

Under the holdings of this case the repair parts were consumed and used by N A C in its business and not "resold" within the definition of that term as used in the Use Tax Act or the Gross Receipts Tax Act.

In point IX for reversal, N A C contends that Act 1237 of

1975 is prospective as to it and not retroactive, as in the case of Federal Express Corporation. The use tax assessments pertaining to N A C are for two audit periods, from November 1, 1970, through February 28, 1973, and from March 13, 1973, through March 31, 1975. As previously stated, this Act was signed into law on February 16, 1976. N A C argues that no "claim was pending" at the time the Act became law, because proper "Notices of Assessment" had not been given at that time. First, it does not appear that the issue relating to the validity of the Notices of Assessment was raised in the lower Court, and, therefore, cannot be raised for the first time on appeal. Second, we hold that the assessments due for the periods involved were matured and payable (notwithstanding the status of the "Notice of Assessments"), so far as they relate to this case, at the time the Act became law, and, therefore, we hold the Act to be retrospective as to these periods and not prospective as contended by N A C. The State has a claim for taxes from the date the taxes are due and payable by applicable law. *Smith* v. *State,* supra. Ark. Stats. Ann. Section 83-3109(a) provides that the use tax is "due and payable to the Commissioner monthly on or before the fifteenth day of each month", and subsection (b) requires each person covered by the law to report and remit the applicable tax on or before the fifteenth day of the month for the prior month's taxable purchases. Thus, so far as it relates to this case, the claim of the State of Arkansas matured on the sixteenth day of every month for the prior month's taxes during the period in question.

The 1975 Amendment to Act 1237 exempts from the operation of the tax certain specified property that would otherwise come within the operation of the taxing statute. N A C contends (Point VIII) that the 1975 Amendment exempts *all* railroad parts. The Appellee contends that the 1975 Amendment to this Act extends only to railroad parts owned or leased by *railroad companies*. Because of the decisions of this Court pertaining to the other issues raised herein, this final contention of N A C is not relevant to the taxes involved in this case and would relate only to future assessments. N A C does not qualify and cannot be considered a railroad company. However, we see no necessity to decide the question as to whether the exemption enacted by the 1975 Amendment to

Act 1237 extends to all "railroad parts" or only railroad parts "owned or leased by ** railroad companies." This question was not decided by the lower Court and this issue is not properly before this Court.

Affirmed.

BYRD, J., dissents.

HICKMAN, J., not participating.

INDEPENDENCE SAVINGS & LOAN ASSOCIATION *v.* CITIZENS FEDERAL SAVINGS & LOAN ASSOCIATION, HOME FEDERAL SAVINGS AND LOAN ASSOCIATION, POCAHONTAS FEDERAL SAVINGS & LOAN ASSOCIATION, and ARKANSAS SAVINGS & LOAN ASSOCIATION BOARD

78-110 577 S.W. 2d 390

Opinion delivered February 26, 1979
(In Banc)

Highsmith, Gregg, Hart & Vinson, by: *John C. Gregg,* for appellant.

Friday, Eldredge & Clark, by: *Hermann Ivester; Roger W. Giles;* and *Crouch, Blair, Cypert & Waters,* by: *James B. Blair* and *William M. Clark, Jr.,* for appellees.

DAN M. BURGE, Special Justice. This is an appeal from the judgment of the Independence County Circuit Court affirming the decision of the Arkansas Savings and Loan Association Board, hereinafter referred to as "The Board," denying the application of Appellant, Independence Savings and Loan Association, for permission or authority to establish and operate a branch office in Jonesboro, Arkansas.

Appellant was organizaed and received its original state charter to open a savings and loan association in Batesville, Arkansas, in June of 1973. It obtained approval for a branch in Ash Flat in February of 1975, and a second branch in Newport in October of 1975. This application for its third branch to be located in Jonesboro, was filed in January of 1976. Home Federal Savings and Loan Association and Citizens Federal Savings and Loan Association, both of Jonesboro, and Pocahontas Federal Savings and Loan Association opposed or protested the application. Pocahontas filed an application for a branch office in Jonesboro with the Federal Home Loan Bank Board in January of 1976, which application was approved, and its branch office is now open.

After taking voluminous testimony (a 1290 page record which includes the petitions, answers to interrogatories, testimony of 26 witnesses, detailed economic reports and numerous exhibits) the Board, in a 2 to 1 decision (one member being absent and with the chairman not voting), denied the application finding (1) that there was not a public need for the proposed branch; (2) that the volume of business in the area is not such as to indicate a successful operation; and (3) that the operation of the proposed branch office would unduly harm existing savings and loan associations or other financial institutions. The Board made 46 separate findings of underlying facts in support of its three findings.

Appellant asserts or relies on the following points for reversal:

(1) The Board's decision, based on the entire record, as affirmed by the Circuit Court, is not supported by substantial evidence.

(2) The Board's decision, as affirmed by the Circuit Court is arbitrary, capricious and characterized by an abuse of discretion.

(3) The Circuit Court erred in reviewing only the evidence which supported The Board's decision.

(4) The Board's Order denying the application is in violation of Arkansas Statutes Annotated Sec. 5-710 (b).

As we view the entire record, there is obviously conflicting evidence. Some of The Board's 46 specific findings of underlying facts are very weak and may not support its conclusion. However, the weakness or elimination of some of these supportive underlying findings does not destroy the foundation for The Board's decision. Even though we may have reached a different conclusion or decision had this matter been before us de novo, we cannot substitute our choice for that of The Board's by weighing the evidence between two conflicting views. We reaffirm the Substantial Evidence Rule relating to Savings and Loan Association Board's Orders whereby The Board's decision will be affirmed or upheld if supported by substantial evidence. In determining whether or not the findings are supported by substantial evidence:

> " — we consider [all] the evidence with all reasonable inferences deducible therefrom in the light most favorable to [The Board's action.] — Whether the evidence of Appellee or the Appellant weighs more heavily is not a consideration."

First State Building & Loan Association, Mountain Home, Arkansas v. *Arkansas Savings & Loan Association Board and Home Savings & Loan Association,* 261 Ark. 482, 549 S.W. 2d 274 (1977), and *Northwest Savings and Loan Association, et al* v. *Fayetteville Savings and Loan Association, et al,* 262 Ark. 840, 562 S.W. 2d 49 (1978), *First Federal Savings and Loan Association of El Dorado* v. *Union Savings and Loan,* 257 Ark. 199, 515 S.W. 2d

75 (1974). *Heber Springs Savings and Loan Association* v. *Cleburne County Bank,* 240 Ark. 759, 402 S.W. 2d 636 (1966).

We have in numerous decisions relied heavily upon the principle that administrative agencies are better equipped than Courts, by specialization, insight through experiences and more flexible procedures to determine and analyze underlying issues . . . [which is] the principal basis for the limited scope of judicial review of administrative action and for the refusal of the Court to substitute its judgment and discretion for that of the administrative agency. *Northwest Savings and Loan Association, et al* v. *Fayetteville Savings and Loan Association, supra,* and *Terrell Gordon* v. *Gordon L. Cummings, et al,* 262 Ark. 737, 561 S.W. 2d 285 (1978).

Appellant's proposed service area consists of Craighead County, which is presently served by three savings and loan associations located in Jonesboro and six commercial banks, four of which are located in Jonesboro. These banks operate 24 separate home offices and branches within the service area. All three associations filed protests to Appellant's application and representatives testified in opposition thereto. The banks did not file any protest.

Edward H. Cherry, President and Chairman of the Board of the Bank of Northeast Arkansas, testified that the six banking institutions were all in heavy, vigorous and even ferocious competition with each other and the existing savings and loan associations for both savings and loans; that he had never seen a city that had as many financial institutions per capita as Jonesboro; that there was no need for another savings and loan assocition; that another savings and loan would not generate any new savings; that the existing associations and banking institutions were adequately serving the needs of the area; that a loss of 10% of savings to a new financial institution would jeopardize the survival of his bank; and that if another association was permitted to open a branch office within the area it will split the business and dilute it to the point that the existing associations and financial institutions would suffer undue harm. Without going into detail concerning his specific testimony in support of the foregoing conclusions, we find that same did constitute sub-

stantial evidence in support of The Board's findings.

Thirty-two realtors and home builders indicated by way of testimony and/or petition that there was not a public need for another association, that existing associations were meeting the needs of the public for both savings deposit facilities and credit or loan sources. Not one local realtor, home builder or representative of existing financial institutions in the service area testified in support of Appellant's petition. Various witnesses testified as to services being rendered by existing associations and that which would be rendered by the Appellant, if approved. Appellant will not provide any new service that one or the other associations do not now furnish, nor will it provide more convenience to its depositors or borrowers and so the services and convenience would remain basically the same. Economic experts testified in behalf of both sides. Appellant's expert was from Northwest Arkansas, whereas Appellees' expert was from the local service area. He had made several economic studies within the area for other clients or purposes. No one witness in the home construction, real estate or banking business testified or indicated in any manner that there was a need for the proposed branch or that it should be granted.

The credibility of these witnesses and the proper weight to be accorded evidence presented is the prerogative of The Board and not that of the reviewing court. The Board has a superior position to that of the reviewing court in as much as it is in a position to observe the witnesses and consider their demeanor. The Board justifiably could and probably did simply find that local realtors, builders, developers, bankers and economists testimony was more plausible than that of Appellants' witnesses and thereby entitled to more weight. *Northwest Savings and Loan Association, et al* v. *Fayetteville Savings and Loan Association, supra.*

Savings and loan associations are authorized and chartered for two purposes: To operate deposit facilities for savings purposes and to meet the credit needs for home loans in its service area. Appellant's track record clearly indicates that it has, in the past, met the first needs by providing deposit facilities for savings in the areas where it serves; but

clearly it has failed to meet the credit needs for local home building and other developments and has, in fact, been siphoning off funds from the areas where it serves by investing same in federal securities. This has resulted in a profitable operation, but at the sacrifice of the credit needs of its service areas.

When we first review the numerous underlying findings of The Board, we find the evidence in support of The Board's decision to be clearly substantial.

Appellant next argues that The Board's decision, as affirmed by the Circuit Court, is arbitrary, capricious and characterized by an abuse of discretion. In *Northwest Savings And Loan Association, et al* v. *Fayetteville Savings And Loan Association, et al, supra,* we quoted from *First National Bank of Fayetteville* v. *Smith,* 508 F. 2d 1371 (8th Circuit 1974) as follows:

> "The 'arbitrary and capricious' standard of review is a narrow one . . . its scope is more restrictive than the 'substantial evidence' test which is applied when reviewing formal findings made on a hearing record . . . 'Administrative action may be regarded as arbitrary and capricious only where it is not supportable on any rational basis' . . . *Something more than mere error is necessary to meet the test* . . . To have administrative action set aside as arbitrary and capricious, the party challenging the action must prove that it was 'wilful and unreasoning action', without consideration and a disregard of the facts or circumstances of the case . . . " (Emphasis added)

We would unduly lengthen this opinion to review all the evidence in this record. It will suffice to state, as we did in the *Northwest Savings and Loan* opinion that we do not find The Board's action to be arbitrary or capricious because, in our judgment, evidence contained in this record cannot be classified as being based upon suspicion, surmise, implications or plainly incredible evidence.

While some of the conflicting evidence in the record clearly

supports the establishment of Appellant's branch, on the whole, the decision of The Board is sustained by substantial evidence. By substantial evidence, we mean valid, legal and persuasive evidence. Where such evidence exists, it automatically follows that the decision of The Board cannot be classified as unreasonable or arbitrary. *Bockman* v. *Arkansas State Medical Board,* 229 Ark. 143, 213 S.W. 2d 826 (1958); *Arkansas Pollution Control Commission* v. *Coyne,* 252 Ark. 792, 481 S.W. 2d 322 (1972).

Appellant's third point urges us to find that the Circuit Court erred in reviewing only the evidence which supported The Board's decision. The Judgment of this Trial Court specifically states that from the record of the proceedings before The Board, the briefs of the parties and the arguments of counsel it found that there was substantial evidence to support the findings and decision of The Board. The reviewing court did not consider just evidence supporting The Board's finding alone. In our review of the entire record, we find many facts and circumstances which would constitute substantial evidence upon which The Board could have based its decision, even though fair-minded men might reasonably disagree. These facts do not show any abuse of discretion or statutory duty on the part of The Board of reviewing Circuit Court.

For its final point, Appellant argues that the forty-six separate specific findings of facts totaling ten pages are so lengthy, redundant and over burdensome as to be a violation of Ark. Stat. Ann. § 5-710(b), which requires The Board's final decision to be concise and explicit and, therefore, same makes its Order arbitrary and an abuse of The Board's discretionary powers. As stated in *Arkansas Savings And Loan Association Board, et al* v. *Central Arkansas Savings and Loan Association,* 256 Ark. 846, 510 S.W. 2d 872, this statutory requirement is primarily for the benefit of the reviewing courts and a failure to comply with the statute, if such a failure exists, is a minor and inconsequential matter. To boil a 1,090 page record down to ten pages is not an easy task by any stretch of the imagination.

For the reasons hereinbefore stated, the judgment of the

Circuit Court upholding The Board's decision to deny Appellant's application to open a branch office in Jonesboro is hereby affirmed.

BYRD, J., concurs.

HOLT, J., not participating.

Dennis CORDES *v.* STATE of Arkansas

CR 78-141 577 S.W. 2d 609

Substituted opinion on rehearing
delivered March 5, 1979
(In Banc)

Erwin L. Davis, for appellant.

Bill Clinton, Atty. Gen., by: *Catherine Anderson,* Asst. Atty. Gen., for appellee.

GEORGE ROSE SMITH, Justice, on rehearing. Upon separate charges of delivering a controlled substance, the appellant Dennis Cordes, then 26, was twice tried by jury in 1974, was found guilty at each trial, and received a 10-year and a 15-year sentence. His original appeal from the first judgment was dismissed on motion of his attorney, who concluded that there was no reversible error. In 1976, upon a petition for postconviction relief, we gave Cordes permission to apply to the trial court for relief upon specified points. After that, an appeal to this court resulted in a remand for further proceedings. *Cordes* v. *State,* decided in an unpublished opinion on September 19, 1977. After a full evidentiary hearing, the record of which, with its exhibits, exceeds 600 pages, the trial judge denied relief. In this court three points for reversal are listed, but they can best be discussed as four points.

First, it is contended that Cordes's retained attorneys were guilty of ineffective representation in failing to call Cordes's codefendant, Bob Phillips, as a witness at each trial. At the first trial Phillips was a defendant and could not have been compelled to testify. He was not a defendant at the second trial, having pleaded guilty, but Cordes's attorney at that trial, Jeff Duty, testified at the hearing below that he interviewed Phillips before the trial and concluded that Phillips's testimony would not have been at all beneficial to Cordes. Phillips himself testified at the hearing below, but, despite be-

ing assisted by many leading questions, Phillips did not testify that, in the language of the petition for postconviction relief, "he was in possession of the controlled substance and that petitioner [Cordes] knew nothing of what was going on." To the contrary, Phillips equivocated, saying that he set up the sales and did *most* of the talking (with the purchaser). He admitted that Cordes, who accompanied him and drove the car to meet the undercover officer who made the buys, knew he had the drugs and was going to sell them. Phillips testified that Cordes did not receive any of the money from the two sales, but he would have received some from a third sale that fell through. Phillips had told Cordes's attorney that "[w]e were both in it. We were supposed to get the money." The record falls decidedly short of showing ineffective assistance of counsel within the test that we have adopted. *Sheppard* v. *State,* 255 Ark. 40, 498 S.W. 2d 668 (1973).

Second, ineffective assistance of counsel is also argued on the basis of counsel's failure to introduce medical records about Cordes's hospitalization following a motorcycle accident in February, 1974, and counsel's failure to call as witnesses two doctors, Dr. Sisco and Dr. Johnson, who treated Cordes at that time. The petition for postconviction relief asserted that the medical records would have been pertinent to show Cordes to be mentally incompetent and that the two doctors would have testified that Cordes was mentally incompetent prior to the commission of the offenses. Neither statement is established by the record. The hospital records would have showed that Cordes sustained a severe brain injury in the accident, but they did not show that he was mentally incompetent. Neither of the doctors was a psychiatrist, and there is no showing that they would have testified as the petition alleged. In fact, mental incompetency was not even an issue at the first trial, and at the second trial the defense of insanity was submitted to the jury upon conflicting expert testimony.

According to this record, neither of the doctors who treated Cordes for his injuries would have testified that he was mentally incompetent as a result of the motorcycle accident. In addition, there was much other evidence that could have been adduced to show the details of Cordes's

hospitalization and its effect upon Cordes. We cannot say that the attorneys' failure to introduce the records or to call the two doctors to the stand demonstrates ineffective assistance of counsel. To the contrary, both the doctors — Dr. Johnson orally and Dr. Sisco by letter — indicated to counsel that their testimony would be restricted to their actual treatment of the injuries.

Third, the only really serious question presented by the record is whether, at the two trials, Cordes was in such a state of mental incompetency as to be, in the language of the petition for postconviction relief, "of little or no assistance to his attorney in the preparation of petitioner's defense. Thus petitioner was incompetent to stand trial."

The evidence on this point is so voluminous that we shall attempt only to give a summary sufficient to show why it cannot be said that the trial judge's findings are clearly against the preponderance of the evidence.

The expert testimony is hopelessly in conflict. Cordes's principal expert witness, Dr. Ragsdill, testified that as a result of the motorcycle accident Cordes had an organic brain syndrome as a consequence of the brain injury. He explained the syndrome as a defect in Cordes's functioning which prevented him from meeting the ordinary requirements of living. His diagnosis was that Cordes was "non-psychotic, with a psychotic element at times." He believed that Cordes had been unable to assist his attorneys at his trials, in September and December of 1974, and that, as of the postconviction hearing in March, 1978, if Cordes were to be tried again the next day "he would not be any assistance in his own defense." Cordes also introduced the testimony that was given in his behalf by Dr. Finch at the second trial, when insanity was a defense. Dr. Finch found that Cordes was with psychosis at that time. Attorney Duty testified that Dr. Finch made one of the best witnesses he had ever seen. At that trial, however, Dr. Finch's opinion was contradicted by that of Dr. Holman, a State Hospital psychiatrist, who testified that Cordes was without psychosis. It may be noted that the jury, after hearing both sides, rejected the defense of insanity and returned a verdict of guilty.

At the hearing below, the State's principal expert witness was Dr. Rosendale, who participated in one of the three State Hospital examinations (in 1974, 1976, and 1978) of Cordes, all of which found him to be without psychosis. Dr. Rosendale was of the opinion that Cordes was in full contact and that he could have supplied complete information if he had so desired. He described Cordes's organic brain syndrome as mild. He thought that Cordes could concentrate upon the tests given him if he wanted to. He indicated that in walking past the cells he had observed Cordes carrying on with the other patients, talking with them, kidding with them, and causing no problems whatsoever.

It is significant, in weighing the testimony, to note that many witnesses thought that Cordes's condition at the time of the postconviction hearing in 1978 was the same as it had been at his trials in 1974. Dr. Ragsdill testified that "I don't think that there is any reason in my mind to suspect that his mental condition was any different than it is now; so if he is psychotic now then he was psychotic then." Attorney Spears, who represented Cordes at the first trial, testified that Cordes exhibited about the same language ability and understanding patterns when Spears was representing him as he did on the witness stand at the postconviction hearing. Attorney Duty testified that he considered Cordes to be mentally competent both at his second trial and on the date of the postconviction hearing. Judge Cummings, who presided when Cordes testified at his second trial and again when Cordes testified at the postconviction hearing, stated in his findings: "I heard the trial before, and there is no difference in his testimony, manner, appearance, et cetera."

Thus Cordes's ability to assist his attorney at the postconviction hearing could be regarded by the trial judge as having a direct relation to his ability to assist his attorneys at his two trials. In that view, the record is replete with proof that Cordes was able to assist his counsel at the postconviction hearing. There are handwritten letters in the record, from Cordes to Judge Cummings and to the circuit clerk, having to do with his case, which show beyond question that he is articulate in correspondence. At the postconviction hearing he testified at length. Even allowing for the court

reporter's inability to reflect in the record Cordes's possible hesitations and stuttering, his testimony reveals no substantial inability to communicate. Several times Cordes's attorney asked for a short intermission so that he could confer with his client (with an ensuing line of questioning). Cordes himself spoke up from time to time. He reported having overheard the prosecutor mention Dr. Rosendale in a telephone conversation during the trial. He asked permission to question Dr. Ragsdill about a matter. He argued intelligently and at length with Judge Cummings about what he considered to be the judge's hostile attitude toward him (we find no such hostility on the part of the judge). He reminded his counsel to bring up the matter of jail time, with his alertness in that respect resulting in the judge's immediately announcing that Cordes would be given credit for 93 days of jail time. The record as a whole indicates that Cordes actively assisted his attorney during the hearing.

We do not imply that the question of Cordes's mental condition at his trials is free from dispute. To the contrary, there is persuasive evidence on each side of the issue. It is impossible, however, for us to say that the findings of the trial judge, who presided at both trials, who corresponded with Cordes from time to time, and who observed his conduct at the protracted postconviction hearing, are clearly against the preponderance of the testimony.

Fourth, it is argued perfunctorily that counsel, prior to the appeal that was ultimately dismissed, should have discussed with Cordes the possible defense of entrapment as a point to be urged on appeal. There is no evidence whatever of entrapment, and the point, as argued, presents nothing for review under the Dixon rule. *Dixon* v. *State,* 260 Ark. 857, 545 S.W. 2d 606 (1977).

The judgment is affirmed and the petition for rehearing denied.

STATE of Arkansas *v.* Thurman ABERNATHY

CR 78-146 577 S.W. 2d 591

Opinion delivered March 5, 1979
(In Banc)

Bill Clinton, Atty. Gen., by: *Ray Hartenstein,* Asst. Atty. Gen., for appellant.

Jack Holt, Jr. and *Junius Bracy Cross, Jr.,* for appellee.

GEORGE ROSE SMITH, Justice. The appellee, Thurman Abernathy, was charged with having murdered Linda Edwards on August 22, 1976. (The record leaves some doubt as to the year, whether it was 1976 or 1977, but apparently 1976 is correct, for the information was sworn to and filed in July of 1977.) The case has not yet been tried. This is an appeal by the State from an interlocutory order holding that certain evidence to be adduced by the State at the trial would be inadmissible. See Rule 36.10 of the 1976 Rules of Criminal Procedure.

Defense counsel filed a preliminary motion asking that the testimony of several witnesses for the State be declared to be inadmissible, primarily under the hearsay rule. The State contended that the testimony is admissible under Rule 803 (3) of the Uniform Rules of Evidence. Ark. Stat. Ann. § 28-1001 (Supp. 1977). After a hearing the court held all the testimony proffered by the State to be inadmissible.

We begin our discussion with Rule 803 (3) itself, which provides:

> Rule 803. Hearsay rule. — Availability of declarant immaterial. — The following are not excluded by the hearsay rule, even though the declarant is available as a witness:
>
> * * * * *
>
> (3) Then existing mental, emotional, or physical condition. A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition, such as intent, plan, motive, design, mental feeling, pain, and bodily health, but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will.

This rule was copied from Federal Rule of Evidence 803 (3), which in turn was evidently designed to continue in effect the decisions of the United States Supreme Court in *Mutual Life Ins. Co.* v. *Hillmon,* 145 U.S. 285 (1892), and *Shepard* v. *United States,* 290 U.S. 96 (1933). In *Hillmon* the court upheld the admissibility of letters written by one Walters, who wrote in one letter: "I expect to leave Wichita [Kansas] on or about March the 5th, with a certain Mr. Hillmon." The court held that the letters were admissible to show that Walters had the intention of leaving Wichita and that therefore a body found several days later at Crooked Creek, Kansas, might have been that of Walters. From the opinion:

> The letters . . . were competent, not as narratives of facts communicated to the writer by others, nor yet as

> proof that he actually went away from Wichita, but as evidence that, shortly before the time when other evidence tended to show that he went away, he had the intention of going, and of going with Mr. Hillmon, which made it more probable both that he did go and that he went with Hillmon, than if there had been no proof of such intention.

At common law we reached a similar conclusion, holding to be admissible the decedent's statement on the day he was killed that he had started to Ravana to see the defendant about a bill of lumber. *Sullivan* v. *State,* 171 Ark. 768, 286 S.W. 939 (1926), clarified in *Hill* v. *State,* 255 Ark. 720, 502 S.W. 2d 649 (1973).

In *Shepard,* the second decision by the United States Supreme Court, it was held that a statement about a past event, "Dr. Shepard has poisoned me," was not admissible. The court explained the distinction:

> Declarations of intention, casting light upon the future, have been sharply distinguished from declarations of memory, pointing backwards to the past. There would be an end, or nearly that, to the rule against hearsay if the distinction were ignored.
>
> The testimony now questioned faced backward and not forward. This at least it did in its most obvious implications. What is even more important, it spoke to a past act, and more than that, to an act by someone not the speaker.

It will be seen that Uniform Rule 803 (3) states the substance of the rules laid down in *Hillmon* and *Shepard.*

In the case at bar the information alleged that Abernathy murdered Linda Edwards with a blunt instrument on August 22. Apparently the State meant to make its case by circumstantial evidence. The State sought to show, among other things, that Linda had expressed her intention to see Abernathy on the preceding night, before her death. To that end, at the hearing on defense counsel's preliminary motion

to declare the testimony inadmissible, the State proffered the testimony of Sara Edwards (no relation to the victim). The trial judge held all of Sara's testimony to be inadmissible.

Sara testified that she had known Linda for four years. During the last three of those years Linda had repeatedly said she was in love with Abernathy (who was married) and had a sexual relationship with him. Before her death Linda told Sara that she was pregnant and thought Abernathy was the father of her child. Linda said that Abernathy wanted her to have an abortion, but she didn't want to. Linda had three appointments for an abortion, but she canceled all of them and finally said that the baby had just as much right to live as any other baby.

Sara testified that Linda told her, on the Thursday before her death, that she and Thurman Abernathy had had a big fight at a parking lot. Sara went on to testify that she saw Linda twice on the final Saturday night before Linda's death. We quote her proffered testimony, which begins with the first of the two visits on Saturday night.

> [Linda] was very mad, very mad, but she was calm, cool mad type, determined mad is I guess the way you would describe it. And she said that she was going to get it straightened out one way or the other that night.
>
> Q. Straightened out with who?
>
> A. With Thurman, and she said, "If he doesn't satisfy me I will walk right up to the front door and tell Judy about it." She said, "He is either going to divorce her and marry me or I am going to see a lawyer Monday morning and have my name changed to Abernathy." She was very determined. I tried to talk her out of it. I told her she was a foolish girl for doing this. I said, "Be careful." And she kept saying, "Thurman won't hurt me. He won't hurt me." I said, "Linda, that's like backing a tiger into a corner." So she left and came back around eleven o'clock. I was asleep. My children were still up watching T.V. She was in my bathroom, and my kids came and got me and told me she was in there. So,

> when I walked in, I said, "Have you talked to Thurman?" She said, "Yeah, I did." She said that he said he had a couple of people to take care of and then he said, "I knew this was going to happen. I knew this was going to happen." He said, "When I get these people taken care of I will see you." I said, "Linda, be careful. Whatever time you get through talking to him, you call me." And that's the last time I talked to her.

For the most part Linda's quoted declarations are inadmissible as being statements of her memory about the past, not statements of an existing state of mind. In that category fall the statements that her relationship with Thurman was sexual, that she thought him to be the father of her child, and that she had canceled appointments for an abortion. Also inadmissible, as hearsay, were Linda's repetitions of what Abernathy had said, such as his statement that he would see Linda after he had taken care of the two people.

In a proper setting, Linda's statement that she was pregnant might be admissible as a statement of physical condition. But in the absence of proof indicating that Thurman might have been the father of Linda's child, the bare statement would not be relevant to any issue in the case. It would be futile for us to speculate about the possibilities that might arise if the case is brought to trial. There is, of course, also the possibility that the evidence, although relevant, might be inadmissible under Uniform Rule 403.

In any event, the trial court should have sustained the admissibility of Linda's statement that she was going to meet Thurman that night. That statement falls within Rule 803 (3) and is in fact similar to the proof found admissible in *Hillmon*. That the statement may also show that Thurman was going to meet Linda does not, under the majority view, render it inadmissible. See *People* v. *Alcalde,* 24 Cal. 2d 177, 148 P. 2d 627 (1944). On the other hand, Linda's statements when she visited Sara for the second time that night are not admissible, as they were primarily repetitions of what Thurman had said, not statements about Linda's own state of mind.

For the error indicated the judgment is reversed and the cause remanded for further proceedings.

HOLT, J., not participating.

James Ray RENTON *v.* STATE of Arkansas

CR 79-34 577 S.W. 2d 595

Opinion delivered March 5, 1979
(In Banc)

John B. Baker, Public Defender, for petitioner.

Steve Clark, Atty. Gen., by: *Robert J. DeGostin, Jr.,* Asst. Atty. Gen., for respondent.

GEORGE ROSE SMITH, Justice. The petitioner was charged by information with capital murder in the death of a police officer in Washington county. Our constitution has this provision with respect to bail: "All persons shall, before conviction, be bailable by sufficient sureties, except for capital offenses, when the proof is evident or the presumption great." Ark. Const., Art. 2, § 8 (1874). The petitioner applied to the circuit court for admission to bail, but the court denied the application on the ground that the proof was not evident nor the presumption great. The present petition for habeas corpus was filed here to review the trial court's decision.

The circuit judge, in holding that the burden of proof rested upon the accused, followed our decisions in such cases as *Smith* v. *State,* 256 Ark. 425, 508 S.W. 2d 54 (1974), holding that the filing of the information raises such a presumption of the accused's guilt as to cast upon him the burden of affirmatively showing that he is entitled to bail. The petitioner argues that our former position can no longer be maintained in the light of the Supreme Court's decision in *Gerstein* v. *Pugh,* 420 U.S. 103 (1975).

We must agree that the petitioner is right. In *Gerstein* the question was whether an arrested person could be detained in custody for an extended period without a judicial finding of probable cause for the detention, merely because the prosecuting attorney had filed an information charging the accused with a crime. The court held that the prosecutor's information, standing alone, does not satisfy the Fourth Amendment requirement that no warrant of arrest be issued except upon probable cause, that requirement being a matter for prompt judicial determination.

The principle laid down in *Gerstein* controls this case. That is, an accused person cannot be indefinitely detained in custody merely because he has been charged by information (as distinguished from a grand jury indictment) with the

commission of an offense. The burden is not on the accused to demonstrate his right to freedom; it is on the State to demonstrate its right to keep him in confinement. It follows that, in a capital case, the State must assume the burden of proving that bail should be denied because the proof is evident or the presumption great. Otherwise the accused is subjected to the difficult task of proving the negative, when it is the State which has instituted the prosecution and should fairly have the responsibility for defending its position when bail is sought.

The petition is granted, and the cause is remanded to the circuit court for a hearing upon the petitioner's application for admission to bail, with the burden resting upon the State to prove its assertion that the petitioner is constitutionally precluded from being released on bail because the proof is evident or the presumption great.

Samuel E. JONES and Blanche
JONES *v.* James P. SEWARD et al

78-219 578 S.W. 2d 16

Opinion delivered March 5, 1979
(Division II)
[Rehearing denied April 2, 1979.]

Dale W. Finley, Ike Allen Laws, Jr. and *William S. Swain,* for appellants.

Richard Peel, for appellees.

FRANK HOLT, Justice. This appeal results from a decree holding that appellants and the appellees had agreed orally upon the location of a boundary line between their respective properties. Appellants contend the court's finding was against the preponderance of the evidence in that the alleged agreement did not contain the necessary elements to make it a binding agreement and that no agreement was shown to have been made by appellant Blanche Jones.

In order for there to be a valid boundary line agreement, certain factors must be present: (1) there must be an uncertainty or dispute about the boundary line; (2) the agreement must be between the adjoining landowners; (3) the line fixed by the agreement must be definite and certain; and (4) there must be possession following the agreement. *Bryson* v. *Dillon,* 244 Ark. 726, 427 S.W. 2d 3 (1968); and *Sherrin* v. *Coffman,* 143 Ark. 8, 219 S.W. 348 (1920).

Appellants and Gerald Ledford were adjoining property owners for several years. When Ledford decided to sell his property, a dispute arose as to the true boundary. Ledford had two surveys made. He testified that appellant Samuel Jones was present at the latter survey and agreed that it would constitute the correct boundary line and Ledford could sell his property up to that line. Ledford was corroborated by the surveyor. Approximately a year later, Ledford sold his

property to the appellees, using the agreed boundary as the true boundary line.

Even if we should agree with the appellees that the preponderance of the evidence establishes that (1) there was an uncertain or disputed boundary, (2) the line fixed by the agreement was made definite and certain by a survey, and (3) there was sufficient possession following the agreement, we cannot agree that the evidence is sufficient that appellant Blanche Jones, who jointly owns the property with her husband, agreed to the survey line as being the true boundary. It is true that in *Priddy* v. *Wood,* 245 Ark. 209, 431 S.W. 2d 744 (1968), we held without merit a wife's contention that she made no agreement about a boundary line. However, in doing so, we observed that it was obvious from the wife's testimony that she knew about the survey and about a garage being moved as a result of the survey. Further, we recognized that Ark. Stat. Ann. § 55-412 (Repl. 1971) provides that when a married woman permits her husband to have custody, control, and management of her separate property, there is a presumption he acts as her agent. We also said the arrangements for the sale of the property were apparently handled by her husband. He also secured the surveyor and assisted him. We do not consider that case controlling here.

In the case at bar there is a joint ownership of the property. There is no evidence that Mrs. Jones had ever permitted her husband to have the custody, control and management of any of her property. Neither is there any evidence that she was present during the survey, knew of its existence or acted in any manner indicating that she was in agreement that the survey constituted the agreed boundary. Since we hold that the true boundary line was not established by oral agreement, the issue remains unresolved. In this exceptional circumstance, we exercise our discretion and remand the cause without prejudice to either party to establish the true boundary line. *Fish* v. *Bush,* 253 Ark. 27, 484 S.W. 2d 525 (1972); *Fulwider* v. *Woods,* 249 Ark. 776, 461 S.W. 2d 581 (1971); and *Arnett* v. *Lillard,* 247 Ark. 931, 448 S.W. 2d 626 (1970).

Reversed and remanded.

We agree: HARRIS, C.J., and FOGLEMAN and HICKMAN, JJ.

Benjamin F. BARTON, et ux *v.*
George E. PERRYMAN, et al

78-169 577 S.W. 2d 596

Opinion delivered March 5, 1979
(In Banc)

Kenneth E. Suggs, for appellants.

No brief for appellees.

DARRELL HICKMAN, Justice. This is an appeal of a chancery foreclosure decree and judgment on a contract of sale. We find the decree must be reversed.

The sellers and appellees, George E. Perryman and others, had sold a house trailer and lot located in Perry County. The initial sale was to Vernon and Elizabeth Highfill in 1973. The sale was perfected by the execution of a Purchaser's Agreement and promissory note which was prepared by the appellees calling for payment in monthly installments.

In 1974, the original Purchaser's Agreement was assigned to the appellants, Benjamin and Connie Barton. The appellees consented in writing. In 1975, the Agreement was again assigned from the Bartons to Michael and Melissa Black using an identical assignment and consent form signed by the parties.

The trailer burned and it was discovered that there was no insurance. The appellees filed a foreclosure suit seeking a judgment against all of the purchasers and assignees for the balance due on the note and, after an agreed sale, a deficiency judgment was entered against these appellants and the Blacks.[1]

The chancellor held that none of the parties had been released from their agreement to buy the property.

The appellants argue on appeal that the chancellor was incorrect because it was the intention of the parties that upon

[1](The first buyers were never served. The Blacks did not appeal.)

each assignment, the assignors were discharged, and the assignees were substituted in their place as a result of a novation. We agree with this argument and reverse the decree of the chancellor.

The chancellor, no doubt, relied upon the law that when rights are assigned and duties delegated, as in this case, the original obligor remains liable as a surety unless he is discharged by novation. Restatement of Contracts §160 (1932). However, an examination of the facts in this case leads us to conclude that it was the intention of the parties in this case that the Blacks be substituted as obligors in place of the Bartons, rather than merely added as additional debtors.

The original Purchaser's Agreement was prepared by the appellees, who were not attorneys, and it is a form instrument. There are two relevant provisions, one which was added by the Perrymans and the other which was contained in the form instrument. The added clause, typed in by the Perrymans, reads:

> Buyer agrees to reimburse seller for yearly insurance premiums in the event that seller must maintain insurance. Buyer also agrees that said mobile home shall not be removed from property without the written consent of seller.

The printed instrument contained a standard provision which reads as follows:

> This AGREEMENT shall not be sold, transferred or assigned, nor shall said property be leased, without written consent of SELLER, and in the event of any sale, assignment, transfer or lease, without written consent, SELLER shall have the right to exercise the options hereinbefore provided in Paragraph 3. In the event of a sale, transfer or assignment of this AGREEMENT with SELLER'S written consent, the assignee or grantee shall succeed to all the rights and liabilities of BUYER, according to the terms of the assignment and consent to be attached hereto.

In 1974, when the appellants purchased the property from the Highfills, the Perrymans prepared an assignment and a consent, which we reproduce.

Attach this Copy to Contract on Tract 1:

PERRYMAN REALT[illegible] 213 Kingsrow Dr. [illegible] Rock, Arkansas 72207
(Specializing in acreage and land Developing)

Phone– 666-7693

ASSIGNMENT OF PURCHASER'S AGREEMENT
LEGAL DESCRIPTION: TRACT #13

DATE Oct 2 1974

PURCHASER: Vernon W. Highfill
ADDRESS: Rt. 1 Bentonville, Ark.

This is to certify that, for Ten DOLLARS and other valuables and subject to the consent of the owner of the property herein described, the undersigned does hereby sell, assign, transfer, and set over and unto BENJAMIN AND CONNIE BARTON all his right, title, and interest in and to the said PURCHASER'S AGREEMENT.

Vernon W. Highfill
Elizabeth H. Highfill

BALANCE AS OF 10/2/74 ($10,200.02)
TRACT #13, MAUMELLE ESTATES,
AND A 1973 SUBURBAN DELUXE(12X60)
SER. #SN1-60122CK3006

ACCEPTANCE OF PURCHASER'S AGREEMENT
BY NEW PURCHASER

NEW PURCHASER: Benjamin F. and Connie Barton
ADDRESS: Rt. 1 Bentonville, Ark.

The undersigned hereby accepts the above assignment of the PURCHASER'S AGREEMENT and hereby expressly agrees to be bound by all of the terms and conditions of the PURCHASER'S AGREEMENT.

Benjamin F. Barton
Connie Barton

CONSENT TO ASSIGNMENT OF PURCHASER'S
AGREEMENT BY OWNERS

The undersigned, owners of the property described in the said PURCHASER'S AGREEMENT, hereby consents to the above assignments and acceptance thereof.

Henry A. Perryman
Donnie J. Perryman

> "Novation is the substitution by mutual agreement of one debtor, or of one creditor, for another, whereby the old debt is extinguished, or the substitution of a new debt or obligation for an existing one, which is thereby extinguished."

Riddick v. *White,* 194 Ark. 1010, 110 S.W. 2d 9 (1937). That intention need not be expressly declared, but may be found upon examining the surrounding circumstances. *Home Life Insurance Co.* v. *Arnold,* 196 Ark. 1046, 120 S.W. 2d 1012 (1938).

Like any other contract, a novation must be supported by consideration. Here the consideration was approximately $400.00 the Bartons paid the Perrymans, and an additional fee of $100.00 to the Perrymans for preparing the simple assignment and consent.

The Bartons testified that they were assured that there was insurance on the property and they would be billed for any insurance and taxes. The Perrymans produced evidence that the Highfills paid $26.67 as their pro rata share of the insurance. The Perrymans, of course, point to the provision in the original contract which holds the purchaser responsible for maintaining insurance. However, it was not disputed that the Perrymans never billed the Bartons for any insurance or taxes or took any steps to make certain that the property was insured at any time after the assignment to the Bartons. (The Bartons held the property from October 2, 1974, until June 17, 1975).

In 1975, the Bartons decided to sell the property to the Blacks for $1,000.00. Benjamin Barton sought the Perrymans' consent and was told that it was the policy of the Perrymans to require new purchasers to buy some equity in the property because it prevented people from moving in and out. It was agreed that the Blacks would pay $1,000.00. However, at Perrymans' insistance, $410.15 was paid directly to the Perrymans as equity. $100.00 was paid to the Perrymans for preparing an identical assignment and consent as we have reproduced herein. The Blacks paid the Bartons $500.00 and executed a note for $500.00 to the Bartons which was never paid.

The trailer burned and it was discovered that there was no insurance on the property and this lawsuit naturally resulted from that fire loss. While the assignments and consents did not expressly release the old purchaser, we have no difficulty in finding that it was the intention of the Perrymans

to release the old obligations by accepting the new ones.

First, all of the instruments, none of which were recorded, were prepared by the Perrymans. The assignment, prepared by the Perrymans and consented to by them in writing, provided that the Bartons "do hereby sell, assign, transfer, and set over all their right, title and interest in and to the property" to the Blacks. There was no express assignment of the note but only of the Purchaser's Agreement. We have said in a similar situation that a note and mortgage are inseparable. As assignment of the note carries the mortgage, while an assignment of a mortgage alone is a nullity. *Bryant* v. *Easton Tire Co.* 262 Ark. 731, 561 S.W. 2 79 (1978). Considering the language of the assignment, which seems to set over all rights and interest in the property, and the fact that the Perrymans in preparing the assignment and consent did not mention that the note was assigned, there would seem to be an uncertainty as to the liability imposed by these documents.

It is a rule of law that documents that contain ambiguities will be construed against the party who drafted them. *Christmas* v. *Raley,* et al, 260 Ark. 150, 539 S.W. 2d 405 (1976).

Next, the Perrymans, who were not authorized to practice law, in two instances charged a fee of $100.00 for the preparation of the simple but brief documents. In each instance they required the new buyer to pay equity to them in the property. The Bartons paid approximately $400.00 and the Blacks paid $410.15 to the Perrymans upon assignment.

Furthermore, there is the testimony of the Bartons that they were told that insurance did exist on the property and that they would be billed for any future insurance. While it was the buyer's obligation to maintain insurance, the contract clearly provided that the sellers, who were the Perrymans under that document, could bill them for it. There was no effort on the part of the Perrymans to make certain that the property was insured.

One of the most important factors is that each time the

Purchaser's Agreement was assigned, the Perrymans required of the assignee a substantial payment of principal.

In summary, this is a case where the original seller chose to directly deal with each assignee requiring payment towards the principal due instead of remaining at an arms length distance from the transaction. Considering all the facts we have recited herein, there is no doubt there was a mutual agreement of the parties to release the Bartons of liability. Therefore, we reverse the decree of the chancellor.

Reversed.

FOGLEMAN, J., dissents.

JOHN A. FOGLEMAN, Justice, dissenting. I cannot join in the reversal of the chancery court's holding that there was not a novation in this case. If there is a novation here, then I do not see how a seller of property of this type can require that assignment of a purchase agreement be approved by him and avoid a release of the original purchaser on his obligation when he approves. In order to show why I think the chancellor was right and the majority clearly wrong, it is necessary that I show the basis for my understanding of the doctrine of novation.

The various treatise writers have made general statements relating to what constitutes a novation and how a novation can be distinguished from a simple assignment of contractual rights and obligations. The following can be found in Corbin on Contracts, § 1301, p. 228:

> Frequently an assignee of contract rights undertakes to perform the assignor's duties also. This is not operative as a novation, since the assignor remains bound by those duties so long as his creditor does not accept the assignee's new promise in lieu of the duty of the assignor. The creditor's actually receiving a payment or other part performance from the assignee, knowing that he has undertaken to perform, is not an assent to a novation discharging the assignor unless the

assignee's performance is tendered not merely as a satisfaction pro tanto of the assignor's duty but also on condition that the assignor shall be discharged from any further duty. In like manner, the creditor's written expression of assent does not operate as a discharge of his debtor by novation where he has merely been notified that an assignment of contract rights has been made and that the assignee has assumed the performance of the assignor's duties. Such an assumption merely gives to the creditor an additional security. His expression of assent does not go beyond this, unless the notice to which he assents is clearly a proposal for a substitution of debtors instead of a mere reasonable interpretation.

From Williston on Contracts, § 353, p. 815:

*** A novation is essentially a new contract whereby the creditor accepts the promise of a new debtor in lieu of the original debtor.

***

As to the elements essential to a novation, the courts have said:

The necessary legal elements to establish a novation are (1) parties capable of contracting; (2) a valid prior obligation to be displaced; (3) the consent of all parties to the substitution; and (4), lastly, the extinction of the old obligation and the creation of a valid new one.

A novation is not made out by showing that the substituted debtor agreed to pay the debt. It must appear that he agreed with the creditor to do so. Moreover, this agreement must be based on the consideration of the creditor's agreement to look to the new debtor instead of the old. The creditor's assent to hold the new debtor liable is therefore immaterial unless there is assent to give up the original debtor. It is not essential that acceptance of the terms of the novation and release of the debtor be shown by express agreement.

And finally, the Restatement of the Law, Contracts, pp. 798 and 805, contains these statements at the sections indicated:

§ 424. DEFINITION OF NOVATION.

A novation within the meaning of the Restatement of this Subject is a contract that

(a) discharges immediately a previous contractual duty or a duty to make compensation, and

(b) creates a new contractual duty, and

(c) includes as a party one who neither owed the previous duty nor was entitled to its performance.

§ 428. NOVATION DISCHARGING DEBTOR BY THIRD PERSON'S ASSUMPTION OF DUTY ASSENTED TO BY CREDITOR.

Where a third person contracts with a debtor to assume, as an immediate substitution for the debtor's duty, a duty to the creditor to render either the performance for which the debtor was previously bound, or some other performance, and the creditor agrees either with the debtor or with the third person to such substitution, there is a novation that discharges the original debtor and subjects the third person to a duty to the creditor.

Comment:

***

b. The creditor can effectively manifest agreement to the substitution either to the original debtor or to the third person. If the assent is manifested to the debtor, it amounts to a direct agreement with the debtor to discharge him in consideration of the substituted right offered by the agreement between the debtor and the third person. If the creditor's manifestation of agreement is made to the third person it amounts to an agreement with the latter to discharge the original debtor in consideration of the new right. And since a creditor can discharge a debtor's duty by accepting as satisfaction a third person's promise or performance, the original debtor is immediately discharged. Nor can the discharge be disclaimed by him, since by virtue of his con-

tract with the third person he has already assented to have the debt discharged in that way.

Arkansas cases on the subject of novation are not numerous; however, some of them could be of assistance in this case. First, novation, as an affirmative defense must be specifically pleaded, and the answer must allege the elements of a novation. *Camfield Tires, Inc.* v. *Moseley,* 253 Ark. 585, 487 S.W. 2d 268. The affirmative defense of novation must be pleaded either expressly or by unequivocal implication. Although the answer of the defendants does not appear to meet the requirements of *Moseley,* the brief in support of the defendants' demurrer to the complaint of the plaintiff dealt with novation, so arguably, the issues of the alleged novation was raised.

There are at least two Arkansas cases which contain general statements concerning the elements of novation and the application of the defense. The first of these is *Simmons National Bank* v. *Dalton,* 232 Ark. 359, 337 S.W. 2d 667, where the trial court found that a novation existed on an action for a note to finance a car which had been traded to another, who agreed to make the payments on the note. Although it was conceded that the creditor was not aware of the assignment at the time it was made and did not agree to release the original debtor from liability, the appellee pointed to the fact that the creditor had attempted to collect from the assignee numerous times. This court found that the trial court erred in finding that there had been a novation. We emphasized the necessity for showing a *clear and definite intention* of the creditor to release the old debtor in order to sustain a defense of novation. The court made the following statements:

> *** In that case [*Elkins* v. *Henry Vogt Machine Company,* 125 Ark. 6, 187 S.W. 663] this Court quoted with approval from 29 Cyc. 1130: "It is not essential that the assent to and acceptance of the terms of the novation be shown by express words to that effect, but the same may be implied from the facts and circumstances attending the transaction, and in the conduct of the parties thereafter. *Such consent is not to be implied merely from the performance of the contract by the substitute, for that might well con-*

sist with the continued liability of the original party . . . " (Emphasis supplied.)

In a case of this kind the burden was on Dalton to show that he had been released by appellant Bank . . . "The burden was upon the defendant to prove that he had been discharged by a novation of the contract." This statement relative to the burden of proof has been approved in many other decisions of this Court.

Our decisions and the text-writers appear to be uniform in holding that it is necessary to show an *intent* on the part of the creditor to release an old debtor and substitute therefor a new debtor. In *Home Life Insurance Company* v. *Arnold,* 196 Ark. 1046, 120 S.W. 2d 1012, this Court, in dealing with the same question, said: ". . . the effect of the novation is the *intention* of the parties." (Emphasis supplied.) Likewise, at Pages 266 and 267 of Volume 39 Am. Jur., it is stated, among other things, that: "In order to effect a novation there must be a *clear and definite intention* on the part of *all* concerned that such is the purpose of the agreement." (Emphasis supplied.) In Williston on Contracts, Volume 6, Revised Edition, at Page 5254, Section 1870, under the sub-title "*Necessity for the assent of all the parties to a simple novation*" it is stated: "It is undoubtedly a *commonplace* in the discussion of novations that the *assent* of all the parties is necessary; and certainly . . . no old debtor can be discharged without the creditor's consent, . . . " (Emphasis supplied.) Numerous cases therein are cited sustaining the above announcement.

And then, in *Alston* v. *Bitely,* 252 Ark. 79, 477 S.W. 2d 446, the court was presented with the argument that an extension agreement as to notes due and payable constituted a novation for one of the parties liable on the note originally. The court sustained the chancellor's finding that a novation had not occurred. From the opinion:

In order to constitute a novation, there must be a clear and definite intention of the parties that such is the purpose of the agreement. [Citations omitted.] There

> must be an intention on the part of the creditor to release the original debtor. [Citations omitted.] The question to be determined is whether by the execution and delivery of the extension agreement, the parties clearly intended to extinguish the old debt and rely entirely on the new, or to keep the old debt alive and merely accept the new as new security or evidence of the debt. [Citation omitted.] The existence of this intention, if it is not expressly declared, must be decided from all of the circumstances in the case, including the subsequent conduct of the parties. [Citation omitted.] The issue is one of fact if there is any conflicting evidence or if the terms of the agreement are capable of more than one construction [Citations omitted.] *We have said that the intention must be so evident as to leave no room for doubt.* [Citations omitted.]
>
> Where the intention to release an old obligation by acceptance of a new one is not expressly stated, *one of the strongest indications of a contrary intention is the retention of the original evidence of debt by the creditor.* [Citations omitted.] . . . It has been said that where a new note is not the obligation of all the parties liable upon the original note, there is no presumption that the former was given and accepted as a discharge of those liable on the latter. [Emphasis mine.]
>
> ***
>
> Where there is a conflict in the evidence pertaining to the issue of novation, we will not reverse where we are unable to say that the decree of the chancery court was against the preponderance of the evidence. *Norden* v. *McAllister,* 207 Ark. 1011, 184 S.W. 2d 459. The chancellor's opinion and the court's decree constituted a finding of fact adverse to appellant on this issue. We cannot say that the preponderance of the evidence does not support the finding.

The chancellor specifically found that appellees accepted the assignments but did not release any of the defendants. On trial de novo, we cannot reverse this finding un-

less it is clearly against the preponderance of the evidence. See, *Alston* v. *Bitely,* supra.

I submit that the evidence in this case fails to support a novation in several respects. I would first point out that the question here is whether there was a novation when the Perrymans accepted the assignment by the Bartons to the Blacks. The assignment by the Highfills to the Bartons is not in issue. There is certainly nothing in any of the terms in the written instruments to show that the Bartons were released. There was never any submission to the Perrymans of any proposal that there be a *substitution of debtors* instead of a *mere assumption* of duty *by the assignee.* There is no evidence of the *extinction of the old obligation* and the creation of a valid new one. There is no evidence that the agreement by the Blacks with the Perrymans to pay the debt was based upon the consideration of the Perrymans to look to the Blacks *instead* of the Bartons, i.e., that the Perrymans assented to give up the Bartons as the old debtor. There is no evidence that the Perrymans discharged the previous contractual duty of the Bartons, or agreed to do so. To say the least, appellees did not meet their burden of showing a *clear and definite intention* on the part of the Perrymans to release the Bartons, i.e., one so evident as to put the matter *beyond doubt.* See *International Minerals & Chemical Corp.* v. *Caplinger,* 241 Ark. 1055, 411 S.W. 2d 526. And there was the strongest possible evidence to the contrary — the retention by the Perrymans of the original evidence of the debt of the Bartons. See *Alston* v. *Bitely,* supra.

In the very first case cited in the majority opinion, we followed the definition of novation, in our holding that there was not a novation, with this:

> *** In *Cockrill* v. *Johnson,* 28 Ark. 193, there is this declaration of the law: "In the substitution of a new debt or obligation for an old one, which is denominated in the civil law a novation, the intention of the parties to that effect should be *positively* declared; or at least in whatever manner expressed, it should be *so evident as not to admit of a doubt:* in other words, a novation is not to be presumed unless the intention to that effect evidently appears." See, also, *Brewer* v. *Winston,* 46 Ark. 163; *Han-*

son v. *Louisiana Oil Refining Corp.,* 186 Ark. 331, 53 S.W. 2d 430. [Emphasis mine.]

I completely disagree with the majority's statement (for which it cites no authority) that a payment on the original debt can be the consideration for a novation. Cf. *Denman* v. *Bruce-Rogers Co.,* 190 Ark. 1098, 82 S.W. 2d 844. Most assuredly, a payment by the Bartons when the assignment was made to them cannot be a consideration for a novation substituting the Blacks for the Bartons as obligors; neither can the payment of a fee for preparing the document by which the assignment from the Bartons to the Blacks was made and the consent of the Perrymans was given. How, I ask, can the fact that an instrument evidencing the assignment was prepared by the Perrymans be evidence of intention to enter into a novation? Of course, it can't; and if that fact is of any probative effect at all, it indicates that there was no intention to release the Bartons, because no mention is made of any release or substitution.

I also ask, what could the lack of assignment of the note have to do with the matter? Obviously, nothing, because a maker or obligor on the note can't assign it. And to whom should the Perrymans have assigned it, if they wanted to hold the Bartons? What could they possibly have put about the assignment of the note into the assignment by the Bartons of the purchase contract to the Blacks? What uncertainty as to liability did this omission create? And what ambiguity is there to be resolved against the Perrymans? The statements in the assignment and consent are crystal clear. The courts cannot import an ambiguity into an instrument in order to resolve it against the draftsman. *Looney* v. *Allstate Insurance Co.,* 392 F. 2d 401 (8 Cir., 1968); *Bodcaw Oil Co.* v. *Atlantic Refining,* 217 Ark. 50, 228 S.W. 2d 626; *Jefferson Square* v. *Hart Shoes,* 239 Ark. 129, 388 S.W. 2d 902; *Inman* v. *Milwhite Co.,* 402 F. 2d 122 (8 Cir., 1968). The rule that language in a contract is to be construed most strongly against the party responsible for it is the last one to be applied by the courts, and then only when a satisfactory result cannot be reached by resort to other rules of construction. 17A CJS 224, Contracts, § 324.

What possible relevance could the failure of the Perrymans to insure the property or, not having exercised their option to do so, to bill the Bartons for it, have on the question of novation?

The requirement of a payment on the principal debt before consent to assignment was given would not constitute a novation, unless the payment was specifically made on condition that the assignor was to be released. See *Denman* v. *Bruce-Rogers Co.,* supra. There is not one word of testimony that this was the case.

I am also unable to fathom the reasoning by which the unauthorized practice of law by the creditor would be of any probative value on the question of novation. Here's another complete mystery to me: How can a seller (creditor) remain at arm's length from a transaction relating to an assignment to which he must consent?

The fact-finding of a chancellor, who saw and heard the witnesses, should never be overturned upon such a flimsy basis.

Obviously, I would affirm the decree.

Julia Griggs SWINSON *v.* Denny JARRATT and Phillip HICKY II

78-195 278 S.W. 2d 197

Opinion delivered March 5, 1979
(In Banc)
[Rehearing denied April 9, 1979.]

Bill W. Bristow, of: *Seay & Bristow,* for appellant.

Butler, Hicky & Hicky, by: *Preston G. Hicky,* for appellees.

DARRELL HICKMAN, Justice. This is an appeal from a decision in a partition suit before the St. Francis County Chancery Court. The court, finding that the appellees had an undivided one-fourth interest in some 380 acres, appointed commissioners and ordered a sale; the property was sold to Capital Growth Corporation for $180,000.00. The appellant, a ninety year old woman whose family had owned the land for several generations, appeals alleging five errors. We find no merit in three of those allegations which relate to the partition decree and order of sale because no appeal was taken from such decree and order.

The other two allegations of error contain merit requiring us to reverse a portion of the order of confirmation and remand the case for another hearing. One of the allegations of error is that a commissioner and a guardian ad litem serving in the case were interested parties in the purchase of the land and, therefore, the sale was void under Ark. Stat. Ann. § 34-1830 (Repl. 1962). The other allegation of error is that the court improperly awarded one of the appellees an attorney's fee for representing himself.

The appellees, Denny Jarratt, a banker, and Phillip

Hicky II, a lawyer, bought a one-fourth interest in this land from several heirs. They knew their title would be questionable but decided the endeavor was worth an investment of some $20,000.00. They made the purchase in October of 1976, with each buying an undivided one-eighth interest. Two months later they filed a partition suit which was resisted by the appellant. After the parties had filed several pleadings, the appellees, on July 11, 1977, filed a request for 128 admissions. The request was not answered nor was an extension of time requested by the appellant's lawyer within ten days. On August 1, 1977, a petition was filed by the appellant's attorney to withdraw citing that he had a failure of communication with the appellant. This was granted after a hearing on the 18th day of August. On August 25, a new attorney for the appellant filed a request for an extension of time in which to answer the request for admissions. (Later, proposed answers to the request for admissions were offered.) The court, after a hearing, denied the motion because no extension was obtained prior to the expiration of time in which to answer.

The testimony taken at the hearing on the motion indicated that the appellant did not receive the request for admissions within the time allowed for answers. According to the appellant's former attorney the request which was mailed to her was returned; sometime later, the request was remailed. No reason was given by the attorney for not obtaining an extension of time.

The court granted the appellees an undivided one-fourth interest in the property on the basis of the pleadings and the unanswered request for admissions. In other words, essentially there was a default on the question of appellees' title.

Three commissioners, appointed by the court, filed a brief statement asserting that the land could not, without prejudice, be partitioned and recommended a sale.

At the court-ordered sale, the land was purchased by Capital Growth Corporation for $180,000.00. After the sale, but before confirmation, Troy Glaspar, Jr., a relative of the appellant, filed a petition to intervene in the matter stating

that he had a power of attorney from the appellant. He objected to the granting of the partition decree and the procedure used by the commissioners. He also pointed out that one of the commissioners had a conflict of interest because he worked for the buyer. He asked for a reconsideration of the matter.

The court entered an order confirming the sale, and, apparently in reference to the numerous allegations of irregularities raised in the petition of Troy Glaspar, Jr., found that there were no procedural defects. However, the court did not address the problem of conflict of interest.

On appeal, the appellant argues that the sale and confirmation are void because of a violation of Ark. Stat. Ann. § 34-1830 (Repl. 1962), which provides:

> No commissioner, nor any person for his benefit, shall purchase or be directly or indirectly interested in the purchase of any of the premises sold, nor shall any guardian of any minor or person of unsound mind, party to the proceedings, purchase or be interested in the purchase of any of the lands, the subject of the proceedings, except for the benefit or in behalf of his wards; and all sales contrary to the provisions of this section shall be void.

The appellant argues that there is evidence that Edward Harris, one of the three commissioners, was an original incorporator and stockholder of Capital Growth Corporation. The appellees virtually concede that there may have been such a conflict of interest and that the sale may be void because Edward Harris is an incorporator and stockholder in Capital Growth Corporation.

Certainly, if that is the case, the sale ought to be set aside and a new sale ordered. A commissioner is a trustee and it is his duty and obligation not only to avoid, in every way, participating in the purchase of property, the sale of which is under his supervision, but also to report to the court any possible conflict of interest. Harris owed this duty to the parties and the court.

The trial judge had before him an allegation that should have been addressed and answered and we remand the case for a hearing on this issue. If it is determined that Edward Harris has an interest in the corporation, of course the sale should be set aside. A new sale may be ordered if the appellant tenders into the court the consideration she had already received from the first sale. We do not go back beyond the sale because those issues were not properly preserved for appeal.

The other allegation of error we address is regarding an attorney's fee awarded to Philip Hicky, II. He asked for $9,000.00 and the court awarded him a $4,500.00 fee. There was a hearing and it was Hicky's testimony that essentially his law firm represented him in the matter, and although he had done much of the work, the firm would have to be paid for the services. The record indicates that all court appearances were by Phillip Hicky, II. He concedes he did a lot of preliminary work that might not be strictly characterized as "legal." We do not feel that Arkansas law permits an attorney to receive an attorney's fee when he is also a petitioner in a partition suit.

Ark. Stat. Ann. § 34-1825 (Supp. 1977), which permits an attorney to obtain a fee in a partition suit, provides:

> Hereafter in all suits in any of the courts of this State for partition of lands when a judgment is rendered for partition in kind, or a sale and a partition of the proceeds, the court rendering such judgment or decree shall allow a reasonable fee to the attorney bringing such suit, which attorney's fee shall be taxed as part of the costs in said cause, and shall be paid pro rata as the other costs are paid according to the respective interests of the parties to said suit in said lands so partitioned.

We have held that an award of attorney's fees under that statute is unconstitutional. *Cole* v. *Scott,* 264 Ark. 800, 575 S.W. 2d 149 (1979). However, under circumstances where a lawyer is entitled to an attorney's fee because he files a petition and partition is granted, the fee should be set carefully by the court after deliberation and then only for an amount

that is fair and justified. While we have approved fees for as much as 5% of the sale price, we recently limited the fee to about 3% of the sale price. *Fortuna* v. *Achor,* 254 Ark. 1035, 497 S.W. 2d 251 (1973); *Cole* v. *Scott, supra.*

We adopt the view in regard to attorney's fees for parties who represent themselves that they are improper. Compare *Muller* v. *Martin,* 116 Cal. App. 2d 431, 253 P. 2d 686 (1953).

We do not mean to imply that the trial court or the appellees acted improperly in any way. We have never had these questions before us heretofore. However, this action was resisted by the appellant from the beginning and the appellees as much as conceded that they bought the property with the intention of having it partitioned and making a profit. The evidence indicates that their profit has been at least $10,000.00; they have doubled their money. Aside from the legal issues raised, it would, in our judgment, be unfair to penalize the appellant by adding to the costs of the proceeding an attorney's fee, when, in fact, one of the petitioners was simply representing himself.

Therefore, the case is remanded for a hearing to determine whether the sale is void under Ark. Stat. Ann. § 34-1830 (Repl. 1962). We reverse the trial court's decision on the matter of the attorney's fee and affirm the judgment in all other respects.

Affirmed in part.

Reversed and remanded in part.

FOGLEMAN and HOLT, JJ., dissent.

JOHN A. FOGLEMAN, Justice, dissenting. I would affirm the decree of confirmation.

In the first place the majority has ignored the rule, heretofore uniformly applied, that one who accepts the benefits of a decree or judgment cannot question its validity on appeal and cannot escape its burdens. *DeLaughter* v. *Britt,* 243 Ark. 40, 418 S.W. 2d 638; *Mason* v. *Urban Renewal of North*

Little Rock, 245 Ark. 837, 434 S.W. 2d 614; *Baker* v. *Adams,* 198 Ark. 482, 129 S.W. 2d 597; *Stanley* v. *Dishough,* 50 Ark. 201, 6 S.W. 896. See also, *Anderson* v. *Anderson,* 223 Ark. 571, 267 S.W. 2d 316. This rule applies where sales for partition are the subject of the decree. *Dodds* v. *Dodds,* 246 Ark. 313, 438 S.W. 2d 54. It cannot be said that acceptance of the proceeds of the sale is independent of appellant's challenge of the validity of the sale. Nor can it be said that the amount withdrawn by appellant would be hers in any event. Certainly her acceptance of her portion of the proceeds of the sale is inconsistent with her appeal. Apparently the majority has carved out a new exception to the general rule without defining it or without specifying whether it applies to this case only. Obviously, a requirement that the benefits accepted be restored could have been utilized in nearly every case in which the rule has been applied, as a means of avoiding its impact. The principle followed in all cases is well stated in *Bolen* v. *Cumby,* 53 Ark. 514, 14 S.W. 926, viz:

> *** Again, a party may prosecute his appeal from a judgment, partly in his favor and partly against him, even after accepting the benefit awarded by the judgment, provided the record discloses that what he recovers is his in any event — that is, whether the judgment be reversed or affirmed. But he waives his right to an appeal by accepting a benefit which is inconsistent with the claim of right he seeks to establish by the appeal. "A party cannot ratify and yet repudiate the same transaction in one breath. He must make his election at the outset to repudiate it *in toto* or take it *cum onere,* and, when once made and acted upon, he is estopped from assuming an attitude inconsistent with his first position and detrimental to the rights of others." *Dismukes* v. *Halpern,* 47 Ark. 320.

The evidence appellant has injected into the record on appeal was not presented to the chancery court, as appellant's attorney says that it was not discovered until after the transcript had been lodged here. It is quite novel for this court to reverse the trial court on evidence that was not before that court. See *Harvey* v. *Castleberry,* 258 Ark. 722, 529 S.W. 2d 324; *Becker* v. *Rogers,* 235 Ark. 603, 361 S.W. 2d 262. For the

first time, this court is reversing the trial court on matters not before the trial court and not properly in the record at all. See *Winfrey* v. *People's Savings Bank,* 176 Ark. 941, 5 S.W. 2d 360; *Gill* v. *Burks,* 207 Ark. 329, 180 S.W. 2d 578; *Jernigan* v. *Pfeifer Bros.,* 177 Ark. 145, 5 S.W. 2d 941.

Newly discovered evidence is not a basis for reversal on appeal. *Osborne* v. *State,* 96 Ark. 400, 132 S.W. 210. It is only a ground for a bill of review in the trial court. *Richardson* v. *Sallee,* 207 Ark. 915, 183 S.W. 2d 508; *Robertson* v. *Chronister,* 199 Ark. 373, 134 S.W. 2d 517, cert. den. 309 U.S. 658, 60 S. Ct. 516, 84 L. Ed. 1007 (1940). Newly discovered evidence presented for the first time to this court dehors the record simply cannot be the basis for a reversal of a decree.

Furthermore, I cannot agree that the award of attorney's fees was erroneous. There is no valid reason for adopting the view that an attorney who represents his own interest is not entitled to have attorney's fees allowed under our statute. In my opinion, it is absurd to say that a lawyer in such a situation must either employ another attorney (in this case outside his own firm) or render his services in a partition suit to all interested parties without compensation.

The statute applies to "all suits" without exception. Its application is mandatory. *Johnston* v. *Smith,* 248 Ark. 929, 454 S.W. 2d 649. The fee is allowed to the "attorney bringing such suit." It is to be paid "pro rata as the other costs are paid." The preamble to the act now in effect premised Act 518 of 1963, which amended the previous act on these premises:

> "Whereas, the attorney for the petitioners in partition suits prepares the papers, including decrees, distribution, and deeds, etc., in the partition proceedings, and
>
> "Whereas, pretended defenses have been set up by which the courts have not set fees against all interested parties, and
>
> "Whereas, many tracts in this state are not being utilized due to the fact that the movant may have to pay

> the fees while those who are stifling the property will go free of costs; . . . "

Prior to the act of 1963, the act which provided for attorney's fees was not applicable to an adversary proceeding. *Hendrickson* v. *Duncan,* 236 Ark. 722, 370 S.W. 2d 131.

We pointed out the justification for a mandatory allowance in *Johnston* v. *Smith,* supra, saying:

> Justification for these statutes has been found in the importance of painstaking preparation before filing of the suit and the necessity for meticulous compliance with procedural requirements thereafter in order to assure that all parties in interest are before the court and that there are no unnecessary impediments to a proper conclusion of the proceeding. These measures obviously inure to the benefit of those owning any share of the property. To require the cotenant who institutes the action to bear more than his proportionate share of this burden is inequitable. The preamble to Act 518 of 1963 clearly indicates our General Assembly's awareness of the inequitable burden risked by one initiating a partition suit and its intention to remedy the situation by amendment of the existing law. Dissatisfaction with the discretionary latitude of the trial courts in allowance of these expenses was expressed in the emergency clause. If there remains, after reading the text of the act, the slightest doubt of the legislative intention to make allowance of attorney's fees in a partition suit mandatory, it is quickly dissipated by reading the introduction and conclusion of this legislative record.

The fact that the services are rendered by one having an interest in the land should not make a whit of difference. To deny compensation on this basis is grossly inequitable. This fee is allowed as costs incident to the action and should be assessed and taxed proportionately against all parties. See *McElhaney* v. *Cox,* 257 Ark. 934, 521 S.W. 2d 66; *Crouch* v. *Crouch,* 251 Ark. 1047, 476 S.W. 2d 248. To hold that the other litigants are entitled to the benefit of an attorney's services just because he happens to be one of the plaintiffs is a

windfall, which could be characterized as a "free ride," if not unjust enrichment.

More should be said, however, as sustaining the chancellor's actions in this matter, in justice to all the parties. In his letter opinion, the chancellor stated that, in arriving at the amount of the award for attorney's fees, he had taken into consideration the fact that Philip Hicky was one of the owners of the land being partitioned, and that he had acted partially in his own behalf in some of the actions. The chancellor found that the fact that Hicky was one of the owners should not deprive him of a reasonable fee,, but that he was not entitled to as large a fee as he otherwise would be. The fee was awarded to Hicky's firm — Butler, Hicky & Jones.

Hicky had requested a fee of $9,000. Mr. Preston Hicky was the attorney of record. Phil Hicky testified that there was a serious question in his mind as to who should be made parties and that he spent considerable time researching deed records and marriage records to ascertain the identity of the proper parties and spent numerous hours discussing the title with various people. He went to the property and made an investigation as to the location of the boundaries. Either he or Preston Hicky prepared the orders entered in the case. Phil Hicky did the major part of the work. A work sheet of the firm showed 88 hours devoted to the case, of which 58.3 were documented and 30 hours estimated. Twenty to twenty-five hours were spent investigating family backgrounds and identifying heirs. Phil Hicky estimated that the total time he devoted to all matters pertaining to the land totalled 150 hours. Phil Hicky testified that he spent the firm's time in the matter and was "going to have to pay for this time through our firm." In *Muller* v. *Martin,* 116 Cal. App. 2d 431, 253 P. 2d 686 (1953), the statute was quite different from ours. It provided for allowance of reasonable counsel fees *expended* by the plaintiff for the common benefit of the parties. The basis for this construction of the statute was that it provided for reimbursement of the parties for fees paid or incurred. To reach this result in this case requires a misreading of our statute. In Oklahoma, the statute is more like our own. The Supreme Court of Oklahoma has held that an attorney who represents himself in a partition action is entitled to compen-

sation, but has adopted the following safeguards, in *Weaver* v. *Laub,* 574 P. 2d 609 (Okla., 1977):

> In order to allow attorneys to collect and be awarded fees for representing themselves, and at the same time minimize the dangers inherent in such a practice, we adopt the following safeguards. Before attorneys can be awarded fees for representing themselves, they must prove the following, through clear and convincing evidence:
>
> 1. Attorneys must show that all actions taken by them, for which they seek a fee, were performed in good faith.
>
> 2. Attorneys must prove that all work performed, for which they seek a fee, was necessary work. In proving necessity, attorneys must present a written itemization of all services performed which must include an indication of the time spent to perform each service and an explanation, of why each itemized service was necessary. The itemization presented for the court's scrutiny must be specific and attested to under oath.
>
> 3. Attorneys must prove the reasonableness of the fees they seek.
>
> 4. In the case of a partition action, attorneys must show that all work for which they seek fees was beneficial to others in the litigation, and not merely beneficial to their own interests.
>
> By placing the above burden upon attorneys seeking fees for representing themselves, we allow attorneys who have acted in good faith and performed necessary services to be compensated for their work, and at the same time establish safeguards to protect the general public against possible abuses.

I submit that the action of the chancellor followed the proper guidelines in the matter.

I am authorized to state that Mr. Justice Holt joins in this opinion.

Paul MOONEY *v.* Wanda MOONEY

78-285 578 S.W. 2d 195

Opinion delivered March 5, 1979
(Division II)
[Rehearing denied April 9, 1979.]

Ted Boswell, P.A., for appellant.

W. J. Walker, for appellee.

DARRELL HICKMAN, Justice. Wanda Mooney, the appellee, sued her husband, Paul Mooney, for divorce in the Pulaski County Chancery Court. He counterclaimed, also seeking a divorce. She amended her complaint requesting only separate maintenance; at trial, she dismissed all of her complaints. The case went to trial on the appellant's counterclaim for divorce.

The main allegation for grounds by the appellant was that the appellee had, by fraud, deceit and breach of trust, converted certain of the appellant's property, in which she had only a dower interest, to her own use. The chancellor found that the appellant had failed to prove his case and on appeal we cannot say the finding of the chancellor was clearly against the preponderance of the evidence. *Digby* v. *Digby,* 263 Ark. 813, 567 S.W. 2d 290 (1978).

These parties were married in December of 1972. Both had been previously married and divorced. The appellant, who was 64 at the time they were married, had been a successful businessman and at the time of the marriage claimed that he had a net worth of over half a million dollars. The appellee testified that she had a good paying job with the state and brought some $86,000.00 in cash into the marriage.

The parties had a stormy marriage. She testified that he drank to excess and beat her about every six or seven weeks. She said that on three separate occasions he kicked or knocked the door down in her home. He testified that they both drank to excess at times and admitted that he had kicked a door down once. He denied that he beat her and, in fact, said at one time she took a board to him. She admitted that once she did strike him with a board.

Although the appellant offered some testimony regarding these personal indignities, it was the circumstances of two of their financial transactions that the appellant relies upon as the basis for his suit for divorce.

After they had been married he went back into the business in which he had been successful, the manufacture of veneer. He said he went into business so that Mrs. Mooney's son would have something to do. She said that she tried to dissuade him from going back into business. Paul Mooney was a director of the Union Bank of Benton and one of its largest stockholders. The first transaction occurred in July 1973; they commingled some of their funds and purchased a $160,000.00 certificate of deposit through the Union Bank of Benton which was placed in Mrs. Mooney's name only. Mrs. Mooney testified that on the day that the money was com-

mingled so that this certificate of deposit could be purchased, she delivered to Paul Mooney her liquid assets which consisted of some $77,000.00 in cash and checks. As far as she knew the money was used to buy the certificate. Paul Mooney offered testimony that her contribution was less than $30,000.00 and called two witnesses, both bank officers, to verify his side of the story. The deal was complex as were all of their financial dealings.

The second transaction, the one most heavily relied upon by Mr. Mooney, was an assignment of most of Paul Mooney's Union Bank of Benton stock in August, 1974, to Mrs. Mooney. The assignment was executed before the president of the bank. However, the stock was not transferred until April, 1976, at the request of Mrs. Mooney.

Paul Mooney did not dispute that he signed the assignment nor did he object to the certificate of deposit being placed in Mrs. Mooney's name. In fact, the president of the bank at the time, who was a friend of Paul Mooney's and a business associate, testified that he tried to talk to Mr. Mooney about both transactions and was rebuffed on both occasions by Mr. Mooney who simply said that he and his wife had an "agreement." It was at the trial that Mr. Mooney offered testimony that his wife had asked him several times to transfer the stock to her name and her subsequent actions amounted to fraud.

The parties have considerable other assets, one of which is a residence located in Pleasant Valley, an expensive subdivision in Little Rock, which is held by the entirety. Mrs. Mooney resides there and apparently makes the house payments. Since she had dismissed her complaint for relief, she was awarded no money as support. She still has the stock in the bank and remaining proceeds from the $160,000.00 certificate of deposit. She gave or loaned some of the proceeds to her son to start a business.

The major point of contention and argument of the appellant is that a handwritten note on the assignment to the effect that the assignment was in consideration of a $50,000.00 loan from Mrs. Mooney to Mr. Mooney was not on

the assignment when it was made. Mrs. Mooney denied that. Also, there was a dispute regarding the source of the money that went to make up the $160,000.00 certificate of deposit. Mr. Mooney called two witnesses, the bank president at the time of the transactions and the bank president at the time of the trial, who testified in detail regarding the bank records and corroborated Mr. Mooney's testimony that Mrs. Mooney did not provide $77,000.00 as she claimed. Also, a witness was called to testify that Mrs. Mooney had spent about $8,000.00 on furnishings through a furniture store, contrary to her contention that the expenditure was more like $2,500.00. All of these, of course, go to the credibility of Mrs. Mooney.

Mr. Mooney claimed in his complaint that the parties were separated in February of 1975. However, he admitted in his testimony that he spent the night at their home in July, 1976, and that was the last time they had stayed together as husband and wife. He said that night he slept on the couch. She alleged that they were separated in December, 1976. She filed the complaint for divorce in January, 1977. It was before either claimed to have been the last date they lived together, that is, July, 1976, or December, 1976, when Mrs. Mooney called the bank and asked that the shares be transferred to her name. The stock was reissued in her name.

What the appellant's argument amounts to is that, while he does not deny that all of these transactions took place with his full knowledge and consent, the transfers were made to protect his assets from his creditors or for other purposes and her subsequent dealings were conversion and breach of trust; he ought to have it back. Appellant acknowledges "that no testimony . . . of a scheme to defraud" was presented, and such intent must be found in circumstantial evidence.

However, the issue, and the only issue to us on appeal, is whether the chancellor was wrong in not granting the appellant a divorce. The grounds for divorce, as alleged, were fraud, deceit and breach of trust in handling his assets which rendered his life intolerable. The parties testified differently and we cannot say, on the basis of the record alone, that Mrs. Mooney clearly intended at the time to fraudulently convert

the property to her own use. It was in her name with the consent of the appellant and at the time the transfers were made there is no evidence she was guilty of fraud in inducing Mr. Mooney to cause the transfers to be made. Husbands and wives often transfer their property to each other and later have a falling out. The fact that one of them keeps that property is not alone grounds for divorce.

The appellant asked the trial court to grant him a divorce and divide the property according to law. On appeal, the appellant asks us to do the same. The property, of course, cannot be divided unless a divorce is granted. Our review is limited to the sole issue of whether the chancellor's finding in dismissing the complaint was clearly erroneous. Since there is no other issue raised on appeal, we simply answer the argument by saying we cannot say the chancellor's decree was against the preponderance of the evidence.

The decree rendered by the chancellor is affirmed and the appellee is denied any attorney's fee on appeal.

Affirmed.

We agree. HARRIS, C.J., and FOGLEMAN and HOLT, JJ.

Clyde Lee MACK *v.* STATE of Arkansas

CR 78-206 577 S.W. 2d 595

Opinion delivered March 5, 1979
(Division II)

William H. Patterson, Jr., for appellee.

Steve Clark, Atty. Gen., by: *E. Alvin Schay*, Dep. Atty. Gen., for appellee.

DARRELL HICKMAN, Justice. The only issue on appeal of this criminal case is whether the trial judge committed error by letting the jury rehear testimony of one witness after it began deliberation.

The trial judge correctly followed our decision in *Gardner* v. *State*, 263 Ark. 739, 569 S.W. 2d 74 (1978), and we affirm the judgment.

Clyde Lee Mack was convicted of theft of property and aggravated robbery of Walker's Cleaners located on Base Line Road in Little Rock on the testimony of two witnesses: Doris Walker, an employee, and Huey Walker, the owner. Huey identified Mack as the robber; Doris could not.

After the jury retired to deliberate, it returned and asked in open court for permission to rehear the testimony of Huey Walker. The defense counsel for Mack was present and objected. After the testimony was repeated and the jury retired again, the trial judge made the following remark:

> I don't see but how the defendant could fail to be prejudiced by playing this, singling out the testimony of this

particular witness. I am merely following what is the stated position of the Arkansas Supreme Court.

We find no error. First, the jury's request was made in the presence of all jurors. *Williams* v. *State,* 264 Ark. 77, 568 S.W. 2d 30 (1970). It was made in open court. *Golf* v. *State,* 261 Ark. 885, 552 S.W. 2d 236 (1977). The defense counsel was present and had an opportunity to object. The jury wanted to hear the testimony of the only witness who identified Mack, evidence essential to a determination of Mack's guilt or innocence. There was no effort by the jury to spotlight a small bit of fact which might work to the prejudice of the defendant. *U.S.* v. *Rabb,* 453 F. 2d 1012 (3d Cir. 1971). Finally, the court's decision was made just sixteen days after our decision in the case of *Gardner* v. *State, supra,* in which we defined the standard to be used when a jury requests to rehear evidence.

The appellant argues that our decision in *Gardner* is unclear in that it may force a trial judge to do something he feels would prejudice a defendant.

After reviewing the cases and statutes relative to this problem, we concluded in the *Gardner* case by stating:

> . . . It seems to us that the better approach is for the trial court to honor any request of a jury to hear specific evidence, in the absence of some compelling reason why it should not be granted, and that the action of the trial court in doing so should not be reversed in the absence of a manifest abuse of discretion. . . .

It is obvious that a trial judge has a clear standard to apply from *Gardner.* Since the trial judge found no compelling reason in this case to refuse the jury's request, we find no error and affirm the judgment.

Affirmed.

We agree. HARRIS, C.J., and FOGLEMAN and HOLT, JJ.

Mary McENTIRE *v.* Jimmy McENTIRE,
Administrator

78-278 577 S.W. 2d 607

Opinion delivered March 5, 1979
(Division I)

Priddy & Hardin, for appellant.

Jim Burnett, for appellee.

JOHN I. PURTLE, Justice. M. A. McEntire died intestate in Van Buren County, Arkansas, on May 9, 1978. Mary McEntire, his widow, petitioned the probate court for ap-

pointment of her nominee, J. E. Godfrey, as administrator of the decedent's estate and the court appointed Godfrey without notice but stated he would set it aside if there were any objections. May 26, 1978, Jimmy McEntire, son of decedent, and other heirs of decedent, filed their objections to the appointment of Godfrey. On July 11, 1978, the court set aside the Godfrey appointment and conducted a hearing resulting in the appointment of Jimmy McEntire as administrator of the estate. Notice of appeal from this order was timely filed.

Appointment of personal representatives of decedents' estates is governed by Ark. Stat. Ann. § 62-2201, which gives priorities as follows: (1) Those nominated in the will. (2) Surviving spouse, or his or her nominee, if appointment is sought within 30 days. (3) Other persons who are entitled to share in the estate, at the discretion of the court, if application is sought within 40 days, in case there is a surviving spouse.

The findings of the court are set out as follows:

> This is one of those cases where each side is attempting to get their administrator in office. The best thing would be to get some disinterested third party to serve. The reluctance of people to get involved in family squabbles makes it difficult to find an impartial, disinterested administrator. The next best thing the court can do is to appoint one side or the other and attempt to keep a close eye on the activities of the estate. An administrator should be fair to all of the beneficiaries and not favor one side or the other. Under the facts of this case, I'm going to appoint Mr. Jimmy McEntire as administrator.

We have previously held that the court is not bound to appoint from the highest priority nominees if he finds sufficient cause or unusual circumstances. *Knight* v. *Worthen Bank and Trust Co.,* 233 Ark. 465, 345 S.W. 2d 361 (1961); *Brod* v. *Brod,* 227 Ark. 723, 301 S.W. 2d 448 (1957). In the absence of unusual circumstances or sufficient cause it is the duty of the courts to follow the statutes as set out by the General Assembly. We do not find anywhere in the record where circumstances in this case require the appointment of anyone

other than the nominee of the widow. Since there was no will, the widow was in the first priority; therefore she, or her nominee, should be appointed as administrator of the estate.

Appellant exercised her statutory authority and nominated J. E. Godfrey as administrator of decedent's estate. Mr. Godfrey is 54 years of age, a native of the area, an accountant by profession, and operated a store and farm from 1970 until about nine months prior to the trial of the contest. He had proceeded in what appeared to be a business like approach to handling the estate until he was stopped by Jimmy McEntire.

On the other hand, Jimmy McEntire rejected the orders granting letters of administration to Godfrey; ran him off the decedent's property; boarded up the store, including some of appellant's perishable personal property in the deep freeze; informed the legally appointed administrator he did not consider the letters of administration to be legal; took charge of decedent's property in general; and prevented Mr. Godfrey from making an inventory of the estate. He further stated he felt part or all the merchandise in the store belonged to the children of decedent. Also, he took charge of the accounts receivable which were owed to his father and appellant.

Reversed and remanded with directions to appoint the nominee of Mary McEntire to serve as administrator of the estate of M. A. McEntire.

Reversed and remanded.

We agree. HARRIS, C.J., and GEORGE ROSE SMITH and BYRD, JJ.

Robert Dennis CANTRELL *v.* STATE of Arkansas

CR 78-201 577 S.W. 2d 605

Opinion delivered March 5, 1979
(In Banc)

DeLoss McKnight, for appellant.

Steve Clark, Atty. Gen., by: *Catherine Anderson,* Asst. Atty. Gen., for appellee.

JOHN I. PURTLE, Justice. Appellant was convicted of theft of property and aggravated robbery in the Craighead Circuit Court on September 20, 1978. He was sentenced to two years on the theft of property and 25 years on aggravated robbery with the sentences to run concurrently. During the trial an alternate juror was seated but at the close of the trial twelve were selected to decide the case. After the jury had deliberated for about an hour and a half they reported to the court that one member held religious beliefs which prevented her from voting to find anyone guilty and inflicting punishment. The court then determined the alternate juror was still present in the courtroom and had not discussed the case with anyone although she had been talking to the members of the victim's family and friends. The court then relieved the juror who had religious objections to punishment and substituted the alternate juror, Evelyn Cloinger. Thereupon the court instructed the then twelve jurors to commence deliberations from the beginning as though the case had not been previously discussed. Also, during an earlier trial of appellant which resulted in a mistrial, a witness named Tim Ray happened to appear with a civics class during the trial and claimed to recognize the appellant as a person he had observed near the scene of the crime on the date it was committed. The rule had been in effect during the first trial and obviously Tim Ray had not been excluded from the courtroom because it was not

known at the time that he was a possible witness. After the trial, Ray informed the state he had recognized the appellant as the person he observed on the date of the robbery and theft. At the second trial Tim Ray was permitted to testify over the objection of appellant that Ray was in violation of the rule in that he had previously heard the testimony.

For his appeal appellant contends it was reversible error to allow Tim Ray to testify and that the seating of the alternate juror after the others had been in deliberation was prejudicial error. We note the statement of the case as set out by appellant is much too lengthy. [See Ark. Supreme Court Rules, Rule 9(b)].

First, we will discuss the testimony of Tim Ray which was in violation of the rule. Whether a witness is placed under the rule is a matter of sound discretion by the court. *Oakes* v. *State,* 135 Ark. 221, 205 S.W. 2d 305 (1918). Also, when a witness violates the rule through no fault of, or complicity with, the party calling him, his testimony may be allowed and the violation of the rule goes only to credibility rather than competency. *Norris* v. *State,* 259 Ark. 755, 536 S.W. 2d 298 (1976). The trial court's exercise of discretion in such matters is not generally disturbed. *McCoy Farms, Inc.* v. *J & M Mckee,* 263 Ark. 20, 563 S.W. 2d 409 (1978). We have held it was error not to permit a witness to testify in violation of the rule under circumstances similar to those presented here. *Mobley* v. *State,* 251 Ark. 448, 473 S.W. 2d 176 (1971) and *Harris* v. *State,* 171 Ark. 658, 285 S.W. 2d 367 (1926).

In view of prior discussions and the facts in this case, we do not feel the court abused its discretion in allowing the testimony of Tim Ray, who was not under the rule at the first trial because no one, including Ray, knew he would be a witness. Appellant knew in advance Ray was to be called and therefore had an opportunity to prepare to test his credibility.

We turn now to the matter of allowing the alternate juror to be seated after the matter had been under consideration for an hour and a half. The answer to this question is plainly visible upon the face of Ark. Stat. Ann. § 39-233 (Repl. 1962) which reads as follows:

> Alternate jurors shall be drawn in the same manner, shall have the same qualifications, shall be subject to the same examinations and challenges, shall take the same oath, and shall have the same functions, powers, facilities, and privileges as the regular jurors. An alternate juror who does not replace a regular juror shall be discharged after the jury retires to consider its verdict.

The General Assembly could not have chosen words to make it more clear that the alternate juror(s) are discharged when the regular panel retires to consider its verdict. The statute states the alternate(s) *shall* be discharged when the regular panel retires to deliberate its verdict. When the jury retired to deliberate, there was then no alternate juror. Whether Evelyn Cloinger had discussed the case with others is of no concern for she was already severed from the case. At this point a mistrial should have been declared by the court because it was no longer possible to have twelve jurors reach a verdict one way or the other, since only eleven jurors remained.

Appellant contends he was placed in jeopardy twice for the same offense. We do not agree. The Fifth Amendment to the Constitution prevents double jeopardy. It has been explained that the Fifth Amendment prohibits a second trial after a judgment of guilt or acquittal and the imposition of multiple sentences. *Benton* v. *Maryland,* 395 U.S. 784 (1969). In view of our holding in this case, appellant has not been found guilty nor has he been acquitted; neither has he been sentenced more than once for the same offense. Appellant now stands in the position he was in before he was tried the first time. He stands innocent until proven guilty beyond a reasonable doubt.

Reversed and remanded.

Floyd ORRELL and Thurman ABERNATHY
v. CITY OF HOT SPRINGS et al

78-293 578 S.W. 2d 18

Opinion delivered March 12, 1979
(Division I)

Gary R. Gibbs of *Gibbs & Henry,* for appellants.

Curtis L. Ridgway, Jr., for appellees.

GEORGE ROSE SMITH, Justice. The two appellants were sergeants on the Hot Springs police force when they brought this action for a writ of mandamus to compel the city and its Board of Civil Service Commissioners to promote them to the rank of lieutenant and to award them increased pay from the date they passed a civil service examination and became eligible for promotion. The issue of promotion immediately became moot, because the plaintiffs were promoted to lieutenant on the day after the suit was filed. This appeal is from a judgment denying the claim for back pay, amounting to $913.87 for Abernathy and to $808.93 for Orrell.

It was stipulated that the plaintiffs became eligible for promotion when the results of the examination were posted on August 26, 1975, that three vacancies in the rank of lieutenant then existed, and that the plaintiffs were not promoted until August 26, 1976. No testimony was introduced. The trial judge, sitting without a jury, gave the following reasons for his decision, with which we agree:

> An eligibility list does nothing more than to establish the eligibility of officers available for promotion and a priority to be given them when the promotions are made. Despite any language in the statutes, ordinances, and civil service regulations, the Civil Service Commission has management responsibilities for the police department and has discretion as to when vacancies are to be filled from the eligibility list. If the Civil Service Commission determines that it will fill existing vacancies, the Civil Service Commission must accept those at the top of the eligibility list unless those are disqualified for reasons permissible under the law. These two officers did not assume the responsibilities of lieutenant until they were appointed on August 20, 1976.

> As far as the record is concerned, nothing prevented these officers from pursuing their administrative remedy before the Civil Service Commission on August 26, 1975, and to appeal to this court if the Civil Service Commission declined to advance them without good cause when they were eligible to fill existing vacancies. The record does not disclose that the plaintiffs pursued any administrative remedy.
>
> Since the plaintiffs did not serve in the rank of lieutenant nor fill the existing vacancies prior to August 20, 1976, this Court concludes that they are not entitled to back pay for services not rendered.

Counsel for the appellants concede their inability to cite any authority for their contention that, regardless of the date of actual promotion, the right to increased pay accrues as soon as the results of the examination are posted, if vacancies then exist. The statute plainly rebuts the notion that promotion is automatic, for the appointing authority makes the selection from among the three persons standing highest on the eligibility list. Ark. Stat. Ann. § 19-1603 (6) (Repl. 1968). Moreover, the eligibility list remains in force for one year, which also indicates that promotions need not be made at once. § 19-1603 (4).

Counsel rely, however, upon the following provision, which is said to be a part of the Hot Springs civil service regulations, approved by the city council:

> In the event a vacancy occurs in any rank regardless of the reason of the existence said vacancy occurs, to fill such vacancy immediately, calling to active duty in the rank in which the vacancy has occurred the man highest on the eligible list for that rank.

There are two objections to this argument. First, the quoted section of the regulations was not introduced in evidence and appears in the record only in a trial brief. The courts do not take judicial notice of municipal ordinances. *Lowe* v. *Ivy,* 204 Ark. 623, 164 S.W. 2d 429 (1942).

Second, the quoted provision, actually an incomplete sentence, is submitted to us with no indication of its context in the regulations; we really have no idea to whom it applies or what it means. It rather clearly refers not to the matter of immediate promotions but to that of calling a person to active duty when some sort of vacancy occurs. We certainly cannot say that the provision, read in complete isolation from its context, demonstrates that the trial judge's opinion is wrong.

Affirmed.

We agree. HARRIS, C.J., and PURTLE, J.

BYRD, J., concurs in the result.

Vernon Lee CANNON *v.* STATE of Arkansas

CR 78-180 578 S.W. 2d 20

Opinion delivered March 12, 1979
(Division II)

[redacted]

[redacted]

[redacted]

John W. Achor, Public Defender, by: *William H. Patterson, Jr.,* Deputy Public Defender, for appellant.

Steve Clark, Atty. Gen., by: *Joseph H. Purvis,* Deputy Atty. Gen., for appellee.

JOHN A. FOGLEMAN, Justice. Vernon Lee Cannon was found guilty of theft by receiving under Ark. Stat. Ann. § 41-2206 (Repl. 1977) by receiving and retaining a 1955 Chevrolet automobile, the property of Ethel Mae Tanner. The offense was alleged to have occurred on January 30, 1978. It was alleged in the information that the value of the property was in excess of $100. In the trial before the circuit judge, without a jury, Cannon was found guilty and sentenced to five years' imprisonment. Cannon asserts that the trial court erred in refusing to reduce the charge to a misdemeanor, because the evidence was insufficient to support a felony conviction.

We agree that there was no substantial evidence to show that the automobile had a value in excess of $100.00 at the time of the offense. The only witness who testified was the owner. She stated that she paid $148 for the 1955 model car in 1966. She testified that she did not know what its value was or how much it would cost to replace it.

Theft by receiving is a Class B felony if the value of the property is $2,500 or more and a Class C felony if its value is less than $2,500.00 but more than $100.00; otherwise, the offense is a misdemeanor. Ark. Stat. Ann. § 41-2206. In this statute, value means the market value of the property at the time and place of the offense, but if the market value cannot be ascertained, value is the cost of replacing the property within a reasonable time. Ark. Stat. Ann. § 41-2201 (11) (a) and (b) (Repl. 1977).

There is no substantial evidence of either market value or replacement cost in this case. The cost to the owner 12 years prior to the offense cannot be substantial evidence that a 1955 model automobile had a market value of more than $100.00 in January, 1978.

Market value of an automobile is what it will bring on the open market when sold by a willing seller to a willing and able buyer. *Southern Bus Co.* v. *Simpson,* 214 Ark. 323, 215 S.W. 2d 699. It was not necessary, however, that market value be shown by expert testimony. *Boston Insurance Co.* v. *Farmer,* 234 Ark. 1007, 356 S.W. 2d 434. Opinion testimony of the owner would have been admissible and would have constituted substantial evidence if she had known the value of the property. *Phillips* v. *Graves,* 219 Ark. 806, 245 S.W. 2d 394; *Caldwell* v. *State,* 255 Ark. 95, 498 S.W. 2d 858. See also, *Garrett* v. *Trimune,* 254 Ark. 79, 491 S.W. 2d 586; *Arkansas State Highway Com'n.* v. *Covert,* 232 Ark. 463, 338 S.W. 2d 196. Evidence of the purchase price recently paid for the property may be evidence of market value when admitted without objection. *Boone* v. *State,* 264 Ark. 169, 568 S.W. 2d 229 (1978). But see, *Addington* v. *Jones,* 149 Ark. 669, 234 S.W. 24. Original cost, however, is not substantial evidence of market value when, as here, present market value in no way reflects that cost. *U.S.* v. *Toronto, H. & B. N. Co.,* 338 U.S. 396, 70 S. Ct. 217, 94 L. Ed. 195 (1949). Cf. *Arkansas State Highway Com'n.* v. *Hubach,* 257 Ark. 117, 514 S.W. 2d 386.

We do not agree with the state's contention that there was no error because the trial judge applied his own common knowledge and experience in concluding that the requisite value had been shown. A fact finder may apply its common knowledge in weighing the evidence and drawing inferences therefrom in the light of its own observations and experience in everyday life. *Polk* v. *State,* 252 Ark. 320, 478 S.W. 2d 738; *Graysonia-Nashville Lumber Co.* v. *Carroll,* 102 Ark. 460, 144 S.W. 519; *Kroger Grocery & Baking Co.* v. *Woods,* 205 Ark. 131, 167 S.W. 2d 869. Experience and common knowledge are only to be applied to evidence adduced. *Missouri Pacific R. Co.* v. *Benham,* 192 Ark. 35, 89 S.W. 2d 928. This is what we said was proper in *Polk* v. *State,* supra, where there was testimony by an owner as to the value of an automobile. See also, *Rouse* v. *Weston,* 243 Ark. 396, 420 S.W. 2d 83. It is not proper to leave a jury to the individual ideas of the jurors to determine value. See *Kansas City Southern Ry. Co.* v. *Biggs,* 181 Ark. 818, 28 S.W. 2d 68.

We have heretofore rejected the idea that common

knowledge and experience could serve as a substitute for evidence of value which is a necessary element of a crime, insofar as the grade of the offense is concerned, holding that it was as incumbent upon the state in a larceny case to establish a value in excess of the diacritical amount as it was to prove the identity of the thief and the ownership of the property. *Rogers* v. *State,* 248 Ark. 696, 453 S.W. 2d 393. Adoption of the Arkansas Criminal Code has not effected a change in the rules governing evidence of value in theft cases, so our holding in *Rogers* is still applicable.

The state relies not only upon the owner's testimony about the purchase price of her vehicle but upon her unresponsive answer to the question, "You don't know the value of the car today, do you?" Her answer to that question was, "No, but it's worth a thousand dollars to me." Value to the owner is not substantial evidence of market value. See *Arkansas State Highway Com'n.* v. *Perryman,* 247 Ark. 120, 444 S.W. 2d 564; *Motor Mill Co.* v. *Wilson,* 128 Wash. 592, 223 P. 1041 (1924).

There was substantial evidence that the automobile had some value. The punishment for theft by receiving property of a value of $100.00 or less is a term of imprisonment, not exceeding one year in the county jail or other authorized institution designated by the trial court, or a fine not exceeding $1,000.00, or both fine and imprisonment. Ark. Stat. Ann. §§ 41-2206(5)(c), -901, -902(2), -1101(2)(a) (Repl. 1977). There is no contention that the evidence did not warrant a finding that the appellant was guilty of theft by receiving. Any error in the denial of appellant's motion may be corrected by modifying the judgment to reduce it to a term of imprisonment of one year, to be served in the Pulaski County jail (unless the circuit court shall designate another authorized place of imprisonment). All time spent by appellant in custody after the date of his arrest on this charge shall be credited against the sentence as modified. Ark. Stat. Ann. § 41-904 (Repl. 1977).

The judgment is affirmed as modified.

We agree. HARRIS, C.J., and HOLT and HICKMAN, JJ.

WALKER FORD SALES and FORD MOTOR COMPANY *v.* William GAITHER et ux

78-150 578 S.W. 2d 23

Opinion delivered March 12, 1979
(In Banc)

Griffin Smith and *W. R. Nixon, Jr.,* for appellants.

John Belew, of: *Harkey, Walmsley & Belew,* for appellees.

FRANK HOLT, Justice. The trial court, sitting as a jury, awarded appellees damages of $1,000 against appellant Walker Ford Sales and $1,000 against appellant Ford Motor Company for breach of warranty. Appellants first assert for reversal that the court erred in ruling that appellants breached an implied warranty of merchantability because such warranty had been conspicuously excluded by the express warranty and because appellees had examined the car and were aware of its alleged defect at the time of the sale.

Appellees bought a 1974 Ford Thunderbird on July 13, 1974, from appellant Walker Ford Sales, an authorized dealer. The car was a demonstrator and had been driven 4,-250 miles. Appellees test drove the car and agreed to pay $6,-300 for it. They paid $1,400 down and signed a $4,900 note plus interest for the balance. After making payments, the appellees refused to pay the $2,000 balance. On May 17, 1976, appellant Walker Ford filed a replevin action. Appellees counterclaimed against Walker Ford and cross-complained against appellant Ford Motor Company, alleging that the car was defective in that it had a persistent and intolerable vibration when driven at highway speeds; that the defective condition had existed since the appellees purchased it; that notice of the defect was given to appellants) that at the time of purchase, appellants jointly gave *an extension* of a new car warranty on the automobile to the appellee purchasers to the effect that the selling dealer would replace or repair, free of charge, any part, except tires, found to be defective in factory materials or workmanship under normal use up to a maximum of 12 months or 12,000 miles *from the date of sale* of the demonstrator; and that appellants had not complied with the warranty by failing and refusing to correct the vibration by replacing parts or repairing the automobile. The appellants denied that the car was defective and that the warranty had been breached by them. The trial court found that Ford Motor Company had breached the express and implied warranties with respect to the merchantability of the car and Walker Ford Sales and Ford Motor Company were unable to diagnose the specific defective parts which caused the vibration. As indicated, appellants cnntend this was error.

An express warranty may exclude an implied warranty of merchantability if the exclusion mentions the word "merchantability" and, if written, is conspicuous. Ark. Stat. Ann. § 85-2-316 (2) (Add. 1961). See *Mack Trucks* v. *Jet Asphalt,* 246 Ark. 101, 437 S.W. 2d 459 (1969). Ark. Stat. Ann. § 85-1-201 (10) (Supp. 1977) defines "conspicuous" as being "so written that a reasonable person against whom it is to operate ought to have noticed it" and states that "language in the body of a form is 'conspicuous' if it is in larger or other contrasting type." Here the express warranty given by

appellants stated that "to the extent allowed by law, THIS WARRANTY IS IN PLACE OF all other warranties, express or implied, including ANY IMPLIED WARRANTY OF MERCHANTABILITY or fitness. Under this warranty, repair or replacement of parts is the only remedy." This language clearly complies with the requirements for exclusion of implied warranty of merchantability. Further, it appears that the appellees never pleaded breach of implied warranty. The court was incorrect in ruling that appellant Ford Motor Company breached the implied warranty since it was effectively excluded. Appellees themselves recognize that the express warranty conspicuously excluded "any other warranties."

As to the express warranty, the appellants argue that the evidence is insufficient to support a judgment for a breach of it. They insist that the appellees failed to prove the demonstrator car had defective factory materials and workmanship. Appellants correctly state that we have held that a party, seeking to establish a breach of warranty against a manufacturer, must show that the automobile was in a defective condition at the time it left the control of the manufacturer. *Ford Motor Co.* v. *Gornatti,* 253 Ark. 237, 486 S.W. 2d 10 (1972). There a defective carburetor was the cause of a mishap 1 1/2 years after the car had left the control of the manufacturer, the date of sale and warranty. No evidence was adduced that the malfunctioning carburetor was factory related or existed at the time of the car sale with the warranty. Consequently, we held there was insufficient evidence from which the jury could properly infer that a defective carburetor existed 1 1/2 years before or when the car left the control of the manufacturer and sale by the retailer.

However, in *Ford Motor Co.* v. *Reid,* 250 Ark. 176, 465 S.W. 2d 80 (1971), a case we feel is more similar to the one at bar, we held that the court was correct in giving a jury instruction which required the appellees, who had sued the appellant manufacturer for breach of express warranty, to prove only that the car had been defective at the time the automobile was delivered to the appellee purchasers. There appellant argued the instruction was error because it did not limit its liability to defects existing prior to the time the car

left Ford's control or for which it had manufacturing responsibility. The warranty expressly provided that it ran from the date of delivery to the purchaser, or first use, whichever was first. In *Gornatti,* the warranty also expressly ran from the date of delivery. Here, as indicated, it ran from the date of sale to the first retail purchaser. To the extent that there is an apparent conflict in *Gornatti* and *Reid,* we hold that *Reid* was correct in assigning the burden of proof to the purchaser for showing that the defect existed at the time the car was first delivered to the retail purchaser. Although we think *Gornatti's* decision was ultimately correct, the language stating the burden was upon the purchaser to establish a defect at the time the car left the manufacturer's control was erroneous. Under the express warranties in *Reid* and *Gornatti* and here, the purchaser had the burden to show a defect at the date of sale or delivery, not at the time it left the manufacturer's factory or control. The evidence in *Gornatti* was insufficient even as to that point in time.

Here the alleged vibration existed and persisted constantly from the very date of the sale and appellant's joint extension of the new car warranty. It is not contended that the appellee purchasers failed to properly maintain, operate and care for the vehicle. It appears there was normal use of it. True, the appellees were never able to tell appellants specifically what defective condition caused the vibration. However, they promptly complained and appellants' mechanics repeatedly worked on the automobile to correct the vibration, described as a "rocking motion," when driven at approximately 55 m.p.h. If you were sitting in the car with your legs crossed, "[y]ou just sit there and rock your legs like that, back and forth." "[Y]ou can feel it through the seats, the whole thing shakes." Appellants' mechanics and others, who worked on the automobile for appellees, were unable to locate a specific defective part. Appellees' witnesses testified that the car retained the vibration even when mounted on blocks and run at highway speeds without the tires. During the three years appellees had the car, efforts by them to correct the vibration consisted of placing seven new sets of tires on the car (one being "ramp tested"), aligning the front end, switching wheels, replacing the drive shaft, turning the rear brake drums, and changing the rims three times.

A contract, as here, should be construed "in accordance with what the ordinary purchaser would understand from its language." *Vernon* v. *Lake Motors,* 488 P. 2d 302 (Utah 1971). Here, as indicated, on the date of sale and delivery of the car, the manufacturer and the dealer jointly agreed, by the extension of a new car warranty, to correct any defects in material or workmanship. The fact that the car had 4,250 miles on it was recognized by the warranty. In the circumstances, the evidence is amply substantial to support the finding that the appellants breached the express warranty.

Appellants assert that, should we find that the express warranty was breached, there is insufficient evidence to support the award of $2,000 damages. We agree. The measure of damages for a breach of warranty is "the difference at the time and place of acceptance between the value of the goods accepted and the value they would have had if they had been as warranted . . . . " Ark. Stat. Ann. § 85-2-714 (2) (Add. 1961). See also *Marion Power Shovel Co.* v. *Huntsman,* 246 Ark. 152, 437 S.W. 2d 784 (1969). Here appellees paid $6,300 for the automobile. They testified that it had "no value" at the time of the purchase. However, admittedly, they have driven the car 60,000 miles in the 3 years since their purchase. The car does not vibrate until it reaches speeds in excess of 50 m.p.h. Therefore, we cannot say that the car was of no value to the appellees. Even so, they argue that the testimony given by appellant Noil Walker, the retailer, indicating he was willing to give them $2,000 credit, was relied upon by the trial court in determining the correct amount of damages. The record shows, however, that Mr. Walker testified that at one time he offered to purchsse the automobile for its market value and deduct $2,000 still due him from appellees from that market value. There was no testimony as to what the market value on that date was. We hold there is no evidence to support the finding that the damages were $2,000. Upon remand, the actual market value of the car when sold in its defective condition can be determined and the appropriate figure for damages established. § 85-2-714 (2), *supra,* and *Marion Power Shovel Co.* v. *Huntsman, supra.*

Appellants did not seek to limit appellees' remedy to repair or replace defective parts. Obviously, they recognize

that the situation is controlled by *Kohlenberger* v. *Tyson's Foods,* 256 Ark. 584, 510 S.W. 2d 555 (1974), where we stated:

> It would seem that the evidence introduced on this trial conclusively showed that the attempted modification and limitation failed of its essential purpose, as a matter of law. It has been held, properly, we think, that when there is substantial evidence, as there is here, tending to show that a particular piece of machinery obviously cannot be repaired or its parts replaced so that the same is made free from defects, a jury verdict, which implicitly concludes that a limitation of the remedy to repair and replacement of nonconforming parts deprived the purchaser of the substantial value of the bargain, should be sustained . . . .

For the error indicated, the judgment is reversed and the cause remanded for a new trial.

Reversed and remanded.

BYRD, J., would affirm.

ARKANSAS SUPPLY, INC. *v.* James K. YOUNG et ux

78-284 580 S.W. 2d 174

Opinion delivered March 12, 1979
(Division II)
[as amended on Denial of Rehearing May 21, 1979.]

Spitzberg, Mitchell & Hays, by: *Theodore C. Skokos* and *Beresford L. Church, Jr.,* for appellant.

Luther B. Hardin, for appellees.

FRANK HOLT, Justice. The appellant contends that the chancellor erred in cancelling its mortgage. Appellant argues that its mortgage was and is valid, because the mortgagors (Curtis and Virginia Wright) were the equitable owners of the real property at the time they mortgaged the property to appellant. The court found that the Wrights had no mortgageable interest in the property. A personal judgment however was rendered in favor of the appellant against the Wrights.

On November 4, 1976, Vernon and Bertha Stewart, sellers, and Curtis and Virginia Wright, purchasers, entered into a written "Escrow Agreement," which stated that the sellers, simultaneously with the execution of the agreement, delivered their warranty deed for 2.46 acres to a bank as escrow agent. The deed was to be delivered to the purchasers, the Wrights, only upon their payment of the $9,250 purchase

price plus interest to the escrow agent. The initial payment of $150 was acknowledged. The balance was to be paid in $150 monthly installments. The escrow agreement further provided that the purchaser would not allow any lien on the property or do any act to lessen the sellers' security. If the purchasers defaulted under the agreement by failing to make payments, time being of the essence, the full amount would become due after the sellers gave 30 days' notice to the purchasers and the escrow agent of their intent to exercise the option to accelerate. If the full amount was not paid or the agreement made current within 30 days, the escrow agent was to deliver the deed to the sellers, any sums paid would be retained as liquidated damages, and the purchasers would lose all rights under the agreement. This agreement was recorded on April 8, 1977. A second agreement followed on April 15, 1977, which was substantially the same as the first except the purchase price was increased to $15,000. This agreement was not recorded. Pursuant to the terms of the agreement, the Wrights, as purchasers, went into possession of the property and began improvements. However, they made no payment on the purchase price other than the original $150. Consequently, by letter dated July 19, 1977, Stewart's attorney notified the Wrights that, pursuant to the escrow agreement, if full payment of the $15,000 plus accrued interest was not paid within thirty days of their receipt of the letter, Stewart would recall the deed from the escrow agent and consider the transaction cancelled and the contract void. There was no compliance from the Wrights. To the contrary, on August 19, 1977, the Wrights executed a $37,889.04 mortgage (without a note) on the property in favor of appellant Arkansas Supply, Inc. It appears the Wrights were indebted to appellant for materials and supplies used on various building projects. Appellant agreed to accept this mortgage in lieu of filing a lien on an apartment project which the Wrights said they had sold. The Wrights continued their default in payments to the Stewarts. On October 13, 1977, appellee James K. Young prepared a release and disclaimer which Mr. and Mrs. Wright signed relinquishing any interest they had in the property and authorizing delivery of all documents by the escrow agent to the Stewarts. On that same day, Young paid the Stewarts $15,770 for a deed to the

property and also paid the Wrights $3,000 for a release of any claim they might have on the property.

Appellant now contends that the Wrights were, on the date of the execution of the mortgage, the equitable owners of the property, that the "mortgage at that time was valid, and remained so attached as a lien on the land and improvements despite the attempted cancellation on October 13, 1977, engineered by the Appellee." They argue that this court has invariably held that a purchaser under an executory contract for the sale of land has an equitable interest in that property. Appellee responds that a long line of Arkansas cases stand for the proposition that escrow agreements, as here, whereby the deed is to be returned to the grantor if the purchase price is not paid, do not provide the purchaser with sufficient title to give a mortgagee an *in rem* mortgage against the property, although the purchaser was in possession of the property. In *Mansfield Lumber Co.* v. *Gravette,* 177 Ark. 31, 5 S.W. 2d 726 (1928), in discussing whether a materialman's lien had attached to certain property, we said:

> It is earnestly contended by counsel for appellant that Mrs. A. L. Beason had an equitable interest in the lots . . . . We cannot agree with counsel in this contention. It is true that Miss Gravette executed a deed to Mrs. Beason to the lots in question, but the deed was placed in escrow . . . . to be turned over to the grantee in the deed when the payments of purchase money were made; but, in case the payments of the purchase money were not made as expressed in the deed, the deed was to be returned to the grantor and become inoperative. When a deed is delivered merely as an escrow to take effect upon the performance of some condition by the grantee in the future, no title passes until the condition has been performed . . . However, if we are correct in holding that the deed was placed in escrow upon the condition that it did not become operative until the balance of the purchase price was paid, the grantee acquired no interest of any kind in the property, because she did not pay any of the balance of the purchase price, and her rights under the contract became forfeited for failure to make such payments.

Where the grantee performs the required conditions, he may compel the grantor to deliver the deed, held in escrow, to him. *Tombler* v. *Sumpter,* 97 Ark. 480, 134 S.W. 967 (1911).

Here, however, the purchasers, the Wrights, only paid $150 on the agreed purchase price of $15,000. The Wrights, as grantees, acquired no interest in the property until the conditions of the escrow agreement were met. Not having met them, the court correctly cancelled appellant's mortgage.

In our view, *Mansfield Lumber Co.* v. *Gravette, supra,* has become a rule of property. Therefore, here we decline to modify or overrule it. However, we will reconsider its applicability to any escrow contract, similar to the one at bar, entered into after this opinion becomes final.

Affirmed.

We agree: HARRIS, C.J., and FOGLEMAN and HICKMAN, JJ.

BYRD and PURTLE, JJ., would grant the rehearing.

CONLEY BYRD, Justice, dissenting. In *Mansfield Lumber Co.* v. *Gravette,* 177 Ark. 31, 5 S.W. 2d 726 (1928), the decree which this court affirmed permitted the lien holder to remove the improvements from the lots. The judgment of the trial court here should be reversed to permit appellant *Arkansas Supply, Inc.* to remove from the lots the apartment house constructed upon the lots by the Wrights. Otherwise the appellees who placed the Wrights in possession, are unjustly enriched. I cannot agree with the majority that *Mansfield Lumber Co.* v. *Gravette, supra,* authorizes such unjust enrichment by a vendor who places a purchaser in possession under an escrow agreement.

Since appellees, or their predecessor in title, had placed the Wrights in possession for construction purposes, I would apply Restatement, Restitution § 52(2) which provides:

(2) A person who, because of mistake of law, reasonably

but erroneously believing that he, or a third person, on whose account he acts is the owner:

> (a) causes improvements to be made upon the land of another, is entitled to restitution for the value of the labor and materials used therein to the extent that the land is increased in value if the mistake is reasonable, . . . "

For the reasons stated herein, I respectfully dissent from the denial of the petition for rehearing.

PURTLE, J., joins in this dissent.

Lonnie KIRKPATRICK *v.* FIRST STATE BANK OF DeQUEEN

78-247 578 S.W. 2d 28

Opinion delivered March 12, 1979
(Division II)

Tackett, Moore, Dowd & Harrelson, for appellant.

Hardegree & Maddox, by: *Joe H. Hardegree,* for appellee.

DARRELL HICKMAN, Justice. This is an appeal from a summary judgment entered by the Howard County Circuit Court against the appellant, Lonnie Kirkpatrick, for some $28,000.00, plus interest and attorney fees, on a note Kirkpatrick co-signed in favor of the appellee, the First State Bank of DeQueen.

We agree with the appellant that the court erred in entering summary judgment for which execution could issue.

The bank sued Kirkpatrick and Frank Ramsey for a debt evidenced by a promissory note they co-signed on October 14, 1976, in the amount of $28,000.00. The money was to be used as consideration for transfer of a half interest in Ramsey's insurance agency to Kirkpatrick. Kirkpatrick, in his answer, did not deny that the note was executed nor that he and Ramsey received the money. Instead, each filed counterclaims and cross-complaints setting up defenses or claims against each other; in Kirkpatrick's case, two other defendants were joined as third party defendants.

Kirkpatrick alleged in his counterclain that the bank, without authority, allowed Ramsey to withdraw money from a joint account, which was an asset of the insurance partnership formed with the use of the bank loan made to him and Ramsey; further, that Ramsey, with the knowledge and consent of the president of the bank, and, together with others who were named third party defendants, unlawfully deprived Kirkpatrick of his half interest in the insurance agency. Kirkpatrick asked for damages against the bank in the sum of $75,000.00, one-half the value of the insurance agency, and for the same amount against Ramsey and two other third party defendants.

The bank moved for summary judgment attaching to the motion an affidavit of the president of the bank attesting to the authenticity of the note and stating that the loan was made. Kirkpatrick filed a general denial in response to the motion alleging that facts were disputed; he relied upon the

existing pleadings, interrogatories and a lengthy deposition of Kirkpatrick's in which Kirkpatrick testified substantially in accordance with the pleadings he had filed.[1]

The judge, finding no defense to the note nor any genuine issues of material fact regarding the note, granted summary judgment. The judge did reserve the remaining issues for later adjudication.

We agree that the appellant did not allege any defenses to the debt on the promissory note. See Uniform Commercial Code, Ark. Stat. Ann. §§ 85-3-305 and 306 (Add. 1961). However, we have what appears to be a case of first impression: whether summary judgment should have been granted when there remains a counterclaim to be decided. The remaining issues had been set for trial for August of 1978, some three and a half months after the judge signed the summary judgment. The appellant's attorney asked that execution on the judgment be delayed until the trial, but the appellee would not agree to this.

Our summary judgment law, Ark. Stat. Ann. § 29-211, is copied after Rule 56 of the Federal Rules of Civil Procedure. Part of that law deals with just such a case as we have before us and that section reads:

> (d) Case Not Fully Adjudicated on Motion. If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy,

[1]It is obvious from the judge's letter of June 15, 1978, that the judge, on reconsideration of his granting the bank's motion, had before him the deposition which was not filed of record until July 20, 1978.

> including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

Ark. Stat. Ann. § 29-211 (d) (Repl. 1962). See also Comment, 15 Ark. L. Rev. 388 (1961).

Other jurisdictions have dealt with this problem in various ways. The majority rule seems to be that where a counterclaim is predicated upon a good and substantial cause justifying a trial, it may preclude summary judgment on a complaint or it may preclude the trial court from ordering execution of a judgment pending the determination of the counterclaim. See Annot., 8 ALR 3d 1961 (1966).

However, where the counterclaim is shown to be a sham, frivolous or without merit, it would not be a bar to summary judgment. *Ford* v. *Luria Steel & Trading Corp.,* 192 F. 2d 880 (8th Cir. 1951). In some jurisdictions where a valid counterclaim is found to exist, the court has granted the motion for summary judgment on the claim but ordered a stay of execution in order to protect a defendant's rights to his counterclaim. *Elliott-Lewis Corp.* v. *Graeff,* 11 N.J. Super. 567, 78 A. 2d 591 (1951). It has been held where the counterclaim is obviously without merit and is being used solely for the purpose of delaying the trial, then summary judgment will be granted. *Seagram-Distillers Corp.* v. *Manos,* 25 F. Supp. 233 (D.C.S.C. 1938).

We think the better practice is not to grant summary judgment on a complaint where there exists a legitimate counterclaim and where the defendant will obviously be prejudiced by the entry of such a judgment. This is especially true since Arkansas recognizes the procedure of compulsory counterclaims. *May* v. *Exxon Corp.,* 256 Ark. 865, 512 S.W. 2d 11 (1974). In some instances such a judgment could actually bankrupt a litigant before a trial could be had upon a valid counterclaim which might ultimately result in a favorable determination of the counterclaim.

In this case we find no evidence that the counterclaim was frivolous or that it was being used as a way of delaying the lawsuit. We feel that the court should have followed that part of the statute which authorizes a finding that there was no material fact in dispute nor defense offered regarding the note. Such a finding would have been proper pursuant to Ark. Stat. Ann. § 29-211(d) and would have permitted the appellee to go to trial knowing that the appellant would offer no valid defense to the debt as evidenced by the note. This seems a better practice than ordering summary judgment and withholding execution.

Therefore, the judgment of the lower court is affirmed as to the findings that no genuine issues of material facts are disputed in connection with the appellee's claim nor any valid defenses made. That part of the judgment which enters judgment for which execution may enter is stricken.

Affirmed as modified.

We agree. HARRIS, C.J., and FOGLEMAN and HOLT, JJ.

STATE of Arkansas *v.* Herbert KIMBROUGH & Phillip BRYANT

CR 78-171 578 S.W. 2d 26

Opinion delivered March 12, 1979
(Division II)

Bill Clinton, Atty. Gen., by: *Catherine Anderson,* Asst. Atty. Gen., for appellant.

No brief for appellees.

DARRELL HICKMAN, Justice. The State appeals this criminal case, as it may by virtue of Ark. Stat. Ann. § 43-2720 (Repl. 1977), conceding that the appellees may not be retried on the charges. See *State* v. *Stringfellow,* 253 Ark. 390, 486 S.W. 2d 65 (1972).

Herbert Kimbrough and Phillip Bryant were convicted in the Little Rock Municipal Court of disrupting and disturbing the lawful assembly of the Liberty Hill Missionary Baptist Church in violation of Ark. Stat. Ann. § 41-2908 (Repl. 1977). Each was fined $50.00 and appealed to the circuit court.

During the circuit court trial, before the State finished examining the first witness, the judge dismissed the charges. This was done when the prosecuting attorney declined to offer further proof in view of the judge's ruling on points of law.

The judge made two rulings which are the subject of this appeal. First, he ruled that membership of these appellees in the church was relevant; their membership was a fact in issue, disputed by the parties. Next, he ruled that the church body would have to "exhaust the remedies" of the organization before these appellees could be charged.

We cannot say on this record whether the appellees were guilty as charged because the trial was not concluded. In any event, there was a confrontation between Kimbrough and Bryant and the pastor in the Liberty Hill Missionary Baptist Church during services which resulted in the charges. The pastor, John Miles, was called as the State's first witness and during his testimony it became an issue as to whether these appellees were, in fact, members of the organization. The attorney for the appellees made objections to the State's proceeding, arguing that before the State could prosecute these individuals for the charges, the organization must exhaust its remedies, that is, hold a hearing and expel the appellees from the church before they could be charged with criminal misconduct. The trial judge agreed. No doubt the judge was prompted to do this because the testimony of the pastor regarding the misconduct of the appellees was unimpressive to the trial judge at that point.

We find that the judge was in error in his rulings. First, membership in a church or organization is not necessarily the controlling factor as to whether a person has committed a crime at a meeting. Neither would a church or organization have to "exhaust the remedies" of the organization, that is, conduct a hearing and discharge a person, if a member, before the State could prosecute an individual for criminal misconduct. Either a member of a stranger can be guilty of unlawfully disrupting a lawful assembly.

Such charges for disorderly conduct are not unprece-

dented. In two cases we have reviewed charges for disorderly conduct in a church meeting. In both instances these charges were brought under a statute which was a predecessor to our present law. *State* v. *Wright,* 41 Ark. 410, 48 Am. Rep. 43 (1883); *Walker* v. *State,* 103 Ark. 336, 146 S.W. 862 (1912).

Our holding in no way affects the right of an individual or a member of any organization to participate in any way in an organization or to voice disapproval of an organization in any way during a meeting. It is simply that a member's conduct during church meetings or similar public meetings is not immune from prosecution if that conduct is criminal in nature. While caution should be exercised in bringing such charges against a member or a stranger accused of disrupting a public meeting, the fact remains that membership alone and the internal remedies of an organization are not, as a matter of law, determinative of one's guilt for criminal misconduct.

For the orderly administration of justice, we declare that error was committed.

Error declared.

We agree. HARRIS, C.J., and FOGLEMAN and HOLT, JJ.

MISSOURI PACIFIC RAILROAD COMPANY
et al *v.* Minnie Faye MERRILL, Individually
and as Guardian, et al

78-305 578 S.W. 2d 35

Opinion delivered March 12, 1979
(Division I)

Herschel H. Friday, Overton S. Anderson and *Donald H. Bacon,* by: *Overton S. Anderson* and *Donald H. Bacon,* for appellants.

W. H. ("Dub") Arnold, for appellees.

JOHN I. PURTLE, Justice. This case results from a railroad crossing accident in Whelan Springs, Arkansas, wherein a Missouri Pacific train struck a 1978 Ford truck driven by Gordon Gene Merrill, who was fatally injured. Minnie Faye Merrill, appellee, brought suit against Missouri Pacific Railroad and two of its employees on behalf of herself, the estate, and heirs of the decedent. The case was submitted to the jury on interrogatories as follows:

. . .

(1) Do you find from a preponderance of the evidence that Dean Davis was guilty of negligence which was a proximate cause of the occurrence?

(2) Do you find from a preponderance of the evidence that M. R. Evans was guilty of negligence which was a proximate cause of the occurrence?

(3) Answer this interrogatory only if you have answered "yes" to one or more of interrogatories 1 or 2: Do you find from a preponderance of the evidence that Gordon Gene Merrill was guilty of negligence which was a proximate cause of any damages he may have sustained?

(4) Do you find from a preponderance of the evidence that Gordon Merrill assumed the risk of his own injuries?

(5) This interrogatory instructed the jury to apportion responsibility in the event one or more of inerrogatories 1 through 4 were answered "yes."

The jury answered interrogatories 1, 2, 3, and 4 "no." Number 3 was not signed at all. The court then explained to the jury their answers to the interrogatories completed the case and the jury was discharged. Subsequently, the court discovered a note on the back of one of the interrogatories which was signed by eleven (11) jurors and reads as follows:

"It is the decision of the jury that the individuals named in this suit are not personally negligent in causing the accident resulting in the death of Mr. Merrill. However, we do find Missouri Pacific negligent in its failure to provide proper warning signals at this particular crossing and an unobstructed view of the approaching train. Because of the negligence on the part of the railroad, we also feel that Mrs. Merrill should be awarded some compensation to cover medical and burial expenses."

The court also discovered it had inadvertently left out AMI Instruction 208 which had been agreed upon by the parties. Appellees moved for a new trial based upon the note

from the jury and the failure to give AMI 208. The court entered the following order:

> The Court grants a new trial because the verdict of the jury and the answers to the written interrogatories are inconsistent and since the jury has been discharged the Court finds that a new trial must be granted in order to provide Plaintiffs a fair trial. Furthermore, it has been discovered that an agreed jury instruction was inadvertently left out of the formal charge to the jury that was necessary for the jury to be properly instructed as to the law of negligence as between employer and employee.

Appellants argue on appeal that the court erred in granting a new trial.

We will first examine the grounds upon which the court may grant a new trial as set out in Ark. Stat. Ann. § 27-1901 (Repl. 1962) which are stated as follows:

> 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.
>
> Second. Misconduct of the jury or prevailing party.
>
> Third. Accident or surprise which ordinary prudence could not have guarded against.
>
> Fourth. Excessive damages appearing to have been given under the influence of passion or prejudice.
>
> Fifth. Error in the assessment of the amount of recovery,

whether too large or too small, where the action is upon a contract or for the injury or detention of property.

Sixth. The verdict or decision is not sustained by sufficient evidence, or is contrary to law.

Seventh. Newly discovered evidence, material for the party applying, which he could not, with reasonable diligence, have discovered and produced at the trial.

Eighth. Error of law occurring at the trial, and excepted to by the party making the application.

AMI 208 provides as follows:

"At the time of the occurrence Missouri Pacific Railroad and Dean Davis and M. R. Evans were employer and employee. Therefore, any negligence on the part of Dean Davis and M. R. Evans is charged to Missouri Pacific Railroad Company."

In the first place, AMI 208 should not be given when the case is presented to the jury on interrogatories. *Argo* v. *Blackshear,* 242 Ark. 817, 416 S.W. 2d 314 (1967). In any event, the instruction was argued to the jury by appellees at the close of the case. Further, it was stipulated that Dean Davis and M. R. Evans were employees of the Missouri Pacific Railroad Company and were in the course of their employment at the time of the occurrence. Therefore, we cannot see any error in the court failing to give an instruction which itself was not proper if objected to. The court gave AMI 203 which informed the jury that if Dean Davis and M. R. Evans were guilty of negligence which proximately caused appellees' damages the jury could return a verdict for appellees. Since the specific answers to the interrogatories found Davis and Evans were not negligent, appellees were precluded from obtaining a favorable verdict. If the failure to give AMI 208 was error at all, it would obviously be harmless in view of the circumstances.

The question relating to the note written by the jury is of a more serious nature. For the purpose of this decision, we

will treat it as a general verdict although it was couched in terms more in the nature of a recommendation. No evidence was presented to the jury upon which such a verdict could be supported. It was agreed that the only issues were whether the appellants sounded the whistle or kept a proper lookout. The answer by the jury of the first two interrogatories answered these issues in favor of appellants.

Ark. Stat. Ann. § 27-1901 (Repl. 1962) states the trial court may grant a new trial, upon application of the aggrieved party, if one of the causes listed materially affected the substantial rights of such party. We do not find any of the eight grounds listed in Ark. Stat Ann. § 27-1901 (Repl. 1962) to be present in this case. Since the irregularity did not materially affect any substantial rights of appellees, there was no basis for granting a new trial. *Bridges* v. *Hemmer,* 256 Ark. 312, 506 S.W. 2d 835 (1974).

The general verdict written by the jury is in conflict with the special verdict or interrogatories. The subject matter of this general verdict was not a matter which was presented to them by the court. Such situation has been discussed in 89 C.J.S. Trial, § 565, as follows:

> "It is proper to disregard as surplusage certain matters contained in a special verdict or in special findings or answers to interrogatories, such as conclusions of law, evidentiary facts, a memorandum preceding the answers, findings on, or answers to, issues or interrogatories improperly submitted, a finding on the matter not submitted to the jury, findings of matters outside the issues, or findings of immaterial facts or on immaterial questions or issues. Also, it has been held that a general verdict may be ignored where, without any instructions from the Court, it was returned with answers to questions submitted."

A case almost on all fours with the present case is reported in *Chicago, Rock Island & Pacific Railroad Co.* v. *Davis,* 239 Ark. 1059, 397 S.W. 2d 360 (1965), wherein the jury returned a verdict in favor of two railroad employees who were charged with lookout and sounding the whistle and

against the employer railroad. We held in the last quoted case that the issue upon which the jury returned its verdict against the railroad was not presented for the jury to consider. We believe the same situation is present here. There were no issues upon which the jury could find as it did in the present case.

Finally, Ark. Stat. Ann. § 27-1741.3 (Repl. 1962) has been interpreted to hold that interrogatories have priority over a general verdict in the event they are inconsistent. *Southwestern Electric Co.* v. *Camp,* 253 Ark. 886, 489 S.W. 2d 498 (1973). Therefore, the trial court abused its discretion in granting the motion for a new trial.

Reversed and dismissed.

We agree. HARRIS, C.J., and GEORGE ROSE SMITH and HICKMAN, JJ.

Ronnie Dean MATTHEWS *v.* STATE of Arkansas

CR 78-186 578 S.W. 2d 30

Opinion delivered March 12, 1979
(In Banc)

Seay & Bristow, by: *Bill W. Bristow,* for appellant.

Steve Clark, Atty. Gen., by: *Catherine Anderson,* Asst. Atty. Gen., for appellee.

JOHN I. PURTLE, Justice. Appellant was convicted in the Lawrence County Circuit Court on June 21, 1973, and sentenced to five years in the Department of Corrections with the last four years suspended on condition of good behavior. Appellant was released from the Department of Corrections with credit for one year served in December 1973. On January 31, 1978, after appellant had been released more than four years, the state filed a petition to revoke the suspended sentence for acts committed during the four years of the suspended sentence. The order of revocation was filed July 27, 1978. On appeal from the order of revocation held on July 6, 1978, appellant argues one point.

I.

THE TRIAL COURT ERRED IN NOT DISMISSING THE PROCEEDINGS BECAUSE THE PETITION WAS UNTIMELY FILED.

There is no dispute as to the facts or dates involved; therefore, it is simply a matter of law as to whether the petition for revocation was filed prior to the expiration of the part of the sentence which was suspended. The petition was filed within five years from the date of the sentence but more than four years after appellant's release from the Department of Corrections.

The trial court very frankly stated:

> "I will risk it that the formula is that a man is on a suspended sentence for a full five-year period of time . . . ."

It is understandable that the court was not more positive because we have been furnished no case directly in point; neither have we been able to find an Arkansas case in our research. The appellant relied upon Ark. Stat. Ann. § 41-1206 (3) (Repl. 1977) which clearly states the suspended part of a split sentence commences to run upon release from custody. Appellee relies upon Ark. Stat. Ann. § 43-2324 (Repl. 1977). Each concedes if he is wrong the other is right.

Ark. Stat. Ann. § 41-1206(3), part of the Arkansas Criminal Code, was effective January 1, 1976. Therefore, it was not in force at the time of the pronouncement of sentence. However, Ark. Stat. Ann. § 43-2324 (Repl. 1977) concerns suspended sentences and the power to revoke. We readily agree that had appellant been placed on a five-year suspended sentence pursuant to § 43-2324 the court would have been authorized to revoke the suspension at any time during the full five years, for good cause shown.

We note the case of *Walker* v. *State,* 263 Ark. 485, 565 S.W. 2d 605 (1978), and it is the closest case in point we have found in Arkansas. In *Walker* there was a 15-year sentence with 14 of it suspended. The petition therein was filed within six years of pronouncement of sentence. Therefore, under either theory advanced herein, the court still retained the right to revoke the suspended sentence of Walker. Ark. Stat. Ann. § 41-1208 (Repl. 1977) provides a revocation may be had at any time before the expiration of the period of suspension. This statute does not answer the question presented because it does not define the period of suspension which follows that portion of a sentence which has been actively served in the Department of Corrections. It is clear under Ark. Stat. Ann. § 41-1206(3) that after January 1, 1976, the suspended portion commences to run upon release of the prisoner. We agree with the Commentary that pre-Code authority was silent as to when the period of probation commenced to run but clearly stated a suspended sentence was to commence upon a plea of guilty or verdict of guilty.

We find no authority or cases cited which hold that Ark. Stat. Ann. § 43-2324 gives a court authority to impose a separated sentence with the suspended portion to commence at a date later than the prisoner's release from active confinement. An article in 21 Ark. Law Review 255 indicates such sentence cannot be pronounced. Since there is no provision pursuant to § 43-2324 to determine the commencement of the suspended portion of a sentence following a period of confinement, we must look elsewhere. *State* v. *Lewis,* 226 N.C. 249, 37 S.E. 2d 691 (1946), held the court could not split the sentences in the manner so as to have the first part served and the second part suspended. In *State* v. *Johnson,* 220 La. 64, 55 So. 2d 782 (1951), it was held that a sentence could not be imposed in a manner to cause the second part of a sentence to be suspended. Admittedly, the statutes are not identical to § 43-2324 but are very similar. Applying the rationale of these cases and the lack of express statutory authority or precedent in Arkansas, we agree the suspended sentence commenced at the time appellant was released by the Department of Corrections.

An article in 147 ALR 656 addresses the question as it concerns the federal statute upon which the Arkansas law is predicated. Under probation or suspended sentences the federal courts cannot require the defendant to serve a part of the sentence and remain on suspension for the balance of the term pronounced.

Since the Department of Corrections had no control over appellant after he was released, he commenced serving the suspended sentence at the time of his release by them. Therefore, the four-year suspended sentence had expired prior to the filing of the Petition for Revocation in this case. Our decision is not that the new Code is controlling but that Ark. Stat. Ann. § 41-1206 (3) reduced the prior law to exactness in the matter of when a suspended sentence commences to run upon release from a period of confinement. Although it is included in the Arkansas Criminal Code, it is not a new manner of computing the running of time but clarifies the law as it existed prior to enactment of the Arkansas Criminal Code.

Reversed and dismissed.

HARRIS, C.J., dissents.

Charles Edward MARSHALL *v.* STATE of Arkansas

CR 78-199 578 S.W. 2d 32

Opinion delivered March 12, 1979
(Division I)

James E. Davis, for appellant.

Steve Clark, Atty. Gen., by: *Ray Hartenstein,* Asst. Atty. Gen., for appellee.

JOHN I. PURTLE, Justice. Appellant entered a guilty plea to aggravated robbery in the Miller Circuit Court upon the understanding his attorney and the state had plea bargained for a 5-year sentence. The court, as it had the authority to do, rejected the agreed sentence of 5 years and sentenced appellant to a term of 20 years. Subsequently, appellant

petitioned, pursuant to Rules of Crim. Proc., Rule 37, to vacate or modify the sentence. We granted the relief in *Marshall* v. *State,* 262 Ark. 726, 561 S.W. 2d 76 (1978), because the record was absolutely silent with reference to the admitted plea agreement. The state was given the option of reducing the sentence to 5 years or conducting a new trial. The state elected to try the case again.

Appellant again entered a guilty plea but without an agreement by the state as to the term to be recommended. On April 25, 1978, the court sentenced appellant to a term of 35 years. Again, pursuant to Rule 37, appellant moved for a reduction of sentence which was denied by the trial court on August 23, 1978. This appeal is from the order denying the motion for reduction of sentence following the second sentence for a term of 35 years.

Appellant contends he was denied due process of law, as guaranteed by the Fourteenth Amendment to the Constitution of the United States, by imposition of the 35-year sentence.

The question before us is whether a second plea or verdict may result in a greater sentence than that decreed by the first conviction after it has been set aside as a result of a successful appeal by the defendant. Appellant vigorously contends it would be a violation of the due process clause secured by the Fourteenth Amendment to the Constitution of the United States, at least as it is applied to the case before us. The state argues with equal vigor that there has been no such violation here. Both cite precedent in support of their respective contentions. We have examined the cases cited and find they are accurately quoted, at least to the extent relied upon by the parties. We might say both parties well presented their arguments.

We are to decide to what extent, if any, the Fourteenth Amendment limits imposition of second sentences after the first is set aside. The United States Supreme Court has held that the Fifth Amendment guarantee against double jeopardy may be enforced through the Fourteenth Amendment. The Fifth Amendment was held in *Benton* v. *Maryland,* 395 U.S.

784 (1969), to guarantee three separate classes of protection: (1) Protection against a second prosecution for the same offense after acquittal; (2) protection against a second prosecution for the same offense after conviction; and (3) protection against multiple punishments for the same offense. These three prohibitions are protected by both the Fifth and Fourteenth Amendments to the Constitution of the United States. The third prohibition above-listed is the basis of the problem here presented. It would clearly be a violation of basic constitutional guarantees to fail to allow full credit for any time served pursuant to a prior sentence upon pronouncement of a second sentence for the same offense.

We do not think the Fifth Amendment, as applicable to the states through the Fourteenth Amendment, absolutely prohibits a greater sentence on a second trial after the first sentence has been set aside because the slate of the accused has been wiped clean and he stands as through he had never been tried. *United States* v. *Tateo,* 377 U.S. 463 (1964). It makes no difference whether the attack setting aside the conviction is direct or collateral. *Robinson* v. *United States,* 324 U.S. 282 (1945). Of course, his slate has not been wiped clean as to any part of the sentence served, and the only way to wipe it nearly clean is to guarantee credit for any time served on the prior sentence(s).

However, the "more severe" sentence is not so easily disposed of. Naturally, if the sentence is the same or "less severe" the accused has no complaint. It is only when a greater sentence is imposed that this question arises. Appellant received a more severe sentence, by 15 years, for the same crime. Whether a constitutional guarantee has been violated depends upon a combination of variables peculiar to the individual case. Every case must be examined upon its own particular circumstances. There is no absolute constitutional guarantee that the same or lesser sentence must be imposed upon a subsequent trial. Cases cited by appellee reveal circumstances which allow a more severe sentence to be imposed uoon a subsequent sentence.

When, then, may a more severe sentence not be imposed? We state unequivocally that a more severe sentence

may not be imposed because of any vindictiveness of the court arising from the convicted party successfully appealing the first sentence. This would clearly be violative of the due process clause of the Fourteenth Amendment. We believe the rule has been reduced to the lowest common denominator in *North Carolina* v. *Pearce,* 395 U.S. 711 (1969), wherein it is stated:

> . . . we have concluded that whenever a judge imposes a more severe sentence upon a defendant after a new trial, the reasons for his doing so must affirmatively appear. Those reasons must be based upon objective information concerning identifiable conduct on the part of the defendant occurring after the time of the original sentencing proceeding, and the factual data upon which the increased sentence is based must be made part of the record, so that the constitutional legitimacy of the increased sentence may be fully reviewed upon appeal.

The record before us simply does not fulfill the above requirements. There is no evidence at all of appellant's conduct subsequent to the original sentencing proceeding. The only additional information relative to the crime is the statement by the court that the victim was still taking medicine. There is no indication that the appellant is less credible or the crime more severe. Neither is there any evidence to indicate that the trial judge was punishing appellant for having successfully appealed his first sentence, nor in any manner showing vindictiveness.

We note that in *Pearce* the dissent would prohibit a greater sentence upon a second guilty plea or conviction as a violation of the double jeopardy clause of the Fifth Amendment. We do not go that far but do hold that, in view of the particular circumstances of this case, the sentence imposed must be reduced to 20 years, based upon the record before us. Therefore, the case is remanded to the Miller County Circuit Court for reduction of the sentence, as stated herein, with full time served on both sentences to be credited.

Affirmed as modified.

We agree. HARRIS, C.J., and GEORGE ROSE SMITH and BYRD, JJ.

Charles Edward BATEMAN *v.* STATE of Arkansas

CR 78-222 578 S.W. 2d 216

Opinion delivered March 19, 1979
(Division I)

Tom Emerson Smith and *Anthony Wayne Emmons,* Memphis, Tenn., for appellant.

Steve Clark, Atty. Gen., by: *Alice Ann Burns,* Asst. Atty. Gen., for appellee.

GEORGE ROSE SMITH, Justice. Bateman, after having first been convicted in a federal court for transporting certain stolen firearms from Mississippi County, Arkansas, to Memphis, Tennessee, was charged in the state court with theft by receiving the same firearms in Mississippi County. His plea of double jeopardy was overruled, and he was convicted by a jury. He now contends that the plea should have been sustained.

The State in its brief does not dispute the appellant's statement of the essential facts: "It is uncontroverted that both prosecutions arose out of one series of events where the Appellant received stolen firearms in Mississippi County, Arkansas, and transported them to Memphis, Tennessee, and there disposed of them." It is also conceded by the State that the federal case resulted in a conviction under 18 USC § 922 (i), which makes it unlawful "for any person to transport or ship in interstate or foreign commerce, any stolen firearm or stolen ammunition, knowing or having reasonable cause to believe that the firearm or ammunition was stolen." By comparison, under the state statute a person commits the offense of theft by receiving "if he receives, retains, or disposes of stolen property of another person, knowing that it was stolen, or having good reason to believe it was stolen." Ark. Stat. Ann. § 41-2206 (Repl. 1977).

At one time the same conduct could give rise to identical federal and state offenses, because the offenses were deemed to have been committed against different sovereigns, but that view no longer prevails. Our General Assembly, in enacting the Criminal Code of 1976, provided that when the same conduct constitutes an offense within concurrent federal and state jurisdiction, a federal conviction or acquittal is an affirmative defense to a state prosecution unless:

> (a) the offense of which the defendant was formerly convicted or acquitted and the offense for which he is subsequently prosecuted each requires proof of a fact not required by the other and the law defining each of the offenses is intended to prevent a substantially different harm or evil. Ark. Stat. Ann. § 41-108.

Neither of the exceptions defined in subparagraph (a) of the statute exists here. First, both the federal and state statutes are aimed at the same evil, the traffic in stolen property. It cannot be said that the intent of the two statutes is substantially different as far as the evil to be prevented is concerned.

Second, it certainly can be argued that the federal statute requires proof of a fact not required by the state law; that is, that the stolen property be a firearm transported in interstate commerce. But the converse is not true. The state law applies to the act of receiving, retaining, or disposing of *any* stolen property, which necessarily includes a firearm but does not add any *new* fact to the federal definition. Traffic in stolen firearms is an offense under both statutes. The State argues, however, that the state statute does require proof of a new fact, in that under the Criminal Code as originally adopted, which applies to this case, theft by receiving was a Class C felony only if the value of the stolen property was less than $10,000 but more than $100. Act 280 of 1975, § 2206. Value, however, goes only to the punishment, not to the definition of the offense. Identical offenses under state and federal law would not be different merely because the punishments were different.

Our decisions in the two *Journey* appeals are distinguishable, because there the federal prosecution had resulted in an acquittal. *Journey* v. *State,* 257 Ark. 1007, 521

S.W. 2d 210 (1975); *Journey* v. *State,* 261 Ark. 259, 547 S.W. 2d 433 (1977). In the first opinion we pointed out that Journey's double jeopardy argument would have been more logical if he had been convicted rather than acquitted under the federal indictment. In the second appeal we did not find that the Criminal Code of 1976 changed an earlier statute sufficiently to require us to reach a different result in the two appeals. Here, however, there was a conviction in the federal court; so the reasoning in the *Journey* case does not control.

Reversed.

We agree. HARRIS, C.J., and BYRD and PURTLE, JJ.

Guy MOON, Jr. *v.* Virginia MOON

78-307 578 S.W. 2d 203

Opinion delivered March 19, 1979
(Division II)

Arnold, Hamilton & Streetman, for appellant.

Bart Mullis, for appellee.

JOHN A. FOGLEMAN, Justice. Appellant contends that an order of the chancery court awarding his wife, appellee here, temporary alimony and attorney's fees should be reversed because of lack of jurisdiction of the parties and the subject matter. The question of jurisdiction was raised by appellant's motion, on special appearance, to dismiss appellee's suit for divorce filed in the Chancery Court of Jefferson County. After an evidentiary hearing on the motion, the chancellor denied it and granted appellee temporary alimony and attorney's fees. Since we are unable to say that the chancellor's holding was clearly against the preponderance of the evidence, we affirm.

In his motion, appellant alleged that the parties had lived continuously in Chicot County for a period of ten years, that they had never resided in Jefferson County and that appellee was not, at the time of filing her complaint, a bona fide resident of Jefferson County.

At the outset, we point out that one questioning the jurisdiction of the court by motion to dismiss bears the burden of proving the pertinent facts whenever the disposition of the motion depends upon the introduction of testimony. *Running* v. *Southwest Freight Lines, Inc.,* 227 Ark. 839, 303 S.W. 2d 578; *Arkansas Land & Cattle Co.* v. *Anderson-Tully Co.,* 248 Ark. 495, 452 S.W. 2d 632; *Nix* v. *Dunavent,* 249 Ark. 641, 460 S.W. 2d 762; *Williams* v. *Edmondson,* 257 Ark. 837, 520 S.W. 2d 260; *Hawes Firearms Co.* v. *Roberts,* 263 Ark. 510, 565 S.W. 2d 620.

Virginia Moon testified that she resided at Sherill with her niece Debbie Chaddick. Other relevant testimony by her may be summarized as follows:

> I came to Pine Bluff about July 21 or 22 because I had a family here and needed a place to live. I was quite upset and I just came to stay with my niece for a few days. I intend to stay in Pine Bluff. I want to reside here. I want to send my two younger children to school here. I have checked on obtaining an apartment but did not have the necessary money to make a deposit. I have checked on employment and financial aid to go to school, because I have been out of school for 20 years and I have never worked. It was my intention when I came to Jefferson County to reside here and continue to do so, no matter what's done in regard to the divorce. I could have filed for divorce in Chicot County, but where would I have found employment, a school to attend or a place to live? Before coming here, I had never lived in Jefferson County. My mother lives in Chicot County and I have a sister who is living in Chicot County, but is moving to Ashley County. After I separated from my husband in June, I went to stay with my mother in Chicot County. After she, my aunt and I went to California for a few days, we returned about July 19th and I spent a Friday, Saturday, Sunday and Monday with Mr. Moon and the children. We all went to church together on July 23. I left on July 26, or approximately that date. I had only been in Pine Bluff two days when I filed for this divorce. In the last two years, I have filed three other divorce actions against Mr. Moon in Chicot

> County. Each one of them was dismissed and I went back to my husband. When I returned from California, my husband took the keys for my 1977 Cadillac away from me and jacked the car up and drained the oil out of it, so I could not use it. Either the day after my husband put black and blue marks on me, or the following day, I grabbed up the keys to a pickup truck and got out of there. I did not bring any clothes, furniture or other personal belongings with me, because if he had seen me packing, there would have been another fight. It is my intention to get my belongings and bring them to Jefferson County.

This suit was filed on July 28, 1978. It was verified before a notary public in Lincoln County. It is clear that these parties had resided in Chicot County during all the ten years of their marriage. Appellant testified that he did not physically abuse his wife on the day she said that he did and that he was only trying to protect himself from appellee's assault. He said that her relatives in Jefferson County hadn't lived there very long. He stated that he couldn't read appellee's mind and didn't know what she was going to do when she left.

We have held that the venue requirement in Ark. Stat. Ann. § 34-1204 (Repl. 1962) means that a divorce proceeding must be in the county of the plaintiff's domicile. *Smith* v. *Smith,* 219 Ark. 876, 245 S.W. 2d 207. No particular length of time is required for the establishment of a domicile, but there must be residence attended by such circumstances surrounding its acquirement as to manifest a bona fide intention of making it a fixed and permanent place of abode. *Smith* v. *Smith,* supra; *McLaughlin* v. *McLaughlin,* 193 Ark. 207, 99 S.W. 2d 571.

We have long recognized, in divorce cases, that one has the absolute and unqualified right to change his place of abode when he pleases, for any reason which prompts him to do so; and that he does change his place of abode when he removes himself from one place, with the intention of abandoning it as his place of abode, to another, where he expects to abide, without having the intention of returning to the place from which he removed and that his intent is controlling.

Hillman v. *Hillman,* 200 Ark. 340, 138 S.W. 2d 1051. A move which is not made with the intention, in good faith, to become a resident of the new place of abode is not sufficient to establish a domicile. *Hillman* v. *Hillman,* supra. In both *McLaughlin* and *Hillman,* we said the evidence was not sufficient to show an intention on the part of the plaintiff to permanently reside in the county chosen as a forum. *Smith* v. *Smith,* supra.

The question in this case resolves itself into an inquiry into the existence of a bona fide intention on the part of appellee. See *Feldman* v. *Feldman,* 205 Ark. 544, 169 S.W. 2d 866. The fact that Mrs. Moon had never before resided in Jefferson County is significant only because a previous residence there would have tended to support her declared intention. The brevity of her residence, of course, was relevant to her intention, but not controlling, in view of the fact that no particular length of time is required for the establishment of a domicile.

Appellant places his principal reliance upon *McLaughlin* v. *McLaughlin,* supra. There is quite a distinction between this case and that. In *McLaughlin,* the plaintiff wife testified that she left the county of marital domicile (Garland) and went to Little Rock for the purpose of bringing suit for divorce. This was the factor upon which this court's decision that she had not established a domicile in Pulaski County turned. *Feldman* v. *Feldman,* supra. See also, *Allen* v. *Allen,* 211 Ark. 335, 200 S.W. 2d 324, where we said that the plaintiff's testimony that he came to the county where the suit was filed largely destroyed other evidence indicating that he had established a domicile. Mrs. McLaughlin's declared intention was supported by the fact that she left her clothing and personal effects in a hotel room she had occupied *separately* from her husband in Garland County, with a special door lock, the key to which she retained. She did not remove these effects from the hotel room until nearly two weeks after her divorce suit was filed. Unlike this case, no particular reason was given for leaving these personal effects in her previous residence.

Appellee gave a reason for not having brought her personal effects to Jefferson County and for not having obtained

an apartment or separate dwelling place. She gave reasons for going to Jefferson County rather than remaining in Chicot County. Her testimony was the only testimony on most of the critical facts. The question of her good faith is largely one of her credibility. Insofar as credibility is concerned, we must defer to the superior position of the chancellor who saw and heard her testify. In a case such as this, the chancellor's finding is persuasive. *Smith* v. *Smith,* supra. We cannot say that it was against the preponderance of the evidence.

The chancery court's order is affirmed.

We agree. HOLT, HICKMAN and PURTLE, JJ.

Sidney PARKER *v.* STATE of Arkansas

CR 78-158 578 S.W. 2d 206

Opinion delivered March 19, 1979
(Division II)

Thomas G. Montgomery, Public Defender, for appellant.

Steve Clark, Atty. Gen., by: *Catherine Anderson,* Asst. Atty. Gen., for appellee.

JOHN A. FOGLEMAN, Justice. Appellant argues seven points for reversal of his conviction of selling or delivering a controlled substance on April 14, 1977. They are:

I

THE TRIAL COURT ERRED IN OVERRULING THE DEFENDANT'S OBJECTION TO THE FORM OF THE PROSECUTOR'S VOIR DIRE REGARDING UNDERCOVER AGENTS.

II

THE TRIAL COURT ERRED IN ALLOWING THE PROSECUTION TO PROCEED ON THE THEORY OF AN ACCOMPLICE, WHILE THE

INFORMATION CHARGED THE APPELLANT AS PRINCIPAL.

III

THE TRIAL COURT ERRED IN PERMITTING THE POLICE OFFICER TO TESTIFY ABOUT HIS EFFORTS TO SET UP A "BIG BUY" UNRELATED TO THE CHARGE AGAINST THE DEFENDANT.

IV

AT THE CLOSING OF THE STATE'S CASE IN CHIEF, THE TRIAL COURT ERRED IN REFUSING THE DEFENDANT'S REQUEST FOR AN INSTRUCTION OF THE UNEXPLAINED FAILURE OF A PARTY TO PRODUCE A WITNESS, WHEN THE STATE HAD REFUSED TO CALL ITS UNDERCOVER AGENT TO TESTIFY.

V

THE TRIAL COURT ERRED IN ALLOWING THE PROSECUTION TO LEAD THE DEFENDANT'S WITNESS IN MATTERS BEYOND DIRECT EXAMINATION.

VI

THE TRIAL COURT ERRED IN DENYING DEFENDANT'S MOTION FOR DIRECTED VERDICT AFTER FOIL PACKAGE WAS FOUND TO CONTAIN NO EVIDENCE OF HEROIN.

VII

THE DEFENDANT WAS PREJUDICED BY THE PROSECUTOR'S CLOSING ARGUMENT.

I

Appellant objected to the prosecuting attorney's state-

ment during voir dire with reference to the state's use of undercover agents in controlled substance cases and his definition of an undercover agent on the ground that this was not a voir dire question but was testimony as to what an undercover agent does. The prosecuting attorney explained that he was laying a predicate and the objection was overruled. The inquiry then propounded to the prospective jurors pertained to the possibility of bias or prejudice against officers in that role, who might become witnesses in the case.

The extent and scope of voir dire examination of prospective jurors are matters lying within the sound judicial discretion of the trial court, the latitude of which is rather wide. Rule 32.2, Arkansas Rules of Criminal Procedure. *Finch* v. *State,* 262 Ark. 313, 556 S.W. 2d 434. *Lauderdale* v. *State,* 233 Ark. 96, 343 S.W. 2d 422. We will not reverse a ruling of the trial judge in permitting inquiries intended to elicit any possible bias or prejudice that might influence a venireman's verdict in the absence of a manifest abuse of that discretion. *Cooper* v. *Kelley,* 131 Ark. 6, 198 S.W. 94.

Appellant contends that the statement was "testimony" by the prosecuting attorney as to the character and credibility of the state's witnesses before they testified. The trial judge, who saw and heard the voir dire examination, was in the best possible position to judge whether it was conducted in good faith or was designed to create a bias or prejudice favorable to the state. *Lauderdale* v. *State,* supra. In passing on the good faith of the interrogator, the trial court necessarily must exercise a large amount of discretion. *Bethel* v. *State,* 162 Ark. 76, 257 S.W. 740. We cannot say that there was a manifest abuse of discretion in this instance.

II

The position of appellant on this point is somewhat confusing. He was charged as a principal. At some point during the examination of Robert York, a state policeman who worked primarily in an undercover capacity, as he was testifying about an alleged transaction with appellant, appellant's attorney (who is not representing him on this appeal) interposed an objection to allowing the state to

amend its information or to try appellant as an accomplice. The attorney said that he had relied upon the language in the information and the opening statement of the deputy prosecuting attorney to the effect that appellant had delivered heroin.

York had testified that, when he expressed an interest in purchasing some heroin, Parker had said that he could get it for York if York would take him to the Ramada Inn, and that, after he had taken Parker there, Parker got out of the vehicle in which they had been travelling, went between some hallways and into the interior area of the motel and then returned and delivered to York a substance (later analyzed as heroin) and accepted $15 from York. The objection was based upon the fact that appellant was not charged with having stood by, aided, abetted or assisted another in the delivery of heroin and, there had been nothing to indicate that Parker was to be tried as an accessory. The attorney also pleaded surprise and moved for a continuance if the state was to be allowed to amend its information to charge that his client was an accomplice or accessory. The prosecuting attorney insisted that he was not asking that the information be amended, but he noted that, in a telephone conversation prior to the trial, Parker's attorney had said that, in a technical sense, his client had not made a delivery, in that value was not received and his client was simply an errand boy between the police officers and the real heroin dealer. The prosecuting attorney simply took the position that the jury should be instructed as to accomplice or accessory liability and asserted that, when Parker's attorney pursued the accomplice theory in voir dire examination, he had informed the trial judge that the state would request a charge to the jury on accomplice liability.

At the conclusion of all the evidence, the trial judge gave a correct instruction stating that a person is criminally liable for the conduct of another, when he is an accomplice to the other in the commission of a crime and defining an accomplice in the language of Ark. Stat. Ann. § 41-303 (Repl. 1977). This definition includes one who solicits another to commit an offense, or who aids or attempts to aid another in planning or committing it. This instruction was given over the objection of appellant on the grounds heretofore stated

and on the ground that the instruction did not require that it be shown that the defendant must have received something of value before he could be found guilty as an accomplice.

Appellant argues here that he first became aware that a conviction was sought on the basis that he was an accomplice, rather than a principal, during York's testimony, and that the offense charged was not stated with that degree of certainty required for pronouncement of a judgment of conviction or to enable him to plead the judgment in bar of further prosecution for the same crime.

In the first place, appellant relies upon such cases as *Slay* v. *State,* 161 Ark. 90, 255 S.W. 292 and *State* v. *Masner,* 150 Ark. 469, 234 S.W. 474, which were decided before the adoption of Initiated Act No. 3 of 1936, which materially changed the requirements as to allegations which must be included in an indictment or information. It is not necessary that the indictment state the act or acts constituting the offense, unless the offense cannot be charged without doing so. It is only necessary that the state file a bill of particulars setting out the act or acts on which it relies, when requested to do so by the defendant. Ark. Stat. Ann. § 43-1006 (Repl. 1977). See *Bosnick* v. *State,* 248 Ark. 846, 454 S.W. 2d 311; *Bryant* v. *State,* 208 Ark. 192, 185 S.W. 2d 280. If the allegations of the information were not sufficient to enable appellant to properly prepare his defense, he should have requested a bill of particulars. *Craig* v. *State,* 195 Ark. 925, 114 S.W. 2d 1073. There is nothing in the abstract of the record to indicate that such a request was made and appellant is in no position to object here to the state's failure to file one. *Smith* v. *State,* 231 Ark. 235, 330 S.W. 2d 58; *Budd* v. *State,* 198 Ark. 869, 131 S.W. 2d 933. Even if there had been such a request, it was only necessary that the bill of particulars state the act relied upon with sufficient certainty to apprise the defendant of the specific crime with which he is charged. The information charged Parker with the crime of violation of the Arkansas Controlled Substances Act and stated that it was committed as follows:

> The said defendant on the 14th day of April, 1977, in Crittenden County, Arkansas, did unlawfully and

feloniously sell or deliver a controlled substance, to-wit: heroin, in violation of the Arkansas Controlled Substances Act, against the peace and dignity of the State of Arkansas.

If the information contained all that was required by statute prior to the adoption of Act 3, appellant would not have been entitled to a bill of particulars, because the information itself was a bill of particulars. *Bryant* v. *State,* supra. The information here was sufficient even under the cases relied upon by appellant. The acts constituting the offense are stated as fully as were those in *Masner.* And in *Slay,* an essential element of the offense of perjury was omitted. Here the information was sufficient because all the essential elements of the crime were covered in the statement of the acts constituting the offense. *Ragsdale* v. *State,* 222 Ark. 499, 262 S.W. 2d 91; *Silas* v. *State,* 232 Ark. 248, 337 S.W. 2d 644, cert. den. 365 U.S. 821, 81 S. Ct. 705, 5 L. Ed. 2d 698.

Even under the statutes governing prior to Initiated Act No. 3, the rigidity of the requirements of particularity in detailing the acts constituting the offense charged were relaxed, so that the particular circumstances of the offense were not required to be charged unless they were necessary to constitute a complete offense, and where the offense was charged with sufficient certainty to enable the court to pronounce a judgment of conviction, the indictment was sufficient. *Bramlett* v. *State,* 184 Ark. 808, 43 S.W. 2d 364. Since the abolition of the distinction between principals and accessories before the fact, an allegation in the information that an accessory committed the crime is sufficient, even though he was only present, aiding, abetting and assisting. *Sloan* v. *State,* 210 Ark. 739, 197 S.W. 2d 757; *Hunter* v. *State,* 104 Ark. 245, 149 S.W. 99. See also, Leflar, The Criminal Procedure Reforms of 1936 — Twenty Years After, 11 Ark. Law Rev. 117. The allegations in the information were certainly sufficient basis for a judgment of conviction, even if it could be said that appellant was an accessory only. *Lewis* v. *State,* 220 Ark. 914, 251 S.W. 2d 490; *Fleeman* v. *State,* 204 Ark. 772, 165 S.W. 2d 62; *Burns* v. *State,* 197 Ark. 918, 125 S.W. 2d 463.

It is difficult to see how appellant could claim surprise.

There is no distinction between principals on the one hand and accomplices on the other, insofar as criminal liability is concerned. Ark. Stat. Ann. §§ 41-301 — 41-303 (Repl. 1977). As far as we can tell from this record, the state has always contended, and still contends, that Parker was a principal. Under the Arkansas Criminal Code, the word accomplice does not imply (as "accessory" once did) that another person is the principal in a criminal transaction. When two or more persons assist one another in the commission of a crime, each is an accomplice and criminally liable for the conduct of both. Each participant is criminally liable, ultimately, for his own conduct, but he cannot disclaim responsibility because he did not personally take part in every act that went to make up the crime as a whole.

The state's evidence tended to show that Parker approached the vehicle in which York and two confidential informants had been cruising the streets and asked if the occupants were looking for "something for the head" and, when York said that he was "looking to cop a $50 paper of heroin," made the proposal that York take him to the Ramada Inn. The offense with which Parker was charged does require actual, constructive or attempted transfer of a controlled substance in exchange for money or something of value, but the fact that the person making the transfer acts as the agent of either the seller or the purchaser does not remove the transfer from the coverage of Ark. Stat. Ann. § 82-2601 (f). *Curry* v. *State,* 258 Ark. 528, 527 S.W. 2d 902; *Fant* v. *State,* 258 Ark. 1015, 530 S.W. 2d 364. See also, *Foxworth* v. *State,* 263 Ark. 549, 566 S.W. 2d 151. We do not see anything which would prevent appellant from pleading this conviction in bar of a later prosecution for his participating in the delivery of heroin in this case.

III

In arguing this point, appellant overlooks (and even failed to abstract) the cross-examination of York by appellant's attorney, just prior to the redirect examination by the prosecuting attorney, during which the questions to which he now objects were asked. Appellant's attorney had asserted in his opening statement that Parker's only participation in the

transaction was to serve as a delivery boy between the police and a man in the Ramada Inn who was the "true seller," and that the state had done nothing to catch the person who had the substance that Parker delivered to the officer. In pursuing this theory, Parker's attorney asked York what attempt he had made to ascertain who was in the Ramada Inn providing the heroin for "these people" to deliver. York responded that he and those assisting him attempted to make "a larger quantity of buy" and were going to attempt to set up "a quantity buy" with a large sum of money in order to "flush them out if someone was there." Upon further questioning, he admitted that this purpose was never accomplished. Parker's attorney then inquired whether the name Vince Tyler meant anything to the officer, whether York had made any attempt to ascertain whether Vince Tyler was involved in the sale of the heroin to him, whether Parker was the only person from whom York had "made a buy" and what other persons had been charged. Objection was made to this question:

> Q. Officer York, you were attempting to explain why you didn't accomplish a big buy, something about a big buy, you were trying to set up a big buy, what was that all about?

After appellant's objection was overruled, York gave the following answer:

> A. We were attempting, like I said, to set up a quantity buy to see if we could flush out anybody that, if there was somebody else involved, at the Ramada Inn, from information that we were trying to gather, without pressuring these subjects that we were buying from and scaring them off from selling to us. We had learned that there may have been something going on. We didn't know for sure. We were trying to set up a possible three or four hundred dollar buy of heroin, through one of these — we didn't have anybody in mind in particular — just someone we were buying from going to the Ramada Inn. This was not accomplished because they couldn't get it set up because they wanted us to front the money, wanted us to give the money and then they would go in and buy the stuff and bring it to us, and we didn't want that because that wouldn't give us a case

> against the person, if there was anybody selling any quantity.

No objection was made to later questions and answers which appellant now says were improper, so we do not consider them.

Reply to new matter brought out on cross-examination is the purpose of redirect examination and examination for that purpose is a matter of right, though its extent is subject to control in the trial court's discretion. McCormick on Evidence (2d Ed.), p. 64, § 32. One cannot complain of evidence developed by his adversary on redirect examination about matter injected into the case on cross-examination. *Stovall* v. *State,* 233 Ark. 597, 346 S.W. 2d 212. The scope and extent of redirect examination lie within the sound judicial discretion of the trial judge. 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 on cross-examination, even though the evidence brought out on redirect examination would not have been admissible on direct examination. *Allen* v. *State,* 260 Ark. 466, 541 S.W. 2d 675. The redirect examination in *Haight* v. *State,* 259 Ark. 478, 533 S.W. 2d 510, relied upon by appellant, was an attempt to bolster the credibility of the witness and not an explanation of matter brought out on cross-examination, so it was beyond the scope of cross-examination. We find no abuse of discretion here.

IV

Appellant requested the following instruction:

> You are instructed that the unexplained failure of a party to produce a witness with special knowledge of a transaction, within the power of the party to do so, raised the presumption that the absent witness should testify against the party.

After the conclusion of the testimony of York and another witness who assisted York as an undercover agent, the

prosecuting attorney stated that he elected not to call Bobby Walden, an undercover agent, because his testimony would be cumulative to that of York and Jones. The state rested without calling Jones. Parker's attorney had stated that the instruction set out above should be given, even before the state rested, and the judge then advised appellant's attorney that he would be permitted to call Walden as an adverse witness and to examine him as such. See Ark. Stat. Ann. § 28-1001, Rule 611 (c) (Supp. 1977). Appellant did call Walden as a witness.

There was no error. There was not an unexplained failure by the state to produce this witness. The witness was produced and his identity made known to defense counsel, who subpoenaed him. Where, as here, there is no indication that the testimony of the witness would be anything other than cumulative and the knowledge of the witness is not special, there is no basis for a presumption, or even an inference, that he would testify adversely to the party who did not call him or with whom he is identified. *U.S.* v. *Antonelli Fireworks Co.,* 155 F. 2d 631 (2 Cir., 1946). Cf. *Saliba* v. *Saliba,* 178 Ark. 250, 11 S.W. 2d 774. Any other rule would require a party to call all eyewitnesses to avoid the impact of the presumption. *De Gregorio* v. *U.S.,* 7 F. 2d 295 (2 Cir., 1925). Once the state has produced sufficient evidence to support a finding of guilty, it has no obligation to present further cumulative evidence. *U.S.* v. *Higginbotham,* 451 F. 2d 1283 (8 Cir., 1971). See also, *Corning Bank & Trust Co.* v. *Foster,* 189 Ark. 655, 74 S.W. 2d 797. Furthermore, there is no basis for an unfavorable presumption or inference where the witness is equally available to both parties, particularly when, as here, he is present and has been subpoenaed by the party seeking the benefit of the inference. *Industrial Mutual Indemnity Co.* v. *Perkins,* 81 Ark. 87, 98 S.W. 709; *U.S.* v. *Antonelli,* supra; *U.S.* v. *Higginbotham,* supra. See also, *Corning Bank & Trust Co.* v. *Foster,* supra. We also note that Parker's attorney had, before trial, taken the position that Walden was an indispensable witness for his defense.

Great caution should be exercised in giving an instruction such as that requested by appellant. *Wilson* v. *U.S.,* 352 F. 2d 889 (8 Cir., 1965). The jury instruction requested

would have been improper in this case. *U.S.* v. *Antonelli,* supra; *De Gregorio* v. *U.S.,* supra. Cf. *Henry* v. *Landreth,* 254 Ark. 483, 494 S.W. 2d 114. The failure to give the instruction would not necessarily preclude general argument by counsel as to why some witness was not called to the stand. *Wilson* v. *U.S.,* supra.

V

Appellant called Walden to the witness stand. His attorney examined this witness and established that he had been sitting with York, that the prosecuting attorney had known he was present since his arrival at the courthouse, that the prosecuting attorney had talked to him about the case, that he and York had discussed the facts and circumstances relating to the case against Parker, that he was paid by Crittenden County, that he was present when Parker delivered heroin to York, and that he didn't indicate to the prosecuting attorney that he did not want to be called as a witness, or give any reason why he should not be called.

Appellant's attorney objected that the prosecuting attorney was going beyond the scope of the direct examination when the prosecuting attorney began to question Walden about the nature of his contract with the authorities. The trial judge then cautioned the prosecuting attorney to try to avoid leading the witness but stated that inquiry about the details of the particular transaction would be permitted, with a minimum of leading. No objection to leading questions was made by appellant, so we will not consider the matter on appeal. In any event, there does not appear to have been any abuse of the trial court's discretion.

Appellant's objection about the scope of the cross-examination is not well taken. Generally, the scope of cross-examination has been held to be a matter resting largely within the discretion of the trial judge, whose exercise of that discretion will not be disturbed on appeal in the absence of abuse thereof. *Clark* v. *State,* 246 Ark. 1151, 442 S.W. 2d 225; *Bartley* v. *State,* 210 Ark. 1061, 199 S.W. 2d 965. Under Ark. Stat. Ann. § 28-1001, Rule 611 (b) (Supp. 1977), a trial court may, in the exercise of its discretion, permit inquiry into

matters outside the scope of direct examination. We find no abuse of discretion in this situation.

VI

During the examination of Gene Bangs, a chemist employed in the Drug Section, State Crime Laboratory, Department of Public Safety, a foil packet was introduced into evidence. Bangs testified that it contained the remains of a substance which had been originally packaged in the foil when he received it for chemical testing. He stated that he had taken a portion of this substance from the foil packet and, after making tests, determined that it was heroin. He said that there was less than one-tenth of a gram of the substance in the packet when he received it.

Appellant does not question the chain of custody between him and the chemist and the evidence established it rather clearly. Appellant's attorney was granted permission to display the contents of the packet to the jury, but when he opened it in the presence of the trial judge and the prosecuting attorney, it was empty. Appellant then moved for a directed verdict, because the absence of the remains of the substance had not been explained. The basis for the motion was that the state had failed to establish the corpus delecti.

There was no error in the denial of this motion. It was not essential to the establishment of the corpus delecti that the substance be introduced in evidence at all. In some situations it might be impossible to do so. For instance, the entire substance might be consumed in making tests. As appellant concedes, we have held that a witness in a criminal case may testify about tangible objects which are the subject of an alleged offense without the object ever being produced. *Washington* v. *State,* 254 Ark. 121, 491 S.W. 2d 594; *Meyer* v. *State,* 218 Ark. 440, 236 S.W. 2d 996.

It certainly was not essential to the meeting of the state's burden of proving the corpus delecti on the charge of delivery of a controlled substance that the substance itself be produced in court, if a person qualified to do so had analyzed it and found it to be that on which the charge was based, or if one

suffiently experienced with the substance could give testimony indicating that it was, indeed, that substance. *People* v. *Fernandez,* 131 Cal. App. 2d 565, 280 P. 2d 808 (1955); *People* v. *Partin,* 254 Cal. App. 2d 89, 62 Cal. Rptr. 59 (1967); *Slettvet* v. *State,* 258 Ind. 312, 280 N.E. 2d 806 (1972). Cr. *Sweatt* v. *State,* 251 Ark. 650, 473 S.W. 2d 913.

The disclosure that the packet was empty had a bearing on the credibility of the witnesses and the weight to be given to their testimony, so it would seem that this development would have been advantageous to the appellant and no doubt was the subject of argument to the jury. The disclosure did not operate to obliterate the evidence pertaining to the identity of the substance delivered to York, so there was no error in the denial of the directed verdict.

VII

During the opening argument to the jury by the deputy prosecuting attorney, appellant objected to the statement that the drug heroin was abundant on the streets of West Memphis, and contends that this was a matter outside the record and unsupported by the evidence. We do not agree. Of course, the prosecution is limited in its argument to the evidence in the record, logical inferences and deductions therefrom and matters of which judicial notice can be taken. *Williams* v. *State,* 259 Ark. 667, 535 S.W. 2d 842; *Long* v. *State,* 260 Ark. 417, 542 S.W. 2d 742; *Dillaha* v. *State,* 257 Ark. 476, 517 S.W. 2d 513. We cannot say that this statement by the state's attorney was totally unsupported by evidence. One of the witnesses who had served as a confidential informer testified that he had found drugs to be easily obtainable in West Memphis. There was testimony by York, some of which was brought out during appellant's cross-examination, that numerous purchases had been made of other persons by him while he was working in West Memphis.

Appellant also objected to the deputy prosecuting attorney's statement that appellant's attorney was going to argue that he was trying to inflame the jurors and added, "Maybe I am because I am inflamed. If you are not inflamed, then something bad is wrong with our system." When ad-

monished by the court that he was bordering on trouble and could rephrase the statement, the deputy prosecuting attorney said:

> Maybe I am over zealous in my argument to you today. Maybe the better word is "concerned." I am concerned, and I know some of you have families and children, and you have heard the testimony in this case about the abundance of drugs in West Memphis, and how easy they are to get. Now, I am concerned about it and I hope as each one of you is sitting there that you are concerned about it enough to go back and punish this man severely enough to not only keep him off the streets, to prevent him from getting out here and trafficing in heroin and seeing that people get it so they can take it and shoot up or snort or whatever you do with it, but I am also concerned in setting an example of deterrents to others. *** . . . [W]hen we get an opportunity and we are able to go out and make a case on a man and bring it up here to you in an iron clad open and shut case like we have got today, when he himself admits it, when we are able to make a case like that and bring it up here for you ladies and gentlemen of this jury, citizens of this community, and you all don't do something about it, then I submit to you that we are going to be in bad shape.

The trial judge has a very broad latitude of discretion in supervising and controlling the arguments of counsel and his action is not subject to reversal unless there is manifest gross abuse of that discretion or the matter complained of is a statement of the attorney's opinion made only to arouse passion and prejudice of the jury, and which necessarily has that effect. *Parrott* v. *State,* 246 Ark. 672, 439 S.W. 2d 924; *Stanley* v. *State,* 248 Ark. 787, 454 S.W. 2d 72; *Perry* v. *State,* 255 Ark. 378, 500 S.W. 2d 387; *Willis* v. *State,* 220 Ark. 965, 251 S.W. 2d 816. Since the offensive language was immediately withdrawn at the court's suggestion and counsel thereafter fully explained his real meaning and no further objection was made, there was no abuse of the trial court's discretion. *Kindle* v. *State,* 165 Ark. 284, 264 S.W. 856; *Nix* v. *State,* 124 Ark. 599, 187 S.W. 308; *Setzer* v. *State,* 110 Ark. 226, 161 S.W. 190;

Satterwhite v. *State,* 82 Ark. 64, 100 S.W. 70; *Henshaw* v. *State,* 67 Ark. 365, 55 S.W. 157. It is also significant that the trial judge had instructed the jury that closing arguments of attorneys are not evidence and that arguments having no basis in the evidence should be disregarded. See *Stanley* v. *State,* supra. We do not find the remarks withdrawn and explained to have necessarily aroused the jurors' passion and prejudice.

There was no abuse of the trial court's discretion in the overruling of appellant's objection to the prosecuting attorney's statement that, unlike appellant's attorney, he didn't think he was possessed of the ability to use rhetorical speech making, or in ignoring an objection to the prosecuting attorney's remarks that the defense of the charge was clever, brilliant and smart and that appellant's attorney was a very skilled and very articulate lawyer. In view of the fact that appellant's entire defense was based upon his contention that Tyler was the "true seller" and real culprit in the transactions, there was no abuse of the trial court's discretion in overruling an objection to the prosecuting attorney's statement: "Tyler is not on trial here today. His trial will be some other day." We note that during appellant's cross-examination of York about Tyler, the witness responded that Tyler had been arrested. The prosecuting attorney's statement was a reasonable inference to be drawn from the testimony.

The judgment is affirmed.

We agree. HARRIS, C.J., and HOLT and HICKMAN, JJ.

Hubert Lee PATRICK, Jr. *v.* STATE of Arkansas

CR 78-213 576 S.W. 2d 191

Opinion delivered March 19, 1979
(In Banc)

Guy Jones, Jr., for petitioner.

Steve Clark, Atty. Gen., by: *Ray Hartenstein,* Asst. Atty. Gen., for respondent.

JOHN A. FOGLEMAN, Justice. Petitioner Hubert Lee Patrick, Jr. was charged with the offense of murder in the second degree under Ark. Stat. Ann. § 41-2206 (Repl. 1964) by information filed by the prosecuting attorney on September 15, 1978. He was charged with having beaten the head of Charles W. Fitzgerald against a concrete wall on the 5th day of July, 1973. It was also alleged in the information that Fitzgerald died on January 20, 1974 as a result of this beating. Patrick's motion to dismiss on the ground that prosecution was barred by the statute of limitations was denied by the trial court. Thereafter, Patrick filed this petition upon the same ground. We find that the circuit court lacks jurisdiction because of the bar of the statute of limitations and that the writ should be granted.

Of course, the alleged offense must be prosecuted under § 41-2206 because both the beating and the death were alleged to have occurred before the effective date of the Arkansas Criminal Code. Prior to the adoption of the code, the statute of limitations on the prosecution of murder in any degree was governed by Ark. Stat. Ann. § 43-1602 (Repl. 1977) since it was a felony not "punishable with death." See Ark. Stat. Ann. § 41-2228 (Repl. 1964). The sole question on this appeal is the effect of the provisions of the Arkansas Criminal Code on this statute of limitations. If the statute of limitations applicable under this code applies, this prosecution is not barred. See Ark. Stat. Ann. § 41-104 (Repl. 1977). If it does apply, then § 43-1602 governs and the trial court is without jurisdiction of the alleged offense. *Savage* v. *Hawkins,* 239 Ark. 658, 391 S.W. 2d 18.

Ark. Stat. Ann. § 41-102 (3) (Repl. 1977) provides that the provisions of the Arkansas Criminal Code do not apply to the prosecution for any offense committed prior to the effective date of the code, i.e., January 1, 1976. Ark. Stat. Ann. § 41-101 (Repl. 1977). Sec. 41-102 (3) further states that such an offense shall be construed and punished in accordance

with the law existing at the time of the commission of the offense. Although there is a provision that a defendant in a prosecution for an offense committed prior to the effective date of the code may elect to have the construction and application of any defense to the prosecution governed by code provisions, the state has no election. Ark. Stat. Ann. § 41-102 (4) (Repl. 1977). Patrick has not made this election. Furthermore, the statute of limitations is not a defense under the code. See Ark. Stat. Ann. § 41-110(3), -104 (Repl. 1977). Thus the statute of limitations in the code clearly is jurisdictional, as were its predecessors, but it has no other role.

When we view the plain language of the Criminal Code sections above cited, it seems quite clear the new statute of limitations had no application to this prosecution. This view is consistent with the fact that there has been no specific repeal of § 43-1602. Hundreds of other sections were repealed by Act 928 of 1975, the principal purpose of which was to "Clarify the Effect of the Arkansas Criminal Code upon certain Statutes." That act was expressly made effective on the effective date of the code. If the General Assembly had intended that the preexisting statute of limitations on the prosecution of felonies be superseded by the code provision, it would have been a very simple matter to have included § 43-1602 in the list of statutes repealed. The general repealer in Act 280 of 1975 does not eliminate § 43-1602 because there is no irreconcilable conflict when that section is applied only to offenses committed before the effective date of the Arkansas Criminal Code. If it were applicable to offenses committed after the effective date of the code, there would be an irreconcilable conflict, but this is not the case.

Both parties find support for their views in the commentary to § 41-104. It appears to us to be strictly neutral on the question presented here. In any event, we have previously said that, even though we find the commentary a highly persuasive aid to construction of the code, it cannot be controlling over the clear language of the statute. *Britt* v. *State,* 261 Ark. 488, 549 S.W. 2d 84. The language here is so clear that resort to statutory construction "crutches" is inappropriate.

The temporary writ of prohibition heretofore granted is made permanent.

Spencer KELLY *v.* STATE of Arkansas and Warren E. WOOD, Circuit Judge of the Sixth Judicial Circuit of the State of Arkansas, 2nd Division

78-303 578 S.W. 2d 566

Opinion delivered March 19, 1979
[Rehearing denied April 23, 1979.]

Bill Clinton, Atty. Gen., by: *Jesse L. Kearney* and *Alice Ann Burns,* Asst. Attys. Gen., for petitioner.

Haskins, Eubanks & Wilson, by: *Gary L. Eubanks,* for respondent.

CONLEY BYRD, Justice. In seeking this Writ of Prohibition, Petitioner Spencer Kelly, a state trooper, contends that a state trooper, as an officer of the State of Arkansas, cannot be sued for damages that result from an automobile collision with a state trooper car. Specifically, petitioner relies upon Ark. Const. Art. 5, § 20 which provides:

> "The State of Arkansas shall never be made defendant in any of her courts."

The facts giving rise to this controversy show that petitioner, while on his regular work shift, was driving his state patrol car along Pratt Road in Pulaski County with the intention of going to 4813 Baseline Road to have dinner with a friend. At the intersection of Pratt Road and Arch Street, petitioner failed to observe a stop sign and as a result thereof collided with an automobile being driven along Arch Street and occupied by Mr. and Mrs. Kenneth Mitchell.

In construing Art. 5 § 20, *supra,* with respect to what actions against an officer constitute an action against the State, *Hickenbottom* v. *McCain, Comm'r of Labor,* 207 Ark. 485, 181 S.W. 2d 226 (1944), we have stated:

> ". . . [W]here a suit is brought against an officer or agency with relation to some matter in which defendant represents the State in action and liability, and the State while not a party to the record, is the real party against which relief is sought so that a judgment for plaintiff, although nominally against the named defendant as an individual or entity distinct from the State, will operate to control the action of the State or subject it to liability, the suit is in effect one against the State and cannot be maintained. . . ."

It was also there pointed out that where the suit is against an officer to prevent him from doing an unlawful act to the injury of the complaining party, the officer cannot shield himself behind the fact that he is an officer of the State.

When considered in connection with what constitutes an action against the State, we have concluded that a negligence action for personal injuries brought against a state trooper for a violation of duty imposed upon him by law in common with all other people using the highways does not amount to an action against the State within the prohibition of Ark. Const. Art. 5, § 20.

Other jurisdictions have reached like results. See *Montanick* v. *McMillin,* 225 Iowa 442, 280 N.W. 608 (1938), where the court in quoting from *Delaney* v. *Rochereau,* 34 La. Ann., 1123, 44 Am. Rep. 456, stated:

> "Everyone, whether he is principal or agent, is responsible directly to persons injured by his own negligence in fulfilling obligations resting upon him in his individual character and which the law imposes upon him, independent of contract. No man increases or diminishes his obligations to strangers by becoming an agent. If, in the course of his agency, he comes in contact with the person or property of a stranger, he is liable for any injury he may do to either, by his negligence, in respect to duties imposed by law upon him in common with all other men."

Writ denied.

HARRIS, C.J., and FOGLEMAN, J., concur in result only.

HICKMAN, J., dissents.

UNION NATIONAL BANK OF LITTLE ROCK *v.* METROPOLITAN NATIONAL BANK

78-253 578 S.W. 2d 220

Opinion delivered March 26, 1979
(In Banc)

Griffin Smith and *W. R. Nixon, Jr.*, for appellant.

Friday, Eldredge & Clark and *Paul B. Benham, III,* for appellee.

GEORGE ROSE SMITH, Justice. This is a controversy between two Little Rock banks over which one is to bear a $5,868.15 loss that resulted from Union National Bank's having cashed 15 bad checks drawn on an account in Metropolitan National Bank. The trial judge held that Union must bear the loss, because Metropolitan promptly returned

the bad checks. Union contends that the return was not timely, so that Metropolitan should suffer the loss.

The facts are not in dispute. On Friday, July 30, 1976, one Jeff R. Johnson cashed 15 identical checks, each for $391.21, at various Union branch offices in Little Rock. On Monday, August 2, Union deposited 11 of the checks, for collection, with the Little Rock Branch of the Federal Reserve System (FED). (The other 4 checks were handled one business day later, but that difference is immaterial.) Metropolitan picked up the 11 checks at FED on Monday afternoon, determined on Tuesday that they should be dishonored, and mailed them back to FED at 5:00 p.m. that afternoon. Union contends that Metropolitan's deadline for returning the checks was 2:00 p.m. on Tuesday. Metropolitan contends, and the trial court found, that its deadline was midnight on Tuesday. Which contention is correct depends upon whether the transaction was governed, on the one hand, by the Uniform Commercial Code and Federal Reserve regulations, both of which fix the midnight deadline, or, on the other hand, by an agreement creating the Central Arkansas Clearing House Association, which fixes the 2:00 p.m. deadline. Metropolitan is not a member of the clearing house association.

It is essential to understand at the outset that "clearing" is a method adopted by banks and bankers for making an exchange of checks, etc., held by each against the others and for settling the resulting differences in their accounts. Webster's New International Dictionary (2d ed., 1934). A clearing house is an institution established for carrying on the business of clearing. *Ibid.* We infer from the record that the Central Arkansas Clearing House Association does not have a physical existence in the sense of having employees or a place of business. It is simply an agreement among four Little Rock and two North Little Rock banks about the methods and deadlines by which they will clear one another's checks.

The clearing house agreement provides that the members' checks will be cleared by the use of a room provided and maintained by FED at its Little Rock office. In that room there is a row of nine bins, one for each of the nine "city

banks" that use the facility. There is a bin for each of the six members of the clearing house association, plus three bins for the non-member banks, one of which is Metropolitan.

We turn now to the path that was traveled by the 11 bad checks that were deposited with FED on Monday. On or before that morning Union bundled together all the checks that it then had against Metropolitan. Attached to the bundle was a Deposit Advice form, which was a printed form apparently specified by FED. That form lists the nine city banks, with a space after each bank's name for the total amount of checks being deposited for collection from that bank. In this instance, for example, Union filled in the total amount of its Metropolitan checks. At the bottom of the form is a detachable receipt by which FED acknowledges the "receipt of checks purporting to amount to $ _____," for which credit is to be given on FED's books.

On Monday morning Union placed its bundle of Metropolitan checks, including the 11 in question, in Metropolitan's bin in the room at FED. FED credited Union's reserve account with the amount of the checks and debited Metropolitan's reserve account in the same amount. Metropolitan did not actually have its own account with FED, using instead a reserve account of First National Bank, another Little Rock bank, as Metropolitan's correspondent bank.

On Monday afternoon Metropolitan picked up the bundle of checks and delivered them to First National for off-premises computer processing. We infer that First National used its own computer system for handling Metropolitan's bookkeeping. First National's computer failed to clear the 11 checks, for insufficient funds. On Tuesday morning the bundle of checks went to Metropolitan, where its bookkeepers verified the worthlessness of the 11 checks. That afternoon, at about 5:00 p.m., Metropolitan mailed the checks back to FED. They were accompanied by a Return Advice Form, which listed each check, the number of the depositing bank, the reason for return, and the amount. The printed form is addressed to FED, P. O. Box 1261, Little Rock. The checks were received by FED on Wednesday morning. FED then

reversed its entries, by crediting Metropolitan with the amount of the 11 checks and debiting Union by that amount. The checks were then placed in Union's bin and were picked up by it. A Union officer decided that the checks had been returned too late, and eventually this action was brought to recover the amount of the checks. The key issue, as we have said, is the controlling deadline for Metropolitan's return of the checks.

The parties agree that under the UCC the credit initially entered on Monday by FED to Union's account was merely provisional. Ark. Stat. Ann. § 85-4-201 (Add. 1961). Under the Code, Metropolitan had until midnight of the banking day following its receipt of the checks to return them to FED. § 85-4-301. If it failed to act by midnight, then the provisional credit to Union became final. § 85-4-213.

The Code provides, however, that its provisions may be varied by Federal Reserve regulations, clearing house rules, and the like. § 85-4-103. We are not concerned here with a variation by Federal Reserve regulation, because the Federal Reserve's Regulation J provides the same midnight deadline as that contained in the statute. Amendment to Federal Reserve Regulation J, 12 C.F.R. § 210.12 (effective Sept. 21, 1972). That regulation, however, contains this exception to the midnight deadline:

> Provided, that the foregoing provisions shall not extend . . . the time for return of unpaid items fixed by the rules and practices of any clearing house through which the item was presented . . .

Union argues that the checks in question were presented "through" the local clearing house, so that its two o'clock deadline superseded the midnight deadline fixed by the UCC and by the federal regulation.

We are not sure there is any substantial evidence to support a finding that the bad checks were presented to Metropolitan through the local clearing house, but in any event we find ample substantial evidence to support the trial court's finding that the checks were not so presented. Federal Regulation J has been described, we think accurately, as

providing "rules governing the clearing house operations provided by the Federal Reserve system for the collection of cash and non-cash items." *Kane* v. *American Nat. Bank & Tr. Co.*, 21 Ill. App. 3d 1046, 316 N.E. 2d 177 (1974). Thus the exchange of checks that occurred in the room maintained by FED in Little Rock was a "clearing" operation, but it was not controlled by the local clearing house association. To the contrary, it was completely owned and controlled by FED. FED's forms were used in the deposit of checks in the bins and in the return of dishonored checks to the bins. The debits and credits, which are really the ultimate purpose of such a clearing facility, were made solely on FED's books. It is, we think, fair to say that the course of the clearing operations at FED would have been precisely the same if the local clearing house had not existed. Thus the overwhelming proof shows that the checks were not presented through the local clearing house, of which Metropolitan was not a member.

Union argues, however, that three facts show that Metropolitan impliedly agreed to be bound by the clearing house rules, including the two o'clock deadline. Those three facts are: (1) Metropolitan designated First National (a clearing house member) as its correspondent bank for making settlement for items drawn on Metropolitan; (2) Metropolitan forwards its checks to First National to be presented at FED to other clearing house members; and (3) Metropolitan receives its items in its bin at FED just as the clearing house members do. Without discussing these three facts in detail, we think it sufficient to say that they demonstrate only that Metropolitan was using a correspondent bank instead of having its own account with FED, not that it was agreeing to clearing house rules of which, according to its witness, it actually had no knowledge. First National took no substantial part in the process, merely running the checks through its computer and making its reserve account available to Metropolitan as the latter's correspondent bank.

Alternatively, Union argues that even if the midnight deadline fixed by the statute is controlling, Metropolitan was not entitled to return its dishonored checks by a mail delivery that did not reach FED by midnight on Tuesday. The

statute, however, provides that an item is returned when it is "sent" to the bank's transferor. § 85-4-301 (4). "Send," under the statute, means among other things to deposit in the mail. § 85-1-201 (38). In a similar case it has been held that the deposit of the returned checks in the mail by midnight complies with the requirement that the checks be "sent" to the FED. *Blake* v. *Woodford Bank & Tr. Co.*, 555 S.W. 2d 589 (Ky. App., 1977). Thus the statute itself authorizes the procedure which Metropolitan, according to its witness, has been using since it began business in 1970.

Finally, Union argues under its alternative contention that the return of the checks by mail to FED was not sufficient, because, it is insisted, FED was not Metropolitan's "transferor" under the statute. We disagree. True, FED did not indorse the checks individually, but the statute does not require that formality in a transfer between banks. Any agreed method which identifies the transferor bank is sufficient for a further transfer to another bank. § 85-4-206. Here FED transferred the checks to Metropolitan in bundles, by means of the deposit advice form that accompanied the checks. In addition to providing a place for the physical transfer of the checks, FED took a substantive part in the chain of transfers by entering the proper debits and credits on its books, adjusting the parties' accounts accordingly. Upon that proof the trial court was warranted in finding that FED, not Union, was Metropolitan's transferor. Consequently Metropolitan's timely return of the checks to FED satisfied the requirement that the checks be returned to Metropolitan's transferor.

Affirmed.

Tommy GHENT *v.* STATE of Arkansas

CR 78-212 578 S.W. 2d 218

Opinion delivered March 26, 1979
(In Banc)

Mike Millar of *Boyett & Morgan* and *Blount & Wilson*, by: *Jerry B. Wilson,* for appellant.

Steve Clark, Atty. Gen., by: *Alice Ann Burns,* Asst. Atty. Gen., for appellee.

GEORGE ROSE SMITH, Justice. This is an appeal from the trial court's denial of Ghent's second petition for postconviction relief under Rule 37.2. According to this second petition, in 1976 Ghent and another man, wearing stocking masks, entered the home of Gale Stuart and robbed Stuart and his son Brett of $430 in cash and of firearms, watches, and liquor.

Upon a plea of guilty to two charges of aggravated robbery, one charge of burglary, and one charge of theft of property, Ghent was sentenced to 40 years' confinement upon each charge of aggravated robbery, 5 years upon the charge of burglary, and 5 years upon the charge of theft, all the sentences to run concurrently.

Ghent's first petition for postconviction relief alleged that the court accepted his pleas of guilty without adequately explaining his rights and that he received ineffective assistance of counsel in that his attorney coerced his pleas of guilty. The trial judge denied the first petition, without a hearing, on the basis of the record. We agree with that conclusion, but in any event the merits of the first petition for postconviction relief are not now before us, because there was no appeal from the court's denial of the petition. Rule 37.2 (b) provides that any grounds for relief finally adjudicated in the original proceedings or in any other postconviction proceedings may not be the basis for a subsequent petition. The trial court's order denying the first petition became a final adjudication when no appeal was taken. Ghent is therefore precluded from arguing the merits of the first petition in connection with his appeal from the trial court's denial of his second petition.

The second petition alleges that the original charges were unwarranted in that the State alleged two offenses of aggravated robbery arising out of a single transaction or course of conduct. Ghent's brief, however, recognizes that essentially the same contention was rejected by our decision in *Britt* v. *State,* 261 Ark. 488, 549 S.W. 2d 84 (1977). The statute has not been changed since that decision, and we see no reason to reach the opposite conclusion in the case at bar.

Affirmed.

BYRD, J., dissents in part.

PURTLE, J., dissents.

HICKMAN, J., not participating.

JOHN I. PURTLE, Justice, dissenting. I would first disagree with the majority view on appellant's first petition pursuant to Rule 37.3 (a) because I feel it was not properly ruled upon by the trial court. Until the court takes time to comply with the specific requirements by the court in ruling on this type petition, I would not penalize the appellant. Therefore, I do not think he had anything to appeal from the first time.

Since his motion was or should have still been pending, I would allow his second petition pursuant to Rule 37.3 (a) to be consolidated with the first and all points considered at the same time.

In his first petition appellant alleged he was unable to employ counsel and requested one be appointed for him. The court did not appoint counsel to assist appellant. If counsel had been appointed, no doubt the petition would have been amended to include the matters set out in the second Rule 37 petition. Rule 37.3 (b) reads as follows:

> . . .
>
> (b) If the original motion, or a motion to take an appeal from the court's findings under subsection (a) hereof, should allege that the prisoner is unable to pay the cost of the proceedings, or to employ counsel, and if the court is satisfied that this allegation is true, the circuit court shall appoint counsel for the prisoner for hearing in the circuit court and for an appeal to the Supreme Court.
>
> . . .

Thus, it is the plain wording of the statute that appellant should have been appointed counsel from the beginning to represent him in the circuit court and the supreme court.

The most critical period of time in many cases is from the time the defendant enters his plea and the time judgment is entered and his being transferred to the Department of Correction or the jail. After entry of judgment and pronouncement of sentence, the record is usually silent as to what takes place between a defendant and his counsel. This is

the time a defendant first realizes what has really happened. It is also the time when he makes it known things did not go as planned or promised. Unless he is given an opportunity to present his argument to the court, which he seldom does, or has an attorney who is capable of doing it for him, then Rule 37 becomes largely some writing on paper and nothing more.

Recognizing full well that most of these petitions are without merit, I would nevertheless give an appellant at least the opportunity to present to the court the facts upon which he bases his motion. It is not inconceivable that sometimes a petitioner may well have proof by witness, or otherwise, that indeed he was promised something in return for his guilty plea. As the system is working in most cases, a prisoner is not being given a meaningful consideration of his petition pursuant to Rule 37.

My chief disagreement with the majority opinion is that it does not deal with the real problem but instead evades it through legal technicalities. Appellant's chief complaint, for which he will never receive a hearing on its merits, is that he was illegally sentenced pursuant to Ark. Stat. Ann. § 41-105 (1) (e) which states:

> "(1) When the same conduct of a defendant may establish the commission of more than one offense, the defendant may be prosecuted for each such offense. He may not, however, be convicted of more than one offense if;
>
> ***
>
> (e) the conduct constitutes an offense defined as continuing course of conduct and the defendant's course of conduct was uninterrupted, unless the law provides that specific periods of such conduct constitute separate offenses."

The whole purpose of enacting this type legislation is to get away from the old theory employed by some people in stacking as many charges as possible in order to increase the chances of a plea and to avoid double jeopardy. After all, you

can kill a person only once. The facts in this case show appellant and his brother robbed a man and his son. It was all one continuing uninterrupted course of conduct such as is described in the above statute. As a result of his guilty plea, appellant was sentenced to (1) 40 years for robbing the man, (2) 40 years for robbing the son, (3) 5 years for burglary, and, (4) 5 years for conspiracy, which was later changed to 5 years for theft of property. It is a wonder the charge of trespassing was not added because he was not invited onto the premises.

Appellant simply robbed his victims and in doing so the other conduct was necessary to accomplish this despicable crime. He could not have robbed his victims except that he first enter the residence of the victims; neither would the robbery have been completed unless he took something of value. Therefore, burglary and theft of property are necessary ingredients of the real crime, aggravated robbery. The very purpose of the legislation has been defeated. The results are that in this one act appellant now has four prior convictions and will, if charged again, be placed in jeopardy for four separate convictions and thereby eligible for treatment under the habitual criminal act.

We have already decided in *Britt* v. *State,* 261 Ark. 488, 549 S.W. 2d 84 (1977) that the robbery of two persons is grounds for two convictions. Therefore, I can only state I do not agree with the *Britt* case but recognize it as binding in this case.

I would dismiss the burglary and theft of property convictions because I think they are an integral part of one continuous course of conduct resulting in aggravated robbery.

O. K. PROCESSING, INC. and MILLS MUTUAL INSURANCE COMPANY *v.* Mary L. SERVOLD

78-315 578 S.W. 2d 224

Opinion delivered March 26, 1979
(Division II)

E. C. Gilbreath, of *Jones, Gilbreath & Jones,* for appellants.

Jim D. Spears, for appellee.

JOHN A. FOGLEMAN, Justice. This appeal is the culmination of a complex series of proceedings which resulted from the appellee's claim to the Arkansas Workmen's Compensation Commission for benefits for two compensable injuries suffered on February 6, 1970 and July 3, 1970, while in the employ of the appellant, O. K. Processing. Among the previous proceedings were the opinions of three administrative law judges; three opinions of the full commission, affirming the opinions of the administrative law judges; two orders of the Circuit Court of Sebastian County, remanding the case to the Workmen's Compensation Commission and, finally, a judgment of the Circuit Court of Crawford County, affirming the final opinion of the full commission.

In the commission's last opinion, filed on March 7, 1978, the claimant was awarded weekly benefits of $49.00 from September 19, 1971, until such time as she is shown to no longer be totally disabled. In addition, the appellants were ordered to pay the appellee's attorney's fees in accordance with applicable state law and all medical expenses incurred by the appellee, excluding treatment by any Colorado physician, with the exception of Dr. Glen Koch. The appellants appeal from the finding of the Crawford County Circuit Court that there was sufficient competent evidence to support the award of the commission.

The appellee claimed that as a result of the accidents she suffered blurred vision and pain in her leg and in her lower back. She was examined by several Arkansas physicians, among them, neurosurgeons, opthamalogists, orthopedists and diagnosticians, but none of them were able to determine what precisely was causing the appellee's pain. As a portion of its second opinion, the full commission conditioned the receipt of any further benefits upon the appellee submitting to a psychological examination and evaluation, as had been suggested by Dr. William B. Stanton, an orthopedic surgeon, who was prepared to operate on the appellee in an attempt to alleviate the pain in her leg. Eventually, Dr. Koch examined the claimant in Denver, Colorado, where she and her family had moved, and his deposition was introduced into evidence at a hearing held on March 5, 1976, presided over by the third administrative law judge. It was Dr. Koch's opinion that the appellee suffered from "chronic brain syndrome," an organic impairment of the brain function resulting from injury or trauma to the brain. From his questioning of the appellee concerning her previous medical history and possible prior injuries, Dr. Koch concluded that this injury was occasioned by the appellee striking her head when she was thrown to the ground by the force of an explosion which occurred at her place of employment on July 3, 1970. It was Dr. Koch's opinion that this injury made Mrs. Servold unemployable, and therefore totally disabled, because she was able to follow instructions for only a very limited period of time and would require continual reinstruction to perform even simple tasks.

The appellants raise two points for reversal. The first of

these relates to a statement in the final opinion of the Workmen's Compensation Commission to the effect that, when all doubts are resolved in favor of the claimant, it must be concluded that the administrative law judge's finding that the claimant is totally disabled is correct. The appellants contend that in resolving all doubts in the claimant's favor the commission failed to weigh the evidence according to the accepted standard requiring the claimant to prove the compensability of his or her claim by a preponderance of the evidence. It is true, as appellants contend, that there is no presumption that a claim for workers' compensation comes within the purview of the law, i.e., that it arose out of, and in the course of, the claimant's employment. Ark. Stat. Ann. § 81-1302 (d) (Repl. 1976); *Robbins* v. *Jackson,* 232 Ark. 658, 339 S.W. 2d 417; *Duke* v. *Pekin Wood Products Co.,* 223 Ark. 182, 264 S.W. 2d 834; *Farmer* v. *L. H. Knight Co.,* 220 Ark. 333, 248 S.W. 2d 111; *Pearson* v. *Faulkner Radio Service Co.,* 220 Ark. 368, 247 S.W. 2d 964; *American Casualty Co.* v. *Jones,* 224 Ark. 731, 276 S.W. 2d 41; *American Red Cross* v. *Wilson,* 257 Ark. 647, 519 S.W. 2d 60; *Wilson* v. *United Auto Workers International Union,* 246 Ark. 1158, 441 S.W. 2d 475. But, in a long line of cases, this court has held that, in light of the beneficent and humane purposes of the Workers' Compensation Law [Ark. Stat. Ann. §§ 81-1301 through 81-1349 (Repl. 1976)], all doubtful cases should be resolved in favor of the claimant. *Potlatch Forests* v. *Funk,* 239 Ark. 330, 389 S.W. 2d 237; *Reynolds Metals Co.* v. *Robbins,* 231 Ark. 158, 328 S.W. 2d 489; *Peerless Coal Co.* v. *Jones,* 219 Ark. 181, 240 S.W. 2d 647; *Cummings* v. *United Motor Exchange,* 236 Ark. 735, 368 S.W. 2d 82; *Eddington* v. *City Electric Co.,* 237 Ark. 804, 376 S.W. 2d 550; *McGehee Hatchery* v. *Gunter,* 237 Ark. 448, 373 S.W. 2d 401. This does not mean that a claimant does not have to meet the burden imposed upon him by a preponderance of the evidence. See, *Potlatch Forests, Inc.* v. *Smith,* 237 Ark. 468, 374 S.W. 2d 166; *Hughes* v. *Hooker Bros.,* 237 Ark. 544, 374 S.W. 2d 355; *McFall* v. *Farmers Tractor & Truck Co.,* 227 Ark. 985, 302 S.W. 2d 801. It does mean that, in determining where the preponderance of the evidence lies, the Workmen's Compensation Commission *must* draw all legitimate inferences and resolve doubts in favor of the claimant, viewing and construing the evidence in favor of the claimant and the purpose of the statutes to compensate those, who, by reasonable con-

struction, are within the terms of the Workers' Compensation Law. *American Red Cross* v. *Wilson,* supra; *Brower Manufacturing Co.* v. *Willis,* 252 Ark. 755, 480 S.W. 2d 950; *Herman Wilson Lumber Co.* v. *Hughes,* 245 Ark. 168, 431 S.W. 2d 487; *Burrow Construction Co.* v. *Langley,* 238 Ark. 992, 386 S.W. 2d 484; *Holland* v. *Malvern Sand & Gravel Co.,* 237 Ark. 635, 374 S.W. 2d 822. The commission obviously did not err in resolving all doubts favorably to appellee.

When the commission has determined the question of preponderance, after resolving all doubts favorably to the claimant, it is not for this court to say that the commission decided that question wrongly, if there is any substantial evidence to support the commission's finding, since the courts are not privileged to consider the matter de novo, or to weigh the evidence. *Comer* v. *Pierce,* 227 Ark. 926, 302 S.W. 2d 547; *Burks, Inc.* v. *Blanchard,* 259 Ark. 76, 531 S.W. 2d 465; *Wilson* v. *United Auto Workers International Union,* supra; *Herman Wilson Lumber Co.* v. *Hughes,* supra; *Plastics Research & Development Co.* v. *Goodpaster,* 251 Ark. 1029, 476 S.W. 2d 242; *Oak Lawn Farms* v. *Payne,* 251 Ark. 674, 474 S.W. 2d 408; *Lane Poultry Farms* v. *Wagoner,* 248 Ark. 661, 453 S.W. 2d 43. In our consideration of the evidence, however, we must give it its strongest probative force in favor of the actions of the commission, because they carry the same weight as a jury verdict.[1] *Holland* v. *Malvern Sand & Gravel Co.,* supra; *Asphalt Materials Co.* v. *Coleman,* 243 Ark. 646, 420 S.W. 2d 921; *Herman Wilson Lumber Co.* v. *Hughes,* supra.

Our disposition of the appellants' first point for reversal leaves us only with the question of whether there was substantial evidence to support the commission's order, which is the substance of the appellants' final point for reversal. The appellants contend that the commission's finding that the appellee has been, and continues to be, totally disabled from September 19, 1971 is not supported by any substantial evidence. Appellants' argument, however, departs from its

[1]The statement made in *Comer* v. *Pierce,* supra, that, in determining the sufficiency of the evidence, it should be liberally construed in favor of the claimant has never been followed where the commission has found against the claimant. It was correct in that particular case, because the commission had held in favor of the claimant.

statement of this point. The argument is devoted almost entirely to its concept of the "overwhelming weight of the evidence," the "considerable weight" which should be given to the opinions and reports of doctors selected by the commission, and the query, "How can the Workers' Compensation Commission disregard the testimony of 12 Arkansas doctors, one of whom was selected by the Workers' Compensation Commission itself, and find in favor of the appellee on the basis of the testimony of one out-of-state psychiatrist?"

Upon review of a decision of the Workmen's Compensation Commission, we must accept that view of the facts most favorable to the findings of the commission, weigh and interpret it along with all reasonable inferences deducible therefrom in that light, and affirm where any substantial evidence exists to support its action. *Barksdale Lumber Co.* v. *McAnally,* 262 Ark. 379, 557 S.W. 2d 868; *Purdy* v. *Livingston,* 262 Ark. 575, 559 S.W. 2d 24; *Westark Specialties, Inc.* v. *Lindsey,* 259 Ark. 351, 532 S.W. 2d 757; *Wilson* v. *United Auto Workers International Union,* supra; *Sneed* v. *Colson Corp.,* 254 Ark. 1048, 497 S.W. 2d 673; *Burrow Construction Co.* v. *Langley,* supra; *Herman Wilson Lumber Co.* v. *Hughes,* supra. We consider only that evidence most favorable to the commission's view. *Barksdale Lumber Co.* v. *McAnally,* supra; *Clark* v. *Shiloh Tank & Erection Co.,* 259 Ark. 521, 534 S.W. 2d 240. We have previously found the evidence to be substantial if a fair-minded person could reach the conclusion the commission did, on the evidence submitted. *Julian Martin, Inc.* v. *Indiana Refrig. Lines,* 262 Ark. 671, 560 S.W. 2d 228. In order to reverse the commission's decision, we would have to say that fair-minded men could not reach the conclusion arrived at by the commission. *Herman Wilson Lumber Co.* v. *Hughes,* supra; *Plastics Research & Development Co.* v. *Goodpaster,* supra; *Brower Mfg. Co.* v. *Willis,* supra; *Purdy* v. *Livingston,* supra.

In their brief, the appellants list numerous Arkansas physicians who "found very little wrong with the appellee," and discuss the testimony of some of these doctors at length. However, as the commission pointed out in its final opinion, these physicians were only attempting to establish an anatomical reason for the ailments complained of and the appellants fail to mention that some of these doctors men-

tioned the possibility of a psychological problem and one of them, Dr. William B. Stanton, suggested that the appellee undergo a psychiatric examination before having corrective surgery he proposed, stating:

> *** As a matter of fact, if she were showing some emotional or psychiatric aberrant behavior then indeed this might be the explanation for the patient's continued subjective complaints of back pain which could not be substantiated through this office.

The fact that the surgery suggested by Dr. Stanton may have been for a physical defect unrelated to appellee's injury does not diminish the impact of this testimony.

Dr. Koch was the only witness who conducted a psychiatric evaluation of the claimant and the commission found that the conclusions reached by Dr. Koch were not conflicting with the opinions of the other physicians. Dr. Koch's deposition presented a reasonable explanation for the claimant's complaints of physical discomfort which could not be verified by physical examination. There was no conflicting evidence concerning Mrs. Servold's chronic brain syndrome. The opinion of an expert will be considered to be substantial evidence unless it clearly appears that the expert's opinion is opposed to physical facts or to common knowledge or to the dictates of common sense, or is pure speculation. *Easton* v. *H. Broker & Co.*, 226 Ark. 687, 292 S.W. 2d 257. Such is not the case here. Resolution of conflicts in medical testimony is a question of fact for the commission, and when the commission chooses to accept the testimony of one physician, where a conflict exists, the courts are powerless to reverse the commission's ruling in this regard, unless it can be said that his testimony is not substantial evidence. *Barksdale* v. *McAnally*, supra. We cannot say that the finding of the Workmen's Compensation Commission is not supported by substantial evidence.

We have not overlooked appellants' argument that the commission should have found that appellee's healing period had ended. The commission's holding was based upon Dr. Koch's testimony that there was a possibility of improve-

ment, even though it was poor. Dr. Koch said that he had suggested that Mrs. Servold have psychiatric treatment along with medical treatment, and said that if that were undergone, it would relieve her disability and pain to some extent. The commission ordered appellants to pay for necessary future medical expenses, including treatment by Dr. Koch. We find that there was substantial evidentiary support for the commission's holding, but feel that the question as to the end of the healing period will now be ripe for determination.

The judgment is affirmed.

We agree. HARRIS, C.J., and HOLT and HICKMAN, JJ.

LEENERTS FARMS, INC. *v.* CRANCO,
A Joint Venture of Andco
Farms, Inc., A California Corporation, and
Crescent Farms Company, A Texas Corporation

78-200 578 S.W. 2d 229

Opinion delivered March 26, 1979
(In Banc)

Wright, Lindsey & Jennings, by: *William D. Haught* and *John R. Tisdale,* for appellant.

Gaughan, Barnes, Roberts, Harrell & Laney, by: *Allen P. Roberts,* for appellees.

CONLEY BYRD, Justice. Leenerts Farms, Inc., an Illinois Corporation, brought this action against Cranco, a joint venture of Andco Farms, Inc., a California Corporation, and Crescent Farms Company, a Texas Corporation, to specifically enforce an alleged contract for the purchase of 3548 acres of land owned by Cranco. The trial court found that appellant Leenerts Farms, Inc. was a foreign corporation not qualified to do business in Arkansas, that the contract sued upon was made in Arkansas and that it arose in the course of and was part and parcel of appellant's doing business in the State contrary to the provisions of the "Wingo" Act, Ark. Stat. Ann. § 64-1201 and § 64-1202. Based upon those findings the trial court dismissed the complaint on the basis that the contract was void. For reversal appellant contends (1) that it was not doing business within the State of Arkansas for purposes of the "Wingo" Act and (2) that the contract of sale was not an Arkansas contract.

The record shows that appellant is a family owned corporation engaged exclusively in farming. Appellant was first contacted by one James Jacks of Monroe, Louisiana, about the possibility of acquiring the farm. On the first visit to Arkansas to view the farm, appellant agreed to pay Jacks a finder's fee in the event the farm was purchased. Sometime around the first of December, 1977, appellees through their agent Jack DeWitt made arrangements with Julian Streett, an attorney in Camden, to handle the negotiations for the sale of

the farm. Streett was not told the identity of the prospective purchasers. After appellant had viewed the farm, its principal officers contacted Tom Henderson, an attorney of McCombs, Illinois, to handle the negotiations for the purchase of the farm. Julian Streett's first knowledge of appellant as a prospective purchaser of the farm came through a telephone call from Tom Henderson. Henderson submitted on December 27, 1977, to Julian Streett a proposal to purchase the farm. Appellant attached its check in the amount of $50,-000 to the proposal for which Streett was to act as escrow agent. After a conference with Jack DeWitt in Streett's office, appellees through Streett submitted a counter proposal to appellant. Tom Henderson from his office in Illinois then contacted Streett by phone. After Streett informed Henderson that he had no authority to make any changes in appellees' counter proposal, all negotiations for the purchase of the farm were carried out between appellant's agents in Illinois and appellee's agent Jack DeWitt in Davis, California. As a result of those negotiations, Tom Henderson prepared appellants' counter proposal and mailed the original to appellees' agent Jack DeWitt in California with a copy to Julian Streett in Camden. On February 1, 1978, Jack DeWitt, while en route to Arkansas, called appellant from Denver, Colorado. There is a dispute between Jack DeWitt and Roger Leenerts as to what was said in that conversation,[1] but the trial court, for purpose of making its ruling on appellees' defense under the Wingo Act, accepted Mr. Roger Leenerts' version — *i.e.* that the contracts were signed and appellant had bought the farm.

Following the telephone call from Jack DeWitt, appellant's managing officers flew by private plane to Arkansas with some Illinois bankers, through whom they intended to make a loan to finance the purchase of the farm. Appellant also made some arrangements with James Jacks to do some surface water drainage of the lands.

Tom Henderson contacted Julian Streett on February 3, 1978, but was unable to verify that the contract had been executed. Following a conversation between Roger Leenerts and Jack DeWitt on February 7, 1978, in which DeWitt told

[1]Jack DeWitt contended there was a counter proposal to the counter proposal.

Leenerts that the farm had been sold to another purchaser Tom Henderson again contacted Streett who verified DeWitt's conversation with Roger Leenerts. When appellant's counter proposal was returned to appellant, the signatures of appellees' officers Mr. Anderson, a Mr. Buretta and a third person that Jack DeWitt could not identify had been cut out.

Appellant's counter proposal, which they allege was the executed contract, in so far as here pertinent provides:

"OFFER TO PURCHASE REAL ESTATE

THIS OFFER, made this 25 day of January, 1978, by and between LEENERTS FARMS, INCORPORATED, of Golden, Illinois, (hereinafter referred to as Buyers) and ANDCO FARMS, of Davis, California, and CRESCENT FARMS, of Houston Texas, (hereinafter referred to as Sellers).

WITNESSETH:

(1) The Buyers hereby offer and agree to pay the Sellers for approximately Three Thousand Five Hundred Forty-eight (3,548) acres the sum of One Million Six Hundred Twenty-nine Thousand Three Hundred Twenty Dollars ($1,629,320.00) in the following manner:

(b) At such time as this is accepted by all parties, the Fifty Thousand Dollars ($50,000.00) which has been placed in escrow shall be delivered to the Sellers and shall be applied toward the total amount at closing.

(6) If the title to said real property be merchantable in fact as called, the Sellers shall deliver for the Buyer at the office of said Seller's agent a general Warranty Deed which shall provide that the conveyance is subject to all prior reservations or conveyances of any part of the mineral estate, and such general Warranty Deed shall be free and clear from all liens and encumbrances whatsoever, except as herein provided, and the Buyer shall

then and there pay the balance of said cash payment at closing.

(9) In furtherance of this agreement, the Seller has deposited with Julian Streett, of Camden, Arkansas, Attorney for Seller, a copy of this Offer to be held in escrow and is authorized to accept for and on behalf of the Sellers the payment of Fifty Thousand Dollars ($50,000.00.). The Sellers and Buyers agree to pay one-half (½) of the escrow fees.

(13) The possession of said real estate is to be delivered to Buyers immediately upon execution of this agreement so that Buyer may start farming operations and prepare for the crop year 1978. Buyers and Sellers agree that if farming operations are not started, the Sellers may upon ten (10) days written notice to the Buyers, commence farming operations in order to take all steps reasonably necessary to prepare the property covered by this Offer for the 1978 crop year. The Sellers agree to include in such notice the anticipated operations on a periodic basis with the charge to the Buyers to be Five Dollars ($5.00) per acre per tractor trip plus the actual cost of fuel, herbicide, lime, fertilizer or seed. The Sellers agree to estimate to the Buyers expenditures which they anticipate making on a weekly basis but both parties acknowledge that such figures will be only an estimate and the Buyers agree and acknowledge that they will be responsible for all such charges reasonably necessary to prepare said lands for the 1978 crop.

(14) This agreement shall extend to and be binding upon the parties hereby and their respective heirs, executors, or administrators. The Buyers agree that their interest in the property, which arises under this agreement shall not be assignable to any other party without prior written consent of the Sellers.

(15) Sellers and Buyers, and each of them, are expressly granted the right to specific performance herein. It is specifically understood and agreed between the

Sellers and the Buyers that the Fifty Thousand Dollars ($50,000.00) put up by the Buyers in this matter is not in any sense of the word to be called 'earnest money.'

IN WITNESS WHEREOF, the parties hereto have signed this Agreement this 31 day of January, 1978."

In *Alexander Film Company* v. *State, use of Phillips County,* 201 Ark. 1052, 147 S.W. 2d 1011 (1941), we pointed out that the Wingo Act, Ark. Stat. Ann. §§ 64-1201 and 64-1202 (Repl. 1966) is a penal statute which must be strictly construed in favor of those against whom the penalty is to be imposed. Furthermore, in construing a contract to determine whether it is valid or invalid, we find in 17 Am. Jur. 2d Contracts § 254 the following:

> "It is a general principle that where a contract is fairly open to two constructions, by one of which it would be lawful and the other unlawful, the former will be adopted. Thus, if a contract is capable of a construction which will make it valid, legal, effective, and enforceable, it will be given that construction if the contract is ambiguous or uncertain. A construction which renders the contract valid is preferred to one which renders it invalid, and it will not be construed so as to the invalid unless that construction is required by terms of the agreement in the light of the surrounding circumstances."

When the record in this case is considered in the light of the penal nature of the Wingo Act and the principle that a contract should be construed where possible to make it valid, we must hold that the trial court erred in ruling that the contract sued upon was an Arkansas contract within the provision of Ark. Stat. Ann. §§ 64-1201 and 64-1202 (Repl. 1966). The fact that the contract for purchase of the real estate was to be closed in Arkansas would not make a contract entered into out of the State of Arkansas invalid under Ark. Stat. Ann. § 64-2102 (Repl. 1966).

Since this disposition makes it unnecessary to determine whether appellant was doing business in Arkansas in viola-

tion of Ark. Stat. Ann. § 64-1201, we have avoided any ruling thereon. However, we point out that upon litigation arising after the effective date of this opinion we will reconsider *Republic Power & Service Co.* v. *Gus Blass Co.,* 165 Ark. 163, 263 S.W. 785 (1924), in so far as it supports appellees' contention that any acquisition of property in ths State by a nonresident corporation is a violation of Ark. Stat. Ann. § 64-1201 (Repl. 1966).

Reversed and remanded.

FOGLEMAN, J., dissents in part.

JOHN A. FOGLEMAN, Justice, concurring in part, dissenting in part. I join in all of the majority opinion except the gratuitous offer to judicially amend the Wingo Act, 55 years after the decision in *Republic Power & Service Co.* v. *Gus Blass Company,* 165 Ark. 163, 263 S.W. 785.

SHIPPERS TRANSPORT OF GEORGIA
and TRAVELERS INSURANCE CO.
v. Johnny A. STEPP

78-233 578 S.W. 2d 232

Opinion delivered March 26, 1979
(In Banc)

Spears, Sloan & Johnson, by: *J. H. Spears,* for appellants.

Hightower & McCaa, by: *William E. Hightower,* for appellee.

FRANK HOLT, Justice. This is a case of first impression. The full commission, in affirming the administrative law judge, found that appellee suffered a compensable injury as an employee of appellant Shippers Transport of Georgia. The circuit court affirmed. The facts are undisputed. When appellant Shippers hired appellee as a mechanic, appellee falsely represented in his written employment application that he had not previously been injured on a job. In fact, he had suffered three prior injuries, which occurred in 1959, 1963 and 1970, to his lower back, resulting in a collective 40% permanent partial disability rating to the body as a whole. Shippers employed appellee on October 21, 1976. He worked a short time, left and worked elsewhere, and was reemployed about 2 weeks before he injured his back on December 28, 1976, when he lifted a heavy object. This injury is in the same area of appellee's three previous back injuries. Appellants contend, as a matter of law, that the appellee is precluded from compensation by our statutes because of the misrepresentation on his employment application. Appellee responds his claim is not so barred and is supported by substantial evidence.

We review our three statutes which specifically bar compensation. Ark. Stat. Ann. § 81-1305 (Repl. 1976) bars compensation for on-the-job injury where the injury was caused by the employee's intoxication or the wilful intention of the injured employee to bring about the injury. § 81-1335 (a) subjects a person, who wilfully makes a false or misleading statement for the purpose of collecting a benefit or payment, to a misdemeanor prosecution. § 81-1314 (a) (2), which appellants specifically invoke, also bars compensation. It provides:

> No compensation shall be payable for an occupational disease if the employee, at the time of entering into the employment of the employer by whom the compensation would otherwise be payable, falsely represented himself in writing as not having previously been disabled, laid off, or compensated in damages or otherwise, because of such disease.

§ 81-1314 (a) (5) (i) defines occupational disease:

> 'Occupational disease' as used in this Act means any disease that results in disability or death and arises out of and in the course of the occupation or employment of the employee, or naturally follows or unavoidably results from an injury as that term is defined in this Act. Provided, a causal connection between the occupation or employment and the occupational disease must be established by clear and convincing evidence.

§ 81-1302 (d) defines injury:

> 'Injury' means only accidental injury arising out of and in the course of employment, including occupational diseases as set out in section 14 [§ 81-1314] and occupational infections arising out of and in the course of employment.

The court, in agreeing with the commission, held that appellee's back injury is not a "disease," hence not an occupational disease within the meaning of § 81-1314 (a) (5) (i); that intoxication and intentional injuries are the defenses to accidental injuries as defined in § 81-1302 (d); the legislative intent was for the additional defense of "misrepresentation" to apply only to occupational disease, which is not involved here and the court concluded, had the legislature intended that the appellee here be denied benefits because of his false employment statement as to previous injuries, it would and could have clearly so stated. Appellee argues that the court correctly interpreted the statutes and legislative intent. Also in giving the act a liberal construction, in view of its purposes, he is not precluded by the statute from collecting the asserted benefits.

As indicated, our statutes are silent on the effect of a false representation, except as to "occupational disease" and where the statement was made for the purpose of collecting benefits. By implication, we think public policy requires an obligation on the part of an employee, upon inquiry, to be truthful to an employer about preemployment health conditions. Therefore, even if we agree with the appellee that an "injury" and "occupational disease" are separate and distinct from each other and appellee's back injury is not a

"disease" within the meaning of § 81-1314 (a) (2), we are of the view that public policy, in the absence of a clear legislative intent to the contrary, requires the application here of the test as stated in 1B Larson's Workmen's Compensation Law § 47-53:

> The following factors must be present before a false statement in an employment application will bar benefits: (1) The employee must have knowingly and wilfully made a false representation as to his physical condition. (2) The employer must have relied upon the false representation and this reliance must have been a substantial factor in the hiring. (3) There must have been a causal connection between the false representation and the injury.

Air Mod Corporation v. *Newton,* 215 A. 2d 434 (Del. 1965); *Cooper* v. *McDewitt & Street Company,* 196 S.W. 2d 833 (S.C. 1973); *Martinez* v. *Mechenbier, Inc.,* 562 P. 2d 843 (N.M. 1977); see also *City of Homestead, Dade County* v. *Watkins,* 285 So. 2d 394 (Fla. 1973); *Martin Company* v. *Carpenter,* 132 So. 2d 400 (Fla. 1961); *Long* v. *Big Horn Const. Co.,* 295 P. 750 (Wyo. 1964). The rationale of Larson's rule is demonstrated by the fact that Workmen's Compensation Law requires that the employer must take an employee as it finds him. Employment places on the employer the risks attendant upon hiring a known or unknown infirm employee. Consequently, it is only fair that the appellant employer here have a right to determine a health history before employment of the appellee as a mechanic to avoid the possible liability for an accidental injury, causally related to an infirmity.

Here we think the fair and just policy is to adopt the rule enunciated in Larson, *supra,* that a false representation as to a physical condition in procuring employment will preclude the benefits of the Workmen's Compensation Act for an otherwise compensable injury if it is shown that the employee knowingly and wilfully made a false representation as to his physical condition, the employer relied upon the false representation, which reliance was a substantial factor in the employment, and there was a causal connection between the false representation and the injury.

Upon review of the record, it appears that the commission, which is the factfinder (not an appellate court), premised its holding solely upon the interpretation of §§ 81-1302 (d) and 81-1335 (a). It never reached the rule enunciated by Larson, which was specifically invoked by the appellants. Appellant employer adduced ample testimony before the commission to establish the first two factors enumerated by Larson. As to the third factor, i.e., a causal connection between the false representation and the present injury, the appellants argue it is common knowledge that appellee's three previous back injuries left him with a weakened back which is prone to serious injury. However, according to appellee, he was advised by his doctor that he was in good physical condition to do manual labor (he had back surgery in each injury), he had no back limitation, and he had worked for the past 6 years as a mechanic without incident until this injury occurred.

In the circumstances, the judgment is reversed and the cause remanded for an evidentiary hearing before the commission and findings in accordance with Larson's three-factor test. See *Cooper* v. *McDevitt & Street Company, supra.* If any factor is absent, then the appellee is entitled to compensation.

Reversed and remanded.

HARRIS, C.J., would reverse and dismiss.

FOGLEMAN, J., concurs.

BYRD, J., would affirm.

JOHN A. FOGLEMAN, Justice, concurring. I concur because I think that, given the "circular" definition of occupational disease, Ark. Stat. Ann. § 81-1314 (a) (2) (Repl. 1976) applies. I also agree that, in spite of the liberal construction, favorable to claimants, to be given worker's compensation acts, public policy declared in the statutes themselves mandates that construction. I further agree that the Larson test is appropriate.

Jarrett RASCOE and SEARCY FEDERAL SAVINGS & LOAN ASSOCIATION *v.* Joe RASCOE

78-306 576 S.W. 2d 892

Opinion delivered March 26, 1979
(Division II)

Robert Edwards, for appellants.

Paul Petty, by: *John Patterson,* for appellee.

FRANK HOLT, Justice. This appeal involves a certificate of deposit issued by appellant Searcy Federal Savings and Loan Association. Sid Rascoe, the brother of appellant Jarrett Rascoe and appellee Joe Rascoe, had four certificates with the Association. Two certificates were listed as "Sid Rascoe or Jarrett Rascoe," and one was listed "Sid Rascoe P.O.D. [pay on death] Jarrett Rascoe." The one involved in this litigation was listed on the books and records of the Association as "Sid Rascoe P.O.D. [pay on death] Jerry Rascoe." Upon Sid Rascoe's death in 1977, the Association paid the funds in all four certificates to appellant Jarrett

Rascoe. Appellee brought suit alleging that the certificate listing "P.O.D. [pay on death] Jerry Rascoe" should be paid to the estate of Sid Rascoe. It was stipulated that no Jerry Rascoe was known or had claimed the account. The court found that the requirements regarding the written execution of a "payable on death" card were not met so as to establish an account in favor of appellant Jarrett Rascoe. The funds were ordered paid to the estate and divided among the seven surviving brothers and sisters of Sid Rascoe. Appellants assert that the court erred in holding that Sid Rascoe did not establish an account payable upon his death to appellant Jarrett Rascoe.

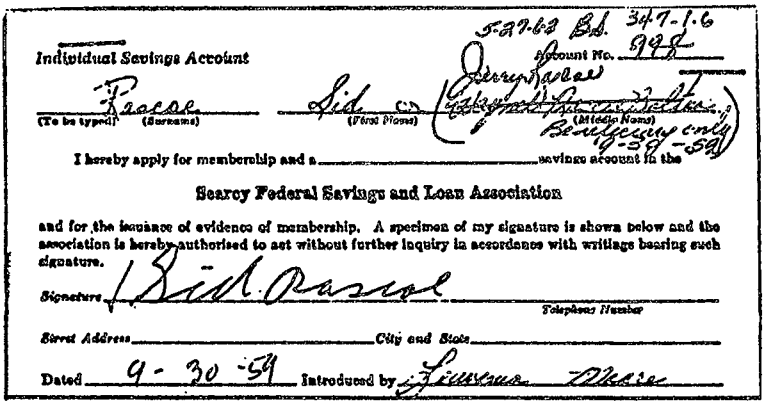
The parties agree that Ark. Stat. Ann. § 67-1838 (5) (Repl. 1966), Act 227 of 1963, controls. That statute provides in pertinent part:

> If a person opening or holding a savings account shall execute and file with the association a designation that on the death of the person named as holder, the account shall be paid to or held by another person or persons, the account, and any balance thereof which exists from time to time, shall be held as a payment on death account and unless otherwise agreed between the person or persons opening the account and the association:
>
> (a) Upon the death of the holder of the account, the person or persons designated by him and who have survived him shall be the owners of the account (as joint tenants with right of survivorship if more than one) and any payment made by the association to any of such persons shall be a complete discharge of the association as to the amount paid;
>
> (b) The person to whom such account is issued may change during his lifetime the designation of any of the persons who are to be holders at his death, by a written direction accepted by the association;
>
> (c) The person to whom such account is issued may pledge, withdraw or receive payment and any such payment made by the association shall be a complete discharge as to the amount paid.

Appellants contend that Sid Rascoe had sufficiently complied with the statutory requirements to create an account payable to a Jerry Rascoe, had a Jerry Rascoe existed. They further assert that, when the testimony, facts and circumstances disclosed by the record are considered, the evidence is overwhelming that it was Sid Rascoe's intent that the account be payable to appellant Jarrett Rascoe. Appellee responds that there was no evidence showing substantial compliance with the statute and argues that we have held when a case is controlled by statute, as here, the intent of the depositor will not control.

The certificate of deposit involved herein was issued on July 1, 1974. The only document bearing the signature of Sid Rascoe was a signature card signed in 1959. The card was for an account which had originally been created as a joint account for Sid and Winifred Rascoe. Upon Winifred's death, Waynell Rascoe B[illegible]on was substituted as the beneficiary, and the signature card, as indicated, was signed and dated "9-30-59." The beneficiary was changed to Jerry Rascoe in May, 1963, by someone inserting "Jerry Rascoe" above that. The change was initialed by "B.S." (presumably an Association employee) and dated. It was not signed by Sid Rascoe. The certificate of deposit in question bears the account number 2D9-347. The signature card originally bore the number of 998, but that number was changed at some point to 347-1.6.

The card is reproduced below:



5-27-63 BS. 347-1.6

Individual Savings Account

Account No. 998

Rascoe (To be typed) (Surname) Sid (First Name) Jerry Rascoe (Middle Name) Beneficiary only 9-30-59

I hereby apply for membership and a _____ savings account in the

Searcy Federal Savings and Loan Association

and for the issuance of evidence of membership. A specimen of my signature is shown below and the association is hereby authorized to act without further inquiry in accordance with writings bearing such signature.

Signature Sid Rascoe

Telephone Number

Street Address _____ City and State _____

Dated 9-30-59 Introduced by [illegible]

We hold there clearly was not substantial compliance with the recited statutory requirements. See *Cupp* v. *Pocahontas Federal Savings and Loan Ass'n,* 242 Ark. 566, 414 S.W. 2d 596 (1967); *Harris* v. *Searcy Fed. Savings & Loan Ass'n,* 241 Ark. 520, 408 S.W. 2d 602 (1966). Here at the time of issuance of the certificate of deposit in 1974, no signature card nor any type designation in writing was executed and filed by Sid Rascoe with the Association indicating that the account should be paid to another person.

Appellants further assert that it was clearly the intent of Sid Rascoe, as reflected by their evidence, that the account be payable at his death to appellant Jarrett Rascoe. Appellee contends that the owner's intent is not controlling here, and we agree. It is true that under Act 343 of 1939, the creation of an account payable on death did depend on the intent of the depositor. See *Cupp* v. *Pocahontas Federal Savings and Loan Ass'n, supra;* and *Park* v. *McClemons,* 231 Ark. 983, 334 S.W. 2d 709 (1960). However Act 227 of 1963 (Ark. Stat. Ann. § 67-1838 [Repl. 1966]) superseded Act 343 and established certain minimum formal action required to be taken by the depositor in order to create an account payable on death. In the absence of a depositor meeting the minimum statutory requirements, his intent is no longer controlling in the creation of an account. *Ratliff* v. *Ratliff,* 237 Ark. 191, 372 S.W. 2d 216 (1963).

Affirmed.

We agree: HARRIS, C.J., and FOGLEMAN and PURTLE, JJ.

Arthur Lee COTTON *v.* STATE of Arkansas

CR 78-111 578 S.W. 2d 235

Opinion delivered March 26, 1979
(Division II)

Andrew D. Gregory, for appellant.

Bill Clinton, Atty. Gen., by: *Catherine Anderson,* Asst. Atty. Gen., for appellee.

DARRELL HICKMAN, Justice. Arthur Lee Cotton was con-

victed in the Desha County Circuit Court of raping two women, one of whom was Cotton's sister-in-law. He was sentenced to ten years in the penitentiary on each count, the sentences to run consecutively.

On appeal Cotton alleges two errors: the court should have granted a continuance; and, substituted counsel should have been appointed. We find no error and affirm the judgment.

In September of 1977, Cotton was charged, determined to be an indigent, and counsel was appointed. The trial was set for April 18, 1978, by an order dated March 1, 1978. Before the jury was impaneled on the trial date, Cotton's counsel made an oral motion for a continuance. He explained that Cotton had told him in September when he was appointed that Cotton desired other counsel. Cotton was advised to feel free to hire other counsel and apparently encouraged to do so. Cotton's counsel explained that he had mailed several letters to Cotton but all of them had been unanswered. He stated that he had only talked to Cotton three times. Counsel explained that the day before the trial another lawyer called him inquiring about the possibility of serving as counsel for Cotton. The other lawyer declined to do so on such short notice. That same day Cotton consulted with his court-appointed attorney and provided counsel with the name of a witness who Cotton claimed would provide alibi testimony. A subpoena was promptly issued for this witness but she was not served and was not present for the trial. The trial court declined to grant a continuance.

The State's case was essentially the testimony of the two women victims. Cotton's defense consisted of his own testimony. His defense was that he wasn't guilty because he was not even there; at the time of the alleged crimes he was with another woman. Cotton was cross-examined as to this other woman and he replied that the reason he did not provide counsel with her name earlier was that she was a married woman, pregnant, and he did not want to get her involved. He said the reason she couldn't be served a subpoena was because she had gone fishing that day.

The first allegation of error is that the court should have granted a continuance. Motions for continuance are governed by Rules of Crim. Proc., Rule 27.3, which provides:

> The court shall grant a continuance only upon a showing of good cause and only for so long as is necessary, taking into account not only the request or consent of the prosecuting attorney or defense counsel, but also the public interest in prompt disposition of the case.

Granting or failing to grant a continuance is within the discretion of the court. *Golden* v. *State,* 265 Ark. 99, 576 S.W. 2d 955 (1979). The burden is on the appellant to show that there has been an abuse of that discretion. *Freeman* v. *State,* 258 Ark. 496, 527 S.W. 2d 623 (1975). We cannot say that the trial court abused its discretion and, therefore, we find no error in this regard.

The other allegation of error is that the court should have appointed other counsel. The appellant concedes that a defendant does not have the right to designate which attorney will represent him. However, he argues that because of Cotton's expression of dissatisfaction, which Cotton's counsel says was called to the court's attention in March, the court should have appointed other counsel.[1] We cannot say on this record that the court should have done so. The case was set for trial in March and a letter was mailed to Cotton notifying him of that fact. Cotton said he did not get that letter or other letters. He said they were apparently sent to the residence of his former wife. However, during the trial, he admitted that he resided at the same address he provided to his counsel — the address to which the letters were mailed.

Essentially, the argument on appeal is that the court-appointed counsel was ineffective because of a lack of communication or cooperation between lawyer and client.

There is a presumption of competency of counsel. *Easley* v. *State of Arkansas,* 255 Ark. 25, 498 S.W. 2d 664 (1973).

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[1]There is no record of counsel's conference with the trial judge in March. This statement is contained in the appellant's brief.

There is insufficient evidence in this record to overcome that presumption. In fact, the record reflects that it was Cotton who was inattentive to his case, not counsel. Counsel repeatedly tried to contact Cotton and prepare a defense for him but received little or no cooperation. Cotton's counsel filed appropriate pre-trial motions and extensively cross-examined the witnesses for the State. Counsel even argues that it was his own inadequacy and inefficiency rather than Cotton's lack of cooperation which should be considered error.[2] Cotton apparently took no action to assist his lawyer until the day before the trial. A lawyer can only do so much and if a client fails or refuses to assist his counsel, in the absence of evidence that counsel was at fault, that alone is not a basis to find a denial of the right to effective counsel.

Affirmed.

We agree. HARRIS, C.J., and FOGLEMAN and HOLT, JJ.

Kenny J. HALFACRE & Walter Andrew
DUTY *v.* STATE of Arkansas

CR 78-221 578 S.W. 2d 237

Opinion delivered March 26, 1979
(Division II)

[2]Counsel argues that he should have filed a motion for a continuance at least three days before trial. The time limit set for such motions is by the court's order setting the matter for trial.

James E. Davis, for appellants.

Steve Clark, Atty. Gen., by: *Catherine Anderson,* Asst. Atty. Gen., for appellee.

DARRELL HICKMAN, Justice. Kenny J. Halfacre and Walter Andrew Duty were jointly tried, at their request, on charges of aggravated robbery. They were found guilty. Halfacre was sentenced to 15 years in the penitentiary; Duty was sentenced to 12 years.

On appeal from the judgment of the Hempstead County Circuit Court they allege three errors: A .22 caliber pistol and $262.00 in currency were improperly admitted because a proper chain of custody was not established; the information was defectively drawn omitting critical language; and, the trial court erred in denying the appellants a post-trial evidentiary hearing on allegations of ineffective assistance of counsel.

We find no merit to any allegation of error regarding the trial. However, there is merit to the appellants' contention regarding the post-trial hearing.

The facts are uncomplicated. James Green, the owner of Green's Grocery and Service Station in Fulton, Arkansas, testified that two white males, driving a yellow Datsun 280Z, robbed him at about 4:00 p.m. on the 27th of January, 1978. He said they took all the bills and quarters in the cash register. He estimated the cash taken to be about $300.00. He immediately called the state police telling them that he had been robbed by two white males driving a yellow Datsun 280Z. He indicated they were headed toward the town of Saratoga. The police put out a radio alert to all local law enforcement officials and several police cars converged on the area.

A sheriff's vehicle, driving toward Saratoga, passed a yellow Datsum 280Z occupied by two white males going in the opposite direction. The officers in the sheriff's vehicle made an immediate turn and gave chase. The Datsun left the highway and was stopped shortly thereafter by the sheriff's vehicle in a churchyard. A state police vehicle arrived on the scene at about the same time.

The suspects and their vehicle were searched. The officers found a blue-steel .22 caliber pistol and one officer took about $200.00 in currency from one of the appellants and another officer took about $62.00 in currency from the other appellant. The gun and the money were later turned over to the sheriff.

The gun and the currency, after being identified by the

sheriff during the trial, were admitted into evidence. He said he gave receipts to the officers for the items. The currency consisted of the following denomination of bills: fifty-two $1.00 bills, five $20.00 bills, seven $10.00 bills and eight $5.00 bills.

Green, in his testimony, identified the appellants as the robbers and said that the gun used in the robbery appeared to be a blue-steel .22 caliber pistol.

The appellants stated that it was error to admit the gun and currency because there was no proper chain of custody. However, their argument is actually that the gun was not shown to have been used in the robbery nor was the money shown to have come from Green's Grocery.

Green had testified that he was robbed at gunpoint and described the gun as a blue-steel .22 caliber pistol. Such a pistol was taken from the appellants' vehicle and introduced into evidence. In a similar case, it was shown that a gun similar to one used in the commission of a crime was properly admitted as relevant evidence. *U.S.* v. *Cunningham,* 423 F. 2d 1269 (4th Cir. 1970). In another situation, where a chrome-plated handgun was admitted into evidence, it was held that it was improper when prosecution witnesses testified that such a gun was not used in the robbery. *Walker* v. *U.S.,* 490 F. 2d 683 (8th Cir. 1974). It, therefore, becomes a question of similarity and relevance. The handgun described by Green was similar to that taken from the appellants' vehicle; it was seized immediately after a report of the alleged robbery. The gun was properly admitted as evidence.

We find that the admissibility of the currency was also proper for the same reasons. Green said that they took all the bills from his cash register. He immediately reported the robbery to the police. Vehicles converged on the appellants within fifteen to twenty minutes after the report was received and they were found to have in their possession $260.00 or $262.00 in bills of various denominations. There was testimony that over a "handful of quarters" were found in the vehicle the next day during a more thorough search of the vehicle. The quarters were located between the two seats in a

console. The immediate report of the robbery, the definitive description of the suspects as being two white males driving a yellow Datsun 280Z and the arrest shortly thereafter, lend weight to the admissibility of the currency. In a similar situation we found that such currency was admissible as relevant. *Logan* v. *State,* 264 Ark. 920, 576 S.W. 2d 203 (1979).

The information charged that the appellants ". . . on the 27th day of January, 1978, in Hempstead County, Arkansas, did willfully, unlawfully and feloniously and with physical force rob Green's Grocery of an undetermined amount of cash, ... "

The Arkansas Statutes define aggravated robbery as follows:

> (1) A person commits aggravated robbery if he commits robbery as defined in section 2103 and he:
>
> (a) is armed with a deadly weapon, or represents by word or conduct that he is so armed; or
>
> (b) inflicts or attempts to inflict death or serious physical injury upon another person.

Ark. Stat. Ann. § 41-2102 (Repl. 1977).

The appellants argue that they could not be convicted of aggravated robbery because there was no allegation that either of the appellants were armed with a deadly weapon, represented by word or conduct that they were so armed, inflicted or attempted to inflict death or serious injury upon another person.

We do not consider this argument on appeal because there was no objection before or during the trial as to the defective information. *Ferguson* v. *State,* 257 Ark. 1036, 521 S.W. 2d 546 (1975). We do not review errors raised for the first time on appeal. *Haynie* v. *State,* 257 Ark. 542, 518 S.W. 2d 492 (1975).

After the appellants were convicted and sentenced, they

wrote directly to the trial judge asking for a hearing on the question of effectiveness of their court-appointed counsel. On the motion of the State that the petition did not allege grounds for a new trial, the court found the petition to be actually in the form of a petition for Rule 37 relief and dismissed it without a hearing.

We feel the petition did allege sufficient grounds for a hearing. Ark. Stat. Ann. § 43-2203 (Repl. 1977) sets forth reasons for which a new trial may be granted. The last reason reads:

> Where, from the misconduct of the jury, or any other cause, the court is of the opinion that the defendant has not received a fair and impartial trial.

The petition, filed a few days after judgment, was not couched in conclusory language but specifically recited instances which could be considered as a basis for finding that their constitutional right to effective assistance of counsel had been denied. *Deason* v. *State,* 263 Ark. 56, 562 S.W. 2d 79 (1978). While such a matter can be raised by way of a petition for relief under Rules of Crim. Proc., Rule 37, a trial court is not precluded from hearing evidence on such a motion as grounds for a new trial. We suggested such a procedure in *Hilliard* v. *State,* 259 Ark. 81, 531 S.W. 2d 463 (1976).

The trial court, having just finished the trial and observing the conduct of counsel, was in a unique position to hear and determine the matter; such a hearing enables us to review the matter on appeal.

Therefore, we remand the matter for the court to conduct such a hearing and make findings and enter an appropriate order. Subject to the outcome of the hearing, we find no error in the record.

Affirmed in part and remanded.

We agree. HARRIS, C.J., and FOGLEMAN and HOLT, JJ.

Jerry A. BALDWIN, Individually, and
AIR DISTRIBUTION PRODUCTS, INC.
v. John PRINCE

78-246 578 S.W. 2d 240

Opinion delivered March 26, 1979
(Division I)

Tom Forest Lovett, P.A., for appellants.

McHenry, Skipper & Skelton, for appellee.

JOHN I. PURTLE, Justice. Appellant, Jerry Baldwin, d/b/a Air Distribution Products, and John Prince, appellee, entered into a contract in August 1973 which was by its terms to continue for one year but renewal for an additional year upon mutual agreement. The contract was not renewed in 1974; however, the parties continued to work together and appellee was paid according to the terms of the contract. He was paid a commission on sales made by him. The parties agreed to form a corporation whereby appellant Baldwin would own 51% of the stock and appellee 49%. Appellant Baldwin then incorporated under the name of Air Distribution Products, Inc. but he never made this fact known to appellee nor did he distribute any shares of stock to appellee. The parties moved into a building appellant had built sometime in 1974. They agreed to continue to work on the same payment schedule as the contract contained. Appellant stated so far as he was concerned the contract between the parties ended at the expiration of one year or in August of 1974. In September 1975 appellant discharged appellee because he told a competitor the amount of Air Distribution Products' bid on a job in Hot Springs.

Appellee brought suit in the Pulaski Chancery Court seeking an accounting for credit earned while he was employed by appellant and for the value of 49% of the stock in Air Distribution Products, Inc. Appellant denied he promised to sell appellee any stock and alleged that appellee came

into equity with unclean hands and the complaint should be dismissed. Also, appellant filed a counterclaim for $25,000 in damages because appellee solicited appellant's customers and sought to undermine appellant's business.

June 20, 1978, the court entered findings of fact and conclusions of law as follows:

1. Prince made sales while working for Air Distribution Products, Inc., and is entitled to commissions in the amount of $9,056.74.

2. A contract existed between the parties at the time.

3. Prince breached his fiduciary duty to his employer by relaying information concerning a bid, but neither Air Distribution Products, Inc. nor Jerry A. Baldwin were injured by the breach and suffered no damage.

4. Baldwin terminated the contract and fired Prince on the 6th day of October, 1975; however, the commissions earned by Prince prior to that time were valid and were to be computed pursuant to the provisions of the contract.

5. Prince is owed interest on the amount from the date the complaint was filed, which was June 29, 1976.

As we view the facts, appellee was a manufacturer's representative for appellant on a commission without any agreement as to the duration of the relationship. The facts are not disputed that appellant severed the working arrangement between the parties in September 1975 because appellee told a competitor the amount of appellant's bid on a certain job. Appellee admits this was a mistake. However, the competitor who was furnished the information by appellee neither changed his bid nor received the contract on that particular job. Apparently, some third party obtained that job. There was no loss to appellant as a result of this action by appellee. It was the incident which caused appellant to terminate the working arrangements between the parties.

The agreement provided appellee would be paid a certain percent of each job sold after the net profits were determined. This necessarily caused payments to appellee be paid at a date much later than the actual sale. It was from past sales the court determined the amount due appellee. This contract or agreement is what we designate as an apportioned service contract inasmuch as the remuneration received by appellee was directly apportioned to completion of specified transactions. An unapportioned contract would be one in which the time periods or items completed could not be separated.

Appellant cites two cases in support of his appeal. *Doss* v. *Board of Directors,* 96 Ark. 451, 132 S.W. 443 (1910) and *Neely* v. *Wilmore,* 124 Ark. 460, 187 S.W. 637 (1916). *Doss* was a contract whereby an engineer agreed to oversee the construction of a levee and during the course of construction he padded the subcontracts and received kickbacks. He was receiving pay from both parties. The court there held:

> "So, we hold the law to be that where the agent is guilty of fraud upon his principal in the transaction of his agency, and his principal is put to trouble and expense of litigation in order to secure his rights, the agent forfeits his right to compensation for his services as a penalty for his fraudulent conduct."

In *Neely, supra,* the employee was employed to oversee a farming operation and in so doing wrote drafts to another employee far in excess of the correct amounts due the employee. It was held that the employee had committed a fraud upon his employer and was not entitled to collect his compensation because of the injury to his employer. Both these contracts were unapportioned and in both the employees were guilty of fraudulent conduct which damaged their employer.

We believe the rule to apply in this case is set out in Restatement, Second, Agency, § 456, which states:

> If a principal properly discharges an agent for breach of contract, or the agent wrongfully renounces the employ-

ment, the principal is subject to liability to pay to the agent, with a deduction for the loss caused the principal by the breach of contract:

(a) the agreed compensation for services properly rendered for which the compensation is apportioned in the contract, whether or not the agent's breach is wilful and deliberate; and

(b) the value, not exceeding the agreed ratable compensation, of services properly rendered for which the compensation is not apportioned if, but only if, the agent's breach is not wilful and deliberate.

The Comments following the above Restatement are as follows:

. . .

b. Apportioned services. If an agent is paid a salary apportioned to periods of time, or compensation apportioned to the completion of specified items of work, he is entitled to receive the stipulated compensation for periods or items properly completed before his renunciation or discharge. This is true even if, because of unfaithfulness or insubordination, the agent forfeits his compensation for subsequent periods of time.

c. Unapportioned services. If the agent has rendered services, compensation for which is not apportioned in the contract of service, and his renunciation or other breach of contract is not wilful, he is entitled to an amount equal to the fair value of his services, not exceeding the agreed compensation, minus any damage caused to the principal by his breach of contract. A breach of contract is wilful and deliberate, as those words are herein used, only when the agent, in complete disregard of his contractual obligations, fails to perform or misperforms the promised services and has no substantial moral excuse for so doing, or is guilty of disloyal or grossly insubordinate conduct.

. . .

If the principal rightfully discharges an agent for cause, the agent is not entitled to compensation for services not yet rendered or sales subsequently made, in the absence of some understanding otherwise, although he may be entitled to the compensation which has accrued before the termination, or pro rata compensation for services already rendered, or to their reasonable value, if such services were part of the agreed consideration. 3 Am. Jur. 2d, Agency, § 257; *Northwest Auto Co.* v. *Harmon,* 250 F. 832 (9th Cir. 1918); *Powers & Co.* v. *American Society of Tool Engineers,* 345 Mich. 392, 75 N.W. 2d 824 (1956). Mere breach of agency contract, even though inconsistent with the good faith due the principal, is not ground for forfeiture of compensation already earned. *Richer* v. *Khoury Bros., Inc.,* 341 F. 2d 34 (7th Cir. 1965); 3 C.J.S. Agency, § 335. Also, C.J.S. Agency, § 344, states a contract will not be treated as entire and indivisible unless the terms of the contract clearly so provide.

We believe this contract or agreement was divisible as clearly expressed by the terms of the written contract which, according to both parties, was the method used to determine the compensation to be received by appellee. The services for which the award was made had already been earned and were merely awaiting payment from the vendees before distribution to the parties to this action. Appellant suffered no damages as a result of appellee's action. To hold otherwise would be unjust and give appellant a windfall bonus.

Affirmed.

We agree. HARRIS, C.J., and GEORGE ROSE SMITH and BYRD, JJ.

Carol ANDREWS *v.* STATE of Arkansas

CR 78-220 578 S.W. 2d 585

Opinion delivered April 2, 1979
(In Banc)

Robert C. Marquette and *Douglas W. Parker,* for appellant.

Steve Clark, Atty. Gen., by: *E. Alvin Schay,* Asst. Atty. Gen., for appellee.

CARLETON HARRIS, Chief Justice. Appellant, Carol Andrews, 38 years of age, was charged by Information with capital murder under Ark. Stat. Ann. § 41-1501 (1)(d),[1] it being alleged that on January 30, 1978, he murdered J. R.

[1]This particular sub-section was a mistake as will be pointed out subsequently in the opinion.

Gillen and Maggie Gillen. Andrews was committed to the state hospital for examination, at which time he was examined by Dr. A. F. Rosendale, M.D., examining psychiatrist, whose report reflected that his findings were derived from:

> 1) Historical data from outside sources; 2) Medical history and physical and neurological examinations by the examining physicians; 3) Laboratory and other physical studies; 4) Psychological assessment by staff psychologist; and 5) Psychiatric history and direct physiciatric examination by the examining psychiatrist.

The doctor diagnosed Andrews as being without psychosis, his opinion stating:

> It is the opinion of the examining psychiatrist that Carol Andrews is not mentally ill to the degree of legal irresponsibility at the time of this examination and probably was not at the time of the commission of the alleged offense.
>
> It is further the opinion of the examining psychiatrist that Carol Andrews has the mental capacity to understand the proceedings against him and has the mental capacity to assist effectively in his own defense; and, that he was probably not suffering from mental disease or defect of such degree as to make him unable to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law.

Prior to trial, which was held on July 10, 1978, appellant moved that a psychiatrist be appointed for the purpose of examining him, such expense to be paid by county funds, since he was an indigent, and he also moved that Ark. Stat. Ann. § 41-601 (Repl. 1977) be declared unconstitutional since the statute declares that the defense of insanity is an affirmative defense, and thus places the burden of proof on the defendant. The court denied both of these motions and after conducting a hearing on the voluntariness of the confession, the case proceeded to trial. On trial, appellant was found guilty of capital murder and was sentenced by the court to life in prison without parole, the state having announced it was

offering no evidence or testimony in regard to aggravating circumstances. From the judgment so entered, Andrews brings this appeal, and for a reversal relies upon four points, which he sets out and which we proceed to discuss in the order listed.

I. THE COURT ERRED IN FINDING THE WRITEN STATEMENT OF DEFENDANT AND RELATED ORAL STATEMENTS TO HAVE BEEN MADE VOLUNTARILY AND WITHOUT UNDUE INFLUENCE OR COERCION, DENYING DEFENDANT'S MOTION TO SUPPRESS SAID STATEMENTS UNDER THE 14TH AMENDMENT TO THE UNITED STATES CONSTITUTION AND THE 5TH AMENDMENT TO THE ARKANSAS CONSTITUTION.

The record reflects (from his written statement) that Andrews, an employee of Gillen at a garage in Mountainburg, became involved in an argument with Gillen during the afternoon of January 30, 1978. Both had been drinking and during the argument, when Gillen (according to Andrews) made some disparaging remarks about Andrews' father, who had died a few days previously, Andrews grabbed a .22 rifle which was in the garage and fired at Gillen, hitting him behind the left ear. About this time, Andrews' son, Terry, came into the garage. According to Andrews, Gillen then grabbed the axe and started swinging it at the appellant, but Andrews took the axe away and Gillen ran outside. Appellant chased him, pulled him back into the garage, and began to beat Gillen over the head with a sledgehammer. Maggie, Gillen's wife, then ran in and while she was bending over her husband, Andrews picked up the axe and hit her numerous times in the head, both Gillens dying from the wounds inflicted.[2] Terry assented to his father's request to help cover the bodies with a piece of plastic. They then left and walked over to the Roadrunner Cafe where Andrews' brother, Tommy, was employed, to get a cup of coffee. The next morning, the three men placed the bodies in a station wagon belonging to Gillen and drove to a wooded location in Logan County where the car and bodies were left. About three days later, the car and

[2]After Andrews killed Mrs. Gillen, he took $51 or $52 from her purse.

bodies were found and the matter reported to the sheriff of Logan County. This sheriff then notified the sheriff of Crawford County that the car and bodies had been found; that the car was registered to Gillen, but that the bodies had not been identified. That afternoon (February 3, 1978), Trellon Ball, sheriff of Crawford County, went to Gillen's garage to see if he was there. Andrews was found inside the garage. The sheriff inquired about Gillen and was told by Andrews that he had not seen him since the previous Monday and that he (Andrews) was there because he was the mechanic for the garage. It being cold, Andrews, the sheriff, and one of the sheriff's deputies who had accompanied him, Bill Grill, went inside the garage and Grill observed blood spots on the door; blood spots were also noted on the ground outside the building. Ball also noticed blood spots on a car within the building and the floor sweep on the floor. About this time, Marshall Wright of Mountainburg drove up and Andrews stated that he wanted some coffee, and he and Wright went to a cafe for coffee. Upon their return, Sheriff Ball asked Andrews to get into his car. Andrews was first read the Miranda rights by Ball, and about that time people from the state police crime laboratory began arriving. Andrews, Sheriff Ball, Deputy Sheriff Grill, and Bobby Underwood (a member of the auxiliary sheriff's mounted patrol) were in the car, and the officers proceeded to interrogate Andrews. This was about 3:30 p.m. and the questioning lasted until 8:30 or 9:00 p.m. State Investigator DuVall arrived about 8:00 p.m. and engaged in the interrogation from that time. According to Andrews, the officers would not let him leave the car, or relieve himself, and he stated that he was told if he opened the door he would be shot. Appellant also said that he was not given anything to eat while in the car and had only a "soda pop." He said that he requested a lawyer, but this was denied; and still further, that DuVall shook his fist in his face. There was no contention that he was beaten or struck by the officers. About 9:00 p.m., Andrews was taken to the Crawford County Court House where he was asked if he wanted to make a statement, to which appellant replied in the affirmative. Deputy Grill then again read to him his "Miranda rights" and Andrews executed a waiver and after brief questioning, proceeded to make a statement. It took about two hours to take the statement and write it up, after which appellant signed same.

As earlier stated, the court conducted an in-chambers hearing relative to the voluntariness of the confession, and at the conclusion thereof, held that the oral statements made to the sheriff and Grill, as well as the written statement were made freely and voluntarily.[3]

In arguing that all statements made by Andrews were involuntary and under undue influence, appellant urges the court to look at the totality of the circumstances, i.e., appellant's length of confinement, lack of refreshment or relief, coercive nature of the questioning, understanding of his Miranda warnings, and his mental competency to give a knowing statement. Appellant concedes that "each of these factors, in itself, might not be sufficient to afford evidence that the statements were involuntary," but states that when "viewed together they cast grave suspicions and doubt on the finding of the trial court judge's decision to admit said statements into evidence."

Of course, the fact that a confession is made after a prolonged period of questioning does not necessarily render the confession inadmissible. In *Ashdown* v. *State,* 357 U.S. 426, 78 S. Ct. 1354, the Supreme Court affirmed a Utah case wherein the petitioner's oral confession was obtained after a 5 1/2 hour interrogation that took place immediately following the defendant's husband's funeral, and likewise, in *U.S.* v. *Lind,* 542 F. 2d 598 (2d Cir. 1976), the court found as unpersuasive the appellant Lind's contention that his confession was involuntary because, *inter alia,* he was questioned for more than eight hours. It would thus appear that the period of interrogation is but one factor that may be considered in determining whether a confession was voluntarily made. Here, the testimony reflects that Andrews was first given his Miranda warning prior to any interrogation, and in fact, this was admitted by appellant. Contradictory to appellant's statement, the record does reflect that Andrews got out of the car at least one time and deputy Grill said that he was given a hamburger and Coca Cola while in the car. As to the statement that trooper DuVall shook his fist in appellant's face, DuVall

[3]There was a statement made to Trooper DuVall (hereafter mentioned) which the court felt to be voluntary, but he did state that he would not issue a definite ruling on that particular statement until later. For that matter, none of the statements made orally were ever offered at trial.

denied that this happened, but did state that he pointed his finger and said "You did it, didn't you?" and Andrews replied, "Yes, sir." During the entire questioning in the automobile, this was the only occasion where Andrews admitted the killings, and this oral statement was not offered into evidence. Andrews not only admitted that his rights were read to him, but he testified that he understood them. While appellant stated that he requested an attorney while in the automobile, the officers testified that they heard no such request made. Of course, this is not a matter where appellant was worn out, excited, or exhausted from the events of the day (as might have been contended with more logic on the day of the killings), but rather the events being discussed took place three days later. In other words, he was certainly not under pressures that would have been applicable on the day of the murders. In *Tucker* v. *State,* 261 Ark. 505, 549 S.W. 2d 285 (1977), this court set out its general rule of review of in custody confessions as follows:

> When an in-custody confession is obtained and the voluntariness of a confession challenged we make an independent determination of the issue from a review of the entire record and in making such a review look to the totality of the circumstances surrounding the confession. However, we will not set aside the finding of voluntariness by the trial court unless the finding is clearly against the preponderance of the evidence. *Degler* v. *State,* 257 Ark. 388, 517 S.W. 2d 514 (1974).

We are unable to say that the finding of voluntariness by the trial court was clearly against the preponderance of the evidence.

II. THE COURT ERRED BY OVERRULING DEFENDANT'S MOTION TO HAVE THE COURT APPROPRIATE FUNDS FOR THE EXAMINATION OF DEFENDANT BY A PSYCHIATRIST AND THE EMPLOYMENT OF SAME TO AID DEFENDANT IN HIS DEFENSE, SAID REFUSAL VIOLATING DEFENDANT'S CONSTITUTIONAL RIGHTS UNDER THE 14TH AMENDMENT TO THE UNITED STATES

CONSTITUTION AND THE 6TH AMENDMENT TO THE UNITED STATES CONSTITUTION.

Appellant cites the case of *Gideon* v. *Wainwright,* 372 U.S. 335, 83 S. Ct. 792, as supporting his contention that the court has a mandatory duty to appropriate funds for the appointment of a psychiatric expert "where the circumstances in a criminal prosecution include both the indigency of the defendant and the announced defense of mental defect or disease." Of course, *Gideon* held that an accused in all criminal prosecutions has the right to have the assistance of counsel for his defense but does not deal in any respect with the appointment of a psychiatric expert to assist in the defense. Appellant urges, however, that this court extend the scope of that decision to include such an appointment. We decline to do so. Ark. Stat. Ann. § 43-1301 (Repl. 1977), requires that whenever a person charged with crime enters a defense of insanity, he must be examined, at county expense, at the State Hospital or at a regional mental health facility. This, of course, was done. Our court has passed on the particular question several times. In *Hale* v. *State,* 246 Ark. 989, 440 S.W. 2d 550 (1969), we said:

> Furthermore, the record shows that the State did furnish to appellant the services of a psychiatrist. The psychiatrists furnished to appellant were selected by the State not for criminal work but for treatment of mental diseases. The State Hospital staff is only incidentally used to determine mental competency of criminal defendants. Selection of psychiatrists on the State Hospital staff is done by the Governor or through his appointees and is not in any way controlled by the persons charged in this state with prosecuting criminal defendants. Under this procedure we can find no denial of due process or equal protection of the laws to the prejudice of appellant.
>
> Surely due process of law does not require the state to furnish expenses for appellant to shop from doctor to doctor until he finds one who considers him mentally incompetent.

See also *Grissom* v. *State,* 254 Ark. 81, 491 S.W. 2d 595 (1973) and *Maxwell* v. *State,* 259 Ark. 86, 531 S.W. 2d 468 (1976).

In accordance with what has been said, the ruling of the trial court did not constitute error.

III. THE COURT ERRED BY OVERRULING DEFENDANT'S MOTION PRIOR TO OPENING STATEMENTS: THAT ARKANSAS STATUTE SECTION 41-601 IS UNCONSTITUTIONAL IN REQUIRING THE DEFENSE OF MENTAL DISEASE OR DEFECT TO BE AN AFFIRMATIVE DEFENSE, SAID STATUTE IN VIOLATION OF THE 14TH AND 5TH AMENDMENTS TO THE UNITED STATES CONSTITUTION, IN THAT IT IS AN UNLAWFUL COMPULSION ON DEFENDANT TO TESTIFY AND ALSO VIOLATIVE OF THE DUE PROCESS REQUIREMENT THAT THE PROSECUTION MUST PROVE BEYOND A REASONABLE DOUBT EACH ELEMENT NECESSARY TO CONSTITUTE THE CRIME CHARGED.

Ark. Stat. Ann. § 41-601 (1) (Repl. 1977), provides:

> It is an affirmative defense to a prosecution that at the time the defendant engaged in the conduct charged, he lacked capacity, as a result of mental disease or defect, to conform his conduct to the requirements of law or to appreciate the criminality of his conduct.

It is appellant's argument that § 41-601 (1), by its very language, has forced him to attempt to disprove the premeditation and deliberation required to be established by the state.

A similar argument was presented to the United States Supreme Court in *Leland* v. *Oregon,* 343 U.S. 790, 72 S. Ct. 1002 (1952). There, the court upheld an Oregon provision requiring the defendant to prove the defense of insanity beyond a reasonable doubt. In making its decision, the court

noted that the burden of proving all elements of the crime beyond a reasonable doubt, including the elements of premeditation and deliberation, was placed on the state and remained there throughout the trial. Only after finding that each element of the crime had been established beyond a reasonable doubt was the jury to consider the independent issue of legal sanity. The court concluded that this practice did not offend the defendant's due process rights even though the Oregon standard of proof for insanity *required that this be shown beyond a reasonable doubt.* This goes far beyond our statute, Ark. Stat. Ann. § 41-110 (Repl. 1977), which states:

> (4) The defendant must prove an 'affirmative defense' by a preponderance of the evidence. An 'affirmative defense' is any matter:
>
> (a) so designated by a section of this Code; or
> (b) so designated by a statute not a part of this Code.

Appellant argues that *Leland* is no longer the applicable law for this court to follow. In making this argument, he cites *In Re Winship,* 358 U.S. 364, 90 S. Ct. 1068 (1970). There, the court held "that the due process clause protects the accused against conviction except upon proof beyond a reasonable doubt of *every fact necessary* to constitute the crime with which he is charged," i.e., before a court may constitutionally allocate the burden of proving any fact to the defendant, the state must first prove every element of the offense charged and must first determine whether that fact is an element of the crime charged. This was done in the present case. *Winship* established the foundation upon which the Supreme Court based a later decision, *Mullaney* v. *Wilbur,* 421 U.S. 684, 95 S. Ct. 1881 (1975), which appellant contends means that the "continued viability of *Leland* appears doomed."

In *Mullaney,* the court held that a defendant was not required to disprove an element of murder in order to reduce the offense to manslaughter. The case did not involve the issue of insanity, in any way, and, at any rate, the United States Supreme Court in *Patterson* v. *New York,* 432 U.S. 197, 97 S. Ct. 2319, held contrary to appellant's assertions, in which it stated:

> The Chief Justice and Mr. Justice Rehnquist, concurring, expressed their understanding that the *Mullaney* decision did not call into question the ruling in *Leland* v. *Oregon,* supra, with respect to the proof of insanity.
>
> Subsequently, the Court confirmed that it remained constitutional to burden the defendant with proving his insanity defense when it dismissed, as not raising a substantial federal question, a case in which the appellant specifically challenged the continuing validity of *Leland* v. *Oregon.* This occurred in *Rivera* v. *Delaware,* 429 U.S. 877 (1976), an appeal from a Delaware conviction which, in reliance on *Leland,* had been affirmed by the Delaware Supreme Court over the claim that the Delaware statute was unconstitutional because it burdened the defendant with proving his affirmative defense of insanity by a preponderance of the evidence. The claim in this Court was that *Leland* had been overruled by *Winship* and *Mullaney.* We dismissed the appeal as not presenting a substantial federal question.

Likewise, in *Duisen* v. *Wyrick,* 566 F. 2d 616 (8th Cir. 1977), the court squarely addressed the issue of whether *Leland* was still good law in light of *Winship* and *Mullaney.* There, the court stated:

> Any doubts as to the merits of petitioner's argument are settled by the recent Supreme Court case of *Patterson* v. *New York,* 432 U.S. 197, 97 S. Ct. 2319. In *Patterson,* the Supreme Court expressly declined to overturn its holding in *Leland.* Consequently, the decision of the District Court to dismiss this action with prejudice is affirmed.

From what has been said, it clearly appears that the logic of the federal courts in discussing this issue is simply that sanity is not an element of the crime; rather, it involves the separate issue of capacity, and thus the burden of proof may be constitutionally placed on the defendant.

Counsel for appellant conducted a very thorough and lengthy cross-examination of Dr. Rosendale, actually cover-

ing 44 pages of the transcript. Dr. Rosendale stated that he had examined over 300 psychotic patients, who were retained for treatment, but "never once have I examined a patient, psychotic patient, who went to the extent that this man did to conceal their evidence. Most of them just walk off and leave it, and make no efforts to cover their tracks, and make no attempts at evasion of apprehension." Andrews, who testified at trial, stated that he had received two Congressional medals for fighting in Vietnam, had served with the CIA, and had been directed by President Kennedy to assassinate the president of the Dominican Republic; further, that he was involved in the assassination of Dr. Martin Luther King, which was ordered by President Johnson. He described experiences in Vietnam which included the year 1965, when appellant stated that he was a prisoner of war,[4] gave his military serial number (which did not exist), said that Gillen was a fellow prisoner in a POW camp with him in Vietnam; that Gillen collaborated with the enemy, which was one reason he wanted to kill him. It was the opinion of Dr. Rosendale that Andrews was fantasizing. The record reflects the following:

> Q. All right, would you please tell this jury in what manner you would be able to diagnose whether or not he was fantasizing or whether he was hallucinating that he was in the military service.
>
> A. Well, in the first place he had no trouble whatsoever in maintaining an oral idea, and a psychotic person cannot do that. He would start talking about something, I could interrupt him and ask him a question, and he would go back to his original chain of thought, and he would complete it. He would complete his idea what he was talking about. He would not insert an inappropriate term during the time he was discussing this. His effect was quite appropriate, he showed no signs of anxiety, he was perfectly relaxed, and this you do not find with patients who are psychotic.
>
> Q. You mean a psychotic person is not relaxed?

[4]The records reflected that he was in Oklahoma State Penitentiary in 1965.

A. No, sir, they are not relaxed.

Q. You mean that they don't sit around down at the Hospital in a very passive state in any event?

A. Well, after you put them on medication they will.

On direct examination, Dr. Rosendale had distinguished between a fantasy and a delusion, stating:

A. He could actually believe it. And in that case this would be a delusion. We would say that he is psychotic. But in the instant case, in my opinion, and the opinion of the doctors at the State Hospital, this was strictly a fantasy.

Q. That would in no way affect, or would it affect the opinion which you and the staff ultimately rendered?

A. No, sir.

So as far as you and the staff are concerned, he is or was, in your opinion, mentally competent on January 30, and during the period of time he was examined he was mentally competent. Is that a correct statement?

A. Yes, sir.

The son and brother verified that Andrews had made statements to them similar to those heretofore mentioned.[5]

In the case before us, the trial court instructed the jury that the burden was "upon the state to prove the defendant's

[5]Entirely aside from the question of sanity, Andrews, on trial, testified that he shot Gillen because he was trying to get Gillen to turn his son, Terry, loose; that Gillen ran outside and appellant tossed Terry the gun and went out to bring Gillen back. According to Andrews, they placed him in a chair and Terry struck Gillen several times with a sledgehammer; about that time Mrs. Gillen came in and Terry hit her with the axe. The witness said she was making a "funny noise" and Terry "went back and he got a small poker and put on her neck, and I went over there and taken the poker off. He was standing on each side of it with his feet." Placing the poker on Mrs. Gillen's neck and putting the pressure on with feet apparently did happen, but Terry testified that both the killing and the latter incident were done by his father.

guilt of each element of the offense with which the defendant is charged to your satisfaction beyond a reasonable doubt." On the issue of insanity, the court instructed the jury that the defendant is required to prove it "now, however, beyond a reasonable doubt, but only to your reasonable satisfaction." We have concluded that error was not committed.

IV. THE COURT ERRED IN NOT GRANTING THE REQUEST FOR A DIRECTED VERDICT OF DEFENDANT WHERE NO EVIDENCE HAD BEEN PRODUCED THAT EITHER OF THE DECEASED HELD PUBLIC OFFICE AT THE TIME OF THEIR DEATH. AS STATED IN THE INFORMATION, SAID ACT BEING IN VIOLATION OF ARKANSAS STATUTE 41-1501 (1)(d).

Ark. Stat. Ann. § 41-1501 provides as follows:

(1) A person commits capital murder if:
(a) acting alone or with one or more other persons, he commits or attempts to commit rape, kidnapping, arson, vehicular piracy, robbery, burglary, or escape in the first degree, and in the course of and in furtherance of the felony, or in immediate flight therefrom, he or an accomplice causes the death of any person under circumstances manifesting extreme indifference to the value of human life; or
(b) . . .
(c) with the premeditated and deliberated purpose of causing the death of any person, he causes the death of two (2) or more persons in the course of the same criminal episode; or
(d) with the premeditated and deliberated purpose of causing the death of the holder of any public office filled by election or a candidate for public office, he causes the death of any person; or . . .

While the Information correctly charged Andrews "did unlawfully and willfully and with the premeditated and deliberated purpose of causing the death of J. R. Gillen, cause the death of J. R. Gillen and Maggie Gillen in the course of the same criminal episode; said act being in viola-

tion of Ark. Stat. Ann. § 41-1501 (1)(d), against the peace and dignity of the State of Arkansas, . . . " it erroneously listed the sub-section as (d), instead of sub-section (c) and at the arraignment, which occurred more than four months prior to the trial, the court told appellant and his counsel that he was charged with violation of § 41-1501 (1)(d). As stated, this was the wrong sub-section, the actual charge as set out in the Information actually referring to (c). There was no evidence at all that either of the deceased persons had ever held any public office, and it was quite apparent that this was simply an error in typing up the Information. The important matter is that the court, in instructing the jury, correctly stated the substance of the charge. There has been no showing by appellant that he was in any way prejudiced by the mistake in the Information (such as preparing the wrong defense), and the entire record denotes that this was simply harmless error. In *Baker* v. *State,* 200 Ark. 688, 140 S.W. 2d 1008, Baker was convicted of embezzlement under § 3151 of Pope's Digest, and it was contended that he was charged under the wrong section, appellant arguing that the particular section applied only to employees of private businesses, copartnerships or private corporations; that Baker's conviction was based on embezzling funds belonging to the school district, which of course was not a private concern. This court held that the fact that the pleader attempted to proceed against Baker for the embezzlement of funds belonging to the school districts named in the Information under § 3151 did not entitle appellant to a discharge if the Information were good under any other section of the statutes, and further held that the Information did charge him with a crime under § 3153 of Pope's Digest, and the fact that the pleader attempted to proceed under § 3151 was immaterial. We said:

> Appellant now argues, in regard to this last section, that it may not be invoked to sustain the conviction of the appellant for the reason that the information, as set forth above, was prepared and filed and was meant to charge an offense under the aforesaid § 3151 of Pope's Digest and that this is apparent from the language used. It may be true that the pleader in drafting his information had before him and in mind the language of the aforesaid statute and followed the same to some extent

> in the preparation of the charge upon which appellant was tried, but it certainly does not necessarily follow, as a matter of law, that because thereof, even if true, the defendant must be discharged. Certainly, if by reasonable construction the language of the information charges an offense against the laws of the State under any other provision of the statutes, the ineptitude of the pleader's diction would not operate to nullify the proceedings.

Of course, in the case now before us, the language of the Information did specifically charge an offense against the laws of the state under the very preceding sub-section of the statute, and, as stated, there was no showing of surprise or that the defense of Andrews was prejudiced in any manner by use of the wrong sub-section, particularly since the offense itself was clearly set out in the Information. There is no merit in appellant's contention.

In accordance with Ark. Stat. Ann. § 43-2725,[6] we have reviewed all objections made by appellant during the course of the trial and find no prejudicial error.

Affirmed.

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[6]"The Supreme Court need only review those matters briefed and argued by the appellant provided that where either a sentence for life imprisonment or death, the Supreme Court shall review all errors prejudicial to the rights of the appellant."

JERRY J. WESLEY *v.* STATE of Arkansas

CR 78-226 578 S.W. 2d 895

Opinion delivered April 2, 1979
(Division I)

John W. Achor, Public Defender, by: *Jim Phillips,* Deputy Public Defender, for appellant.

Steve Clark, Atty. Gen., by: *Robert J. DeGostin, Jr.,* Deputy Atty. Gen., for appellee.

GEORGE ROSE SMITH, Justice.The appellant, Jerry J. Wesley, and a codefendant, Donald Ray Bailey, were jointly charged with theft of property (Cadillac hubcaps) and with aggravated robbery in that they pointed a gun at Officer A. Brown with the purpose of resisting apprehension immediately after committing the theft. The jury returned verdicts of guilty and sentenced defendant to two years' imprisonment upon the charge of theft and to six years upon the charge of aggravated robbery.

Wesley, the only appellant, does not question the jury's verdict of guilty upon the charge of theft. He contends, however, that the evidence is insufficient to support the verdict of aggravated robbery, because the jury, although returning a verdict of guilty on that charge, also found as a fact, in response to an interrogatory, that neither defendant was guilty of using a deadly weapon in the commission of the aggravated robbery. The court at first refused to accept the verdicts, as being inconsistent, and sent the jury back for further deliberation. The jury adhered to its verdicts, however, and judgment was entered accordingly.

Officer Brown, a Little Rock policeman, testified that while he was off duty he saw the defendants pulling hubcaps off a parked Cadillac. He identified himself and ordered them to halt. The defendants jumped into a car and fled. Officer Brown testified that during the ensuing high-speed chase the defendant Bailey pointed a pistol at him. The weapon appeared to be a small handgun. Officer Brown then dropped back and called for help. The defendants were apprehended, but no gun was found. Bailey testified that he did not have a gun and had never owned one. Wesley did not testify.

We must agree that the evidence is insufficient."A person commits robbery if with the purpose of committing a theft or resisting apprehension immediately thereafter, he

employs or threatens to immediately employ physical force upon another." Ark. Stat. Ann. § 41-2103 (Repl. 1977). A person commits aggravated robbery if he commits robbery as so defined and is armed with a deadly weapon or represents by word or conduct that he is so armed. § 41-2102.

Stealing hubcaps from a parked car is not robbery. The jury, to find the defendants guilty of aggravated robbery, had to find that in resisting apprehension they were armed with a deadly weapon or represented by their conduct that they were so armed. But the jury specifically found that the defendants were not so armed. Thus the verdicts were inconsistent, as the trial judge pointed out. Moreover, the special finding of fact eliminates the only basis for a verdict of guilty upon the charge of aggravated robbery.

The State argues, however, that even though the defendants were not in fact armed with a deadly weapon, the jury could have found that they represented by their conduct that they were so armed. The trouble is, there is no basis except pure guesswork for such a conclusion. Officer Brown testified that Bailey had what looked like a small handgun—"no doubt in my mind that it was a gun." Bailey denied that he had a gun. No gun was found. Thus the conflict between the two versions was direct and beyond reconciliation. The testimony presents no third possibility. It is therefore impossible for us to sustain the finding of guilty upon the charge of aggravated robbery in the face of the explicit finding of fact that no deadly weapon was involved.

The judgment is affirmed with respect to the charge of theft of property, but with respect to the charge of aggravated robbery the judgment is reversed and the cause dismissed.

We agree. HARRIS, C.J., and BYRD and PURTLE, JJ.

Jay CORE *v.* STATE of Arkansas

CR 78-218 578 S.W. 2d 581

Opinion delivered April 2, 1979
(Division II)

Robert S. Gunter, for appellant.

Steve Clark, Atty. Gen., by: *Ray Hartenstein,* Asst. Atty. Gen., for appellee.

JOHN A. FOGLEMAN, Justice. Appellant Jay Core was engaged in a business he described as "architectural antiques" or "the glorified junk business." He contends that the evidence was insufficient to support his conviction of the offense of theft by receiving, as defined by Ark. Stat. Ann. § 41-2206 (Repl. 1977), and that the court erred in denying his motion for a directed verdict. He was tried by the court, sitting without a jury. He argues that the state failed to produce evidence to show that he knowingly received the goods in question or that he knew, or had good reason to believe, that

the goods were stolen. He also argues that the trial court erroneously disregarded evidence supporting a defense. We affirm.

The statute applies to one who receives or retains stolen property of another, knowing, or having good reason to believe, it was stolen. The statute includes this provision:

> The unexplained possession or control by a person of recently stolen property or the acquisition by a person of property for a consideration known to be far below its reasonable value shall give rise to a presumption that he knows or believes that the property was stolen.

The property, belonging to one Louis Stafford, found in Core's possession on September 12, 1977, consisted of two Century three-phase motors, one of a 1-1/2 h.p. capacity and the other 7-1/2 h.p. A Reznor overhead heater and a Batson search vacuum pump were also identified by Stafford as his property.

The owner of the property testified that he obtained the heater and the motors from Maxie's Reliable Loan Office. He said that the larger motor was probably worth $225, the smaller one, $125, and the heater, $150. Core relinquished possession of the motors to Stafford, but not the heater. Stafford had positively identified this property, which he found at Core's place of business on September 12, 1977. Maxie Itzkowitz, proprietor of Maxie's Reliable Loan Office, testified that Stafford had purchased these three items from him "about in September 1977." He placed the value of one motor at $125 to $150, and the other[1] at "around $200." He said the heater would be worth about $150. Stafford said that a table saw had been taken from his place of business, but he could not identify one he saw at Core's.

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[1]Appellant contends that this evidence should not be considered, because the motor was actually rated at 7-1/2 h.p. Through the trial it was referred to most often as being 10 h.p. or "about 10 h.p." After Itzkowitz had testified that he had sold the two motors to Stafford, and had stated the value of the smaller one, he was asked to state his opinion of the value of "the ten horse power Century motor." There was no chance that the fact-finder was misled by this alleged discrepancy.

Appellant's explanations of his possession of this property were, in some respects, vague and conflicting. Stafford testified that Core said that he didn't know if the person from whom he bought the "stuff" was white or black, male or female. The police officer who accompanied Stafford to Core's place of business testified that Core had said that he had bought some of the property from someone, but couldn't recall who it was. The officer produced a written statement signed by Core. In it, Core stated that he had purchased the two motors and a table saw from "one unknown person," approximately May 1, 1977, for $75 and the pump from "one unknown person," approximately June 1, 1977, for $150. In this statement Core said he could not remember whether the person was male or female, black or white, because of the lapse of time.

Core testified that the purchase of these items and some others was a little bit vague, but that he had purchased them from someone who came to his place peddling some junk. He stated that he did not know this person and had never seen him before, or since, the purchase. According to Core's best recollection, he paid $150 to $250 for everything he bought from this person. Later he said that he paid $150 for everything in question. He had gone back to his books for verification of this amount because of the lapse of time. To the best of his recollection, he had not written a check for the purchase price, although he ordinarily tried to do so. He said the standard procedure in such transactions was "cash for cash," because "these guys" are basically just peddling scrap metal and want their money immediately. He couldn't remember examining these items for evidence of ownership, as he normally did.

Core expressed the opinion that the motors were scrap and said that he didn't normally buy this sort of item, but that his specific purpose for buying these was to use the electric motors in the restoration of metals. Later he said that he bought the motors simply because they were there, but admitted that he had said he bought them for scrap and had also said that he was going to use them. Still later, he said that they were of no value to him whatsoever. He stated that the vacuum pump was simply something that was there

which he would not ordinarily use, but it was something of particular interest to him. He said that he probably paid more than a fair price for it because fair price would have been scrap price.

Core denied buying the heater from this man or men. He testified that this Reznor heater was in his building when he first occupied it.

We find ample evidence to support a finding that Core received the motors, pump and heater having good reason to believe that they were stolen and to give rise to the presumption that he knew or believed they were stolen.

Appellant argues that the presumption is inapplicable because 3-1/2 to 4 months elapsed between his purchase and the time he had any knowledge that the goods might have been stolen. In his argument, appellant says that, if all inferences are drawn in his favor, it is apparent that his testimony is consistent with the possibility that these items had been removed from Stafford's building long before Stafford discovered, on August 30, 1977, that they were missing. We cannot agree with appellant's argument. In the first place, the drawing of reasonable inferences from the testimony was for the trial judge as fact-finder and not for this court. See *Upton* v. *State,* 257 Ark. 424, 516 S.W. 2d 904; *Reynolds* v. *State,* 211 Ark. 383, 200 S.W. 2d 806; *Shoop* v. *State,* 209 Ark. 498, 190 S.W. 2d 988; *Morrison-Knudsen Co., Inc.* v. *Lea,* 208 Ark. 260, 186 S.W. 2d 429; *Cox* v. *State Farm Fire & Casualty Co.,* 240 Ark. 60, 398 S.W. 2d 60.

We cannot say that it was unreasonable for the trial judge to draw an inference unfavorable to appellant on the evidence before us. In the next place, it would have been impossible for Core to have bought these items when he said he did if the testimony of Maxie Itzkowitz as to the date he sold them to Stafford is accepted as true. Obviously, the trial judge resolved the question of the credibility against appellant and in favor of Itzkowitz. This was a matter which addressed itself to the trial judge, not this court. *Horton* v. *State,* 262 Ark. 211, 555 S.W. 2d 226.

Appellant also seems to think that one of the two alternate bases for the presumption of knowledge or belief of the possessor, i.e., unexplained possession or control, is eliminated simply whenever the possessor gives a plausible explanation for his possession. This is not so. In this respect, the new statute (§ 41-2206) only restated law existing when it was adopted. See Commentary to § 41-2206; *Boyette* v. *State,* 254 Ark. 320, 493 S.W. 2d 428; *Bridges* v. *State,* 177 Ark. 1193, 9 S.W. 2d 240. The trier of fact is not required to believe the testimony of any witness. *Hamilton* v. *State,* 262 Ark. 366, 556 S.W. 2d 884; *Clark* v. *State,* 246 Ark. 1151, 442 S.W. 2d 225; *Maples* v. *State,* 225 Ark. 785, 286 S.W. 2d 15. See also, *Smith* v. *State,* 216 Ark. 1, 223 S.W. 2d 1011, cert. den. 339 U.S. 916, 70 S. Ct. 562, 94 L. Ed. 1341 (1950). This is especially true where the testimony of the accused, probably the person most interested in the outcome of the trial, is involved. See *Duncan* v. *State,* 196 Ark. 171, 117 S.W. 2d 36; *Maples* v. *State,* supra. Here there were valid reasons for discounting the credibility of Core, as indicated by inconsistencies in his testimony, such as the price he paid for the items involved and the number of sellers from whom he purchased. The reasonableness and sufficiency of his explanation were matters to be determined by the fact-finder. *Boyette* v. *State,* supra; *Shoop* v. *State,* supra. In doing so, the trial judge had the right to accept such portions of the testimony as he believed to be true and to reject those he believed to be false. *Richie* v. *State,* 261 Ark. 7, 545 S.W. 2d 638.

Furthermore, there was sufficient evidence of the second of the alternate bases which give rise to the presumption of knowledge. It is difficult to decide just what Core paid for the articles positively identified because he admitted that at least one purchase included items which were not identified as the property of Stafford and there is no testimony showing what part of the purchase price was attributable to these additional items. Giving his testimony its strongest probative force, there is no evidence that Core paid more than $250 for all purchases which included the items identified by Stafford. If Stafford's testimony is accepted, his property was worth $525. Itzkowitz valued it at $475. No witness testified about the value of the pump, but there was no reason for the trial court to believe it had no value. Even though value may be a

matter of opinion, the question of fact as to whether Core paid a consideration he knew to be far below reasonable value was a matter the trial court resolved against appellant.[2] On appellate review, we consider only that evidence most favorable to the appellee. *Maples* v. *State,* supra. In that light, we find it sufficient.

Appellant contends that we should follow the holding of *State* v. *Thomas,* 13 Or. App. 164, 509 P. 2d 446 (1973), because the critical statutory language as to belief of the receiver [§ 41-2206 (1)] was adopted from a section of the Oregon Criminal Code. In that case, it was held that before a jury could find one accused of this offense guilty, it must find that the defendant had either actual knowledge or the belief it was stolen, and the fact that some other person (or a reasonable man), under the same circumstances, would have known, or had good reason to believe, the property was stolen is insufficient. This decision was based upon decisions of Oregon courts construing a prior statute, so it does not necessarily control our construction of our statute. The commentary to § 41-2206 clearly indicates that the drafters of our code did not intend to adopt the Oregon judicial construction because it indicates that a jury verdict may be based upon evidence that the accused was "on notice of the facts that would lead a reasonable person to entertain such a belief."

This is a question we need not decide in this case. In *Thomas,* the question involved was the propriety of a jury instruction covering the required culpable mental state. There is no indication in this record that the trial judge applied the

[2]We do not overlook appellant's argument that only the relationship of the price paid for the two motors to the value of those motors should be considered. This argument is based upon a statement of the trial judge in ruling on an objection to testimony relating to an unidentified person who accompanied Stafford to Core's place of business. Appellant interprets this statement to mean that the judge considered that the state's evidence had failed as to any of the property described in the information, except for the two motors. We cannot accept this version, because of the action of the judge in requiring appellant to make restitution to Stafford by paying him $500. This could not have been for the two motors returned to Stafford. It could only have been for the Reznor heater and the vacuum pump, and perhaps other items not found. These items were the subject of a colloquy among the judge, the deputy prosecuting attorney, appellant and appellant's attorney, just prior to pronouncement of the sentence and the terms of suspension of part of it.

test to a "reasonable man" and did not decide the question whether Jay Core had good reason to believe this property was stolen. As we have pointed out, there is substantial evidence that Core did have such reason.

Appellant also argues that the trial judge disregarded evidence which constituted a complete defense to the charge. He relies upon Ark. Stat. Ann. § 41-2206 (4) (Repl. 1977), which provides that it is a defense that the property is received, retained or disposed of with the *purpose* of restoring it to the owner. He also relies upon the evidence that he did release the motors to Stafford and other testimony of specific instances in which he had released other property to owners who established their ownership. Even if we accept appellant's position that there was no identification of anything except the two motors, there is not a scintilla of evidence that Core's purpose at the time of the purchase was restoration to the proper owner. His own testimony about his purpose was to the contrary. The defense is not applicable, as appellant seems to think, when property is returned when "the defendant was confronted." The purpose must exist at the time of the purchase and it cannot be based upon a general policy of the buyer to relinquish property purchased by him to a claimant who can identify it as his to the satisfaction of the buyer.

We agree. HARRIS, C.J., HOLT and HICKMAN, JJ.

ARKANSAS STATE HIGHWAY COMMISSION *v.* FIRST PYRAMID LIFE INSURANCE COMPANY OF AMERICA et al

78-277 579 S.W. 2d 587

Opinion delivered April 2, 1979
(In Banc)
[Rehearing denied May 21, 1979.]

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

Spitzberg, Mitchell & Hays, by: *John P. Gill,* for appellees.

CONLEY BYRD, Justice. Appellant Arkansas State Highway Commission by eminent domain took 58.39 acres from three separate tracts of land, the title of which was held by appellee First Pyramid Life Insurance Company of America, for construction of the East Belt Freeway where it connects with I-40. Appellant deposited $44,960.00 as estimated just compensation at the time of the taking. Appraisal witnesses Jack Farris, James Larrison and Wesley Adams called on behalf of appellee testified to damages of $550,150, $640,950 and $495,000 respectively. For appellant Dave Roberts placed damages at $73,743 and William B. Putnam placed the damages at $46,945. The jury returned a verdict for $495,000. For reversal of the judgment entered on the jury's verdict, appellants contend:

"I. The trial court erred in permitting Wesley Adams to be called as a witness by the appellees over appellant's objection.

II. The trial court abused its discretion in allowing appellees to call Wesley Adams in rebuttal.

III. The trial court erred in admitting into evidence certain transactions between 1st Pyramid and Harris Cattle Company.

IV. The trial court erred in not striking the value testimony of appellee's expert witness, Jack Farris, relating to his before value.

V. The trial court erred in not striking the before value testimony of appellee's expert witness, James Larrison.

VI. The trial court erred in not granting a mistrial.

VII. The trial court erred in not allowing appellant's Exhibit "D" and the testimony relative thereto into evidence.

VIII. The trial court erred in not permitting appellant to introduce its proffered Exhibit No. 11."

POINT I. Appellant makes two contentions under this point — *i.e.*:

"(1) The trial court erred in allowing appellees to call Wesley Adams, an appraisal expert, as a witness in order to ascertain the amount of his appraisal, and

(2) The trial court erred in permitting appellee to bring out that Wesley Adams had been hired by appellant as an expert appraisal witness and the appellant was not calling him as a witness."

Both questions were virtually answered in *Arkansas State Highway Comm'n* v. *Witkowski,* 257 Ark. 659, 519 S.W. 2d 743 (1975), wherein we cited *Boyles* v. *Houston Lighting and Power Company,* 464 S.W. 2d 359 (Tex. 1971), *State ex rel State Highway Comm'n* v. *Texaco, Inc.,* (Mo. 1973) and *Logan* v. *Chatham County,* 113 Ga. App. 491, 148 S.E. 2d 471 (1966). Those cases hold that neither party to a condemnation case is bound by rejected opinions of expert witnesses employed by them to appraise property being condemned and cannot be prejudiced by the admission in evidence of rejected appraisals made at their instance. All of those cases also hold that testimony as to the original employment of the expert is not pertinent to the issue of just compensation and when admitted over the objection of the party who originally employed the expert the same constitutes prejudicial error requiring a new trial.

It follows that the trial court erred in permitting appellee to show that Wesley Adams had been employed by appellant to make an appraisal of the estimated just compensation due.

POINT II. In view of the fact that Adams if called must be called as a witness for the landowner, this alleged error is not apt to occur on a retrial.

POINTS III. and VII. The record shows that appellee in the purchase of the property from Harris Cattle Company had some kind of an agreement for the sharing of development costs with Rector, Phillips and Morse, Inc. The 1973 deed from Harris Cattle Company to appellee recites a consideration os $10,000 paid and the execution of a Vendor's Lien Note in the amount of $2,000,765.30 with interest at 4%. The deed provided that the lien retained could be released upon any part of the property by the payment of $7,700.00 per acre. The Vendor's Lien Note provided:

"VENDOR'S LIEN NOTE

$2,000,765.30 September 6, 1973

First Pyramid promises to pay Harris Cattle Company $2,000,765.30 with intersst at rate of 4% per annum. Principal sum due September 6, 1979. Interest due and payable March 6, 1975, and annually then after. Note is evidence of unpaid balance of purchase price for 260 acres and payment of note is secured by Vendor's lien retained in deed between parties. Harris not entitled to obtain a judgment against First Pyramid in event of default — sole and exclusive remedy of Harris is to retain any payments previously made and require First Pyramid to reconvey the said land, or that part which they still have. Upon reconveyance it shall be by Warranty Deed free and clear of any liens. If upon default First Pyramid fails to reconvey upon written demand by Harris within 10 days, then Harris can obtain judgment plus 10% interest and attorney's fees."

Rudolph S. Del Donno, the Senior Vice-President of appellee in charge of investments, testified that appellee had laid out for improvements $1,425,000. That the North Little Rock Water Department, Plough Incorporated [The Maybelline Plant], North Little Rock Chamber of Commerce and Fifty For The Future had reimbursed appellee for $640,-

318.00, leaving appellee's unreimbursed improvement costs at $784,682.00. Other than for the lands involved in this litigation appellee according to the terms of the Vendor's Lien Note had paid $57,000 on the principal. The witness was permitted to show by cancelled check that for the lands involved in the eminent domain action, appellee had paid to Harris Cattle Company at the rate of $7,700 per acre for a total of $448,500. Mr. Del Donno also stated that at the request of appellee's counsel in a lawsuit in chancery court between appellee and Harris Cattle Company, he had executed a deed of the property back to Harris Cattle Company but he did not know whether the deed had been accepted.

Appellant to rebut the foregoing proof sought to call Allan W. Horne, a member of appellee's board of directors and its legal counsel in the chancery court action between appellee and Harris Cattle Company, to show how appellee was attempting to extricate itself from any obligation on the Vendor's Lien Note by trying to return the land to Harris Cattle Company. In its proffer of proof appellant elicited from Horne that appellee was not necessarily a volunteer in paying the $7,700 per acre to Harris Cattle Company for the 58.39 acres involved in this eminent domain action — *i.e.* the $448,500 check — but that the obligation arose because the Vendor's Lien Note failed to make an exception in cases of eminent domain actions. However, the trial court excluded all of the testimony of Horne.

To support the action of the trial court in permitting appellee to show the price that it paid for the land, appellee relies upon *Arkansas State Highway Commission* v. *Hubach,* 257 Ark. 117, 514 S.W. 2d 386 (1974), where we stated:

> "When a parcel of land is taken by eminent domain, the price which the owner paid for it when he acquired it is *one of the most important pieces of evidence* in determining its present value. However, this assumes that the sale was recent, was a voluntary transaction between parties each of whom was capable and desirous of protecting his own interest, and that no change in conditions or marked fluctuation in values has occurred since the sale. A price paid under such conditions is a

circumstance which a prospective purchaser would seriously consider in determining what he himself should pay for the property. As evidence before a jury, it consumes little time in introduction and raises few collateral issues, so that every argument is in favor of its admissibility."

Based upon the foregoing we agree with appellee that the trial court did not err in permitting appellee to show what it had paid for the land. It does not follow that the court was correct, in refusing to permit appellant to show through Horne, that appellee was attempting to extricate itself from the transaction. Rules 401 and 402 of the Uniform Rules of Evidence, Ark. Stat. Ann. § 28-1001 (Supp. 1977) provides:

"Rule 401. Definition of 'Relevant evidence.' — 'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

Rule 402. Relevant evidence generally admissible — Irrelevant evidence inadmissible. — All relevant evidence is admissible, except as otherwise provided by statute or by these rules or by other rules applicable in the courts of this State. Evidence which is not relevant is not admissible."

In view of the foregoing rules the appellant was certainly entitled to produce any evidence that it might have to show the Two Million Dollar transaction between appellee and Harris Cattle Company was a sick or sham transaction. Consequently, the trial court erred in refusing to admit the testimony of Horne.

POINT IV. Jack Farris, called as a real estate expert by appellee, testified that in determining that the fair market value of the property taken had a fair market value of $569,-425 he considered that the highest and best use of the property was for industrial purposes. Farris stated that he used the comparable sale approach in appraising the property.

The first comparable sale he used was First Pyramid Life Insurance Company to Pulaski Equipment Company, 5 acres sold for $21,800 per acre. The second sale was First Pyramid Life to Kenneth Penebaker, one acre sold to Twin City Bank for $53,000. The third sale was First Pyramid to Mapco, an easement at $12,000 per acre. The fourth sale was Faulkner and Saterra to Southwestern Bell, eight acres at the corner of I-40 and Highway 161 at $22,500 per acre. Farris also used the sale of Winrock Homes in 1976, next to the Southwestern Bell tract, at $12,148 per acre for 14.89 acres. On cross-examination Farris stated that he did not consider the Penebaker purchase (Twin City Bank) as comparable. He was not sure whether Mapco had the power of eminent domain. Neither did he know whether Southwestern Bell had the power of eminent domain for the eight acre tract.

At the conclusion of Farris' testimony appellant moved "to strike the before value testimony . . . and consequently the figure on just compensation . . . on the grounds he has given no fair and reasonable basis for his value." Appellant contends here that the sales used by Farris were either sales to a condemning authority or sales which were located near interchanges, small in size and in developed areas and consequently not comparable.

The trial court was not asked to exclude the Mapco and Southwestern Bell sales on the grounds now suggested and, consequently, committed no error. However, since the issue is likely to arise on a retrial, we point out that sales to one having the right of eminent domain do not ordinarily fall in the category of voluntary sales in the ordinary course of business and, consequently, are not fair criteria of value for purposes of comparable sales in determining the just compensation due in eminent domain actions, *Arkansas Power & Light Company* v. *Harper,* 249 Ark. 606, 460 S.W. 2d 75 (1970). The party relying upon comparable sales to show estimated just compensation has the burden of proving that such sales are voluntary. *May* v. *Dewey,* 201 Va. 621, 112 S.E. 2d 838 (1960). As pointed out in *Transwestern Pipeline Company* v. *O'Brian,* 418 F. 2d 15 (5th Cir. 1969), the burden is a heavy one when the

purchaser of the proposed comparable sale falls in the category of those possessing the power of eminent domain.

As to the second contention that the comparables used by Farris were located near interchanges, small in size and in developed areas, we cannot say from the record as abstracted that appellant demonstrated that Farris had no fair and reasonable basis for his value. As pointed out in *Arkansas State Highway Commission* v. *Russell,* 240 Ark. 21, 398 S.W. 2d 201 (1966), where the testimony shows only a weak or questionable basis for the opinion of the expert, the issue becomes one of credibility for the fact finder rather than a question of law for the court. Thus, the mere showing that an expert witness uses an eight and a fourteen acre tract as a comparable tract for appraising three parcels of property comprising 58.39 acres does not as a matter of law show that the witness has no fair or reasonable basis for his opinion.

POINT V. James Larrison, an expert witness for the landowner, testified that estimated just compensation for the three tracts involved in the taking would total $640,950. On cross-examination he testified that he considered the Plough sale, the Mack Truck five acre sale, the Winrock sale north of Protho Interchange and the Southwestern Bell sale just north of the Winrock sale. He also considered two sales in the Little Rock Port development, *i.e.,* Reynolds Metal consisting of 17.62 acres and the 7 ¼ acre Hershey sale. Larrison admitted that the demand for industrial sites between the period of 1973 to January, 1978, was stagnant all over Arkansas.

Following Larrison's testimony, appellant moved to strike his before value testimony and, consequently, his figure of just compensation on the grounds that "he has given no fair and reasonable basis for his value testimony." Appellant now contends that the sales used by Larrison were not comparable and that there was no competent testimony as to the value of the property condemned as industrial property.

We have searched appellant's abstract of Larrison's testimony and failed to find any statement by Larrison that he relied upon the enumerated sales as being comparable. So far as the abstract shows Larrison only considered the

enumerated sales in arriving at his estimated just compensation. As pointed out in *Arkansas State Highway Commission* v. *Johns,* 236 Ark. 585, 367 S.W. 2d 436 (1963), the admissibility of the opinion of a real estate expert is not conditioned upon his stating facts upon which the opinion is based. Furthermore, once an expert has given his opinion, the burden shifts to the condemnor to demonstrate that the expert had no basis for his opinion. Consequently, we cannot say that the trial court erred in refusing to strike Larrison's testimony.

Larrison's statement that the demand in Arkansas for industrial sites was stagnant for five years prior to the taking, while detracting from the present value of the land for industrial sites, cannot be taken as a matter of law to mean that no land in Arkansas had a value for use as an industrial site.

POINT VI. In view of the action of the trial court in striking that portion of witness Byron Morse's testimony with reference to the use of federal funds in the building of a highway interchange, we do not rule upon this contention as it is not apt to arise upon a new trial.

POINT VIII. Appellant's proffered Exhibit # 11 is an aerial photograph made on the date that the eminent domain action was filed. Since the witness admitted that it was not a photograph of the lands taken by the appellant, we cannot say that the trial court abused its discretion in refusing to admit the photograph.

Reversed and remanded.

FOGLEMAN, J., dissents in part.

JOHN A. FOGLEMAN, Justice, dissenting in part. I agree that the judgment must be reversed because of the exclusion of the testimony of Allen Horne. I cannot agree, however, with the court's holding as to the testimony of Wesley Adams.

The trial of any lawsuit should be a search for truth, not a "cat and mouse" game. This should especially be true in an eminent domain suit. It is a procedure for seeking a truth bas-

ed on an idealistic concept, that of "just compensation" for "private property . . . taken, appropriated or damaged for public use." Art. 2, § 22, Constitution of Arkansas. The application of this concept in a realistic way is essential to a government which puts more emphasis on the rights of the individual and on the concept of private property than on sovereign rights. Under the Constitution of Arkansas, great emphasis is put upon the rights of the individual by Art. 2. Specifically, in the context of this case, § 22 of that article expresses the philosophy of this state in seeking to balance the inequality inherent in a contest between the might of the sovereign and the relative impotence of its subject. Before the "State's ancient right of eminent domain" is "conceded" by Sec. 23, this document pronounces in Sec. 22 that "[t]he right of private property is before and higher than any constitutional sanction." That section goes further than most American constitutions in that it requires just compensation for damaging private property, as well as for its taking. The fundamental basis of the American system is the accentuation of the rights of the citizen-subject, accompanied by limitations on sovereign power.

In this case, the ultimate power of the sovereign is pitted against the private citizen-subject, who bears the burden of proving by a preponderance of the evidence the amount of "just compensation" due him for his property taken by the sovereign. The combatants in this contest are not equal. The Arkansas State Highway Commission is the state in these proceedings. Once we did not think so, especially where the power of eminent domain was exercised. *Campbell* v. *Arkansas State Highway Com'n.,* 183 Ark. 780, 38 S.W. 2d 753. But later, the state's sovereign immunity was extended to this commission. *Arkansas State Highway Com'n.* v. *Dodge,* 190 Ark. 131, 77 S.W. 2d 981. All the might of the sovereign became fully vested by *Arkansas State Highway Com'n.* v. *Nelson Bros.,* 191 Ark. 629, 87 S.W. 2d 394, and has remained so continuously. It was extended to eminent domain actions by *Arkansas State Highway Com'n.* v. *Kincannon,* 193 Ark. 450, 100 S.W. 2d 969. The continuous emphasis placed upon the posture of the commission is illustrated in the following unbroken line of cases, some of which admittedly produced extremely harsh results by leaving the property owner to the grace of the

sovereign, i.e., by "filing an administrative claim for such relief as the State may see fit to provide." See *Bryant* v. *Arkansas State Highway Com'n.,* 233 Ark. 41, 342 S.W. 2d 415 and the following cases: *Arkansas State Highway Com'n.* v. *Partain,* 193 Ark. 803, 103 S.W. 2d 53; *Federal Land Bank of St. Louis* v. *State Highway Com'n.,* 194 Ark. 616, 108 S.W. 2d 1077; *Arkansas State Highway Com'n.* v. *Bush,* 195 Ark. 920, 114 S.W. 2d 1061; *Arkansas State Highway Com'n.* v. *Palmer,* 222 Ark. 603, 261 S.W. 2d 772; *Arkansas State Highway Com'n.* v. *McNeil,* 222 Ark. 643, 262 S.W. 2d 129; *Roesler* v. *Denton,* 239 Ark. 462, 390 S.W. 2d 98; *Arkansas State Highway Com'n.* v. *Lasley,* 239 Ark. 538, 390 S.W. 2d 443; *Arkansas State Highway Com'n.* v. *Cunningham,* 239 Ark. 890, 395 S.W. 2d 13; *Arkansas State Highway Com'n.* v. *Flake,* 254 Ark. 624, 495 S.W. 2d 855; *Arkansas State Highway Com'n.* v. *Rice,* 259 Ark. 190, 532 S.W. 2d 727; *Tri-B Advertising, Inc.* v. *Arkansas State Highway Com'n.,* 260 Ark. 227, 539 S.W. 2d 430. Casting aside "due process" and "equal protection" arguments that might be advanced[1] against barring inverse condemnation where the taker (or "damager") is the Arkansas Highway Commission, via the dilution of Art. 2, § 22 by making Art. 5, § 20 superior, the appellant in this case is the complete sovereign in its field. That sovereignty has been more firmly established since, in the wisdom of the people of Arkansas, the ultimate sovereign (see Art. 2, § 1, Constitution of Arkansas), Amendment 42 was adopted.

Thus, when the property was taken, the appellee bore the burden of showing, to the satisfaction of a jury, by a preponderance of the evidence, the amount by which it would be justly compensated. A preponderance of the evidence is another concept that is more susceptible to perception than definition. We spoke of it in *Titan Oil & Gas Co.* v. *Shipley,* 257 Ark. 278, 517 S.W. 2d 210. There we said:

> The weight to be given evidence depends upon its effect in inducing belief. *Romines* v. *Brumfield,* 199 Ark. 1066, 136 S.W. 2d 1023. Where evidence is in conflict, that which preponderates is the evidence entitled to the greater weight in respect to credibility. *Missouri Pacific*

[1]It appears that we have been faced with such an argument only once. We somewhat summarily rejected it in *Arkansas State Highway Com'n.* v. *Flake,* 254 Ark. 624, 495 S.W. 2d 855.

> *Railroad Co.* v. *Hancock,* 195 Ark. 414, 113 S.W. 2d 489. There is a preponderance of the evidence only when there is a preponderance of all reasonable inferences that might be drawn to prove the principal facts sought to be established, sufficient to outweigh all other contrary inferences. *Smith* v. *Magnet Cove Barium Corp., [212 Ark. 491, 206 S.W. 2d 442].*

In Smith v. *Magnet Cove Barium Corp.,* supra, we had more to say on the concept. Omitting that portion of the language upon which we relied in *Titan,* we said:

> *** The term does not mean preponderance in amount, but implies an overbalancing in weight. *United States* v. *Mancini,* D.C. Pa., 29 F. Supp. 44-5. ***
>
> The words "weight," "credibility," "overbalancing," "degree," "force," "tipping of the scales," and others of similar connotation, have been used by opinion writers so long that one would suppose their inclusion in "preponderance of the evidence" gives to the term a fixed, inflexible meaning, applicable alike to all cases where the rule invokes the use. Much must be left to the Judge who considers the evidence. Nature of the testimony, demeanor of the witness if the hearing is oral, *opportunity for acquiring the information it is sought to impart, interest in the subject matter or in the parties to be affected,* bias based upon political, secular, or novel social beliefs, regard for accepted conventions in dealing with conduct and behavior, *environment, a capacity to understand,* fidelity to the oath that has been taken, — these and other considerations are, or may be, components of that general result called "preponderance." The number of witnesses is not controlling, and may even be unimportant. It is possible for cumulus error to overshadow intrinsic truth, and the *statement of a single witness may be entitled to more consideration than assertions of a dozen whose source of knowledge or capacity for appraising value impairs the probative force of testimony.* [Emphasis mine.]

In arriving at the truth as to just compensation, there are rules of evidence to be followed. The most recent ones are the

Uniform Rules of Evidence, set out in Ark. Stat. Ann. § 28-1001 (Repl. 1976). They are to be construed to secure fairness in administration and promotion of growth and development in the law of evidence, to the end that truth may be ascertained and proceedings justly determined. Rule 102. Relevant evidence is evidence having *any* tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. Rule 401. The evidence in this case falls into the category of expert opinion testimony, which is admissible when specialized knowledge will assist the trier of fact to understand the evidence or determine a fact issue. In such a case, a witness qualified as an expert by knowledge, skill, experience, training or education, may testify by stating his opinion. Rule 702.

Wesley Adams fell into this category. What is important, however, is the weight to be given his testimony. Appellee should have been permitted to show every factor which might persuade the jury to give his testimony more weight than it gave that of other witnesses. The only prejudice to the sovereign in this case was that there were compelling reasons for giving his testimony more weight than might have been given testimony of those who had been employed by appellee for the express purpose of giving an opinion or by others employed by the sovereign, whose opinions found greater favor in its sight.

The question as to the showing that Adams was employed to make an appraisal for the Arkansas State Highway Commission must be examined in the interest of fairness, and in light of emphasis on the rights of the subject and the preservation of the right of private property.

I suggest that it is very important that Adams was caused to make his appraisal and express his opinion as to just compensation at a very critical stage of the proceeding. It was at the time the sovereign was to decide the amount of money it would deposit in the registry of the court to assure the private property owner that it would receive just compensation, in order that the sovereign might take possession of the

property before a jury decided the amount which constituted just compensation.

Appellant must have thought that Adams' testimony would be given considerable weight. During discovery procedures, it successfully avoided disclosing the fact that Adams had made an appraisal for it until it was compelled to do so by the trial court. When Wesley Adams was called as a witness by appellee, appellant objected that his appraisal was privileged (but it was not). Appellant seems to have abandoned that objection. It further made the objection that use of his testimony should be prohibited on the ground that Adams had a contractual relationship with the Arkansas State Highway Department.

It was important for the jury to know the purpose for which Adams made his appraisal. It was also important for the jury to know that this expert had not been employed by anyone who had any interest in the lands taken. Appellant says that it should not be put in the position of having to explain why it did not choose to use Mr. Adams as one of its expert witnesses. Why not? It says in its brief that the reason was that he considered, as a basis for his opinion, the transaction between Harris Cattle Company and First Pyramid Life Insurance Company, the details of which we hold to be admissible evidence on retrial. Appellant is still going to have to explain why this transaction does not afford a basis for an opinion as to the land value, even if Adams does not testify. Other witnesses used by appellant also used this transaction as a basis. Furthermore, appellant informs us that Adams' appraisal, and all other appraisals, are reviewed by a reviewing appraiser, who may reject an appraisal based upon a factual consideration he considers inaccurate. If the reviewing appraiser is competent to perform his job, why can't he show the inadequacies of the appraisal that caused it to be rejected? What is there about the fact that Adams submitted an appraisal that was rejected by the party who employed him that would arouse passion in the breast of a juror or embed prejudice in his mind? Prejudice cannot be inferred from the fact that the jury verdict was for the exact compensation that was just, in the opinion of Adams. It simply indicates that the jury found that his testimony carried the greatest weight.

It was also important for the jury to know that Adams was under contract with appellant to make appraisals when he testified.

I would suggest that the majority has a new definition for "reconsidered." The rule stated in *Phillips* was to "be reconsidered." In today's opinion the majority says that the questions posed by appellant were "virtually answered" in *Arkansas State Highway Com'n.* v. *Witkowski,* 257 Ark. 659, 519 S.W. 2d 743. The two terms are certainly not synonymous. Furthermore, a different question was posed in *Witkowski,* i.e., whether a party to an eminent domain action could present evidence to a jury that the adverse party had used appraisers that were not called to testify. In this case, the appraiser in question was called to testify. I am unable to see how *Witkowski* answered the question.

I am convinced that the cases cited by the majority in support of its position are not sound. One of them does not seem to me to support that position at all. That case is *State Highway Com'n.* v. *Texaco, Inc.,* 502 S.W. 2d 284 (Mo., 1973). In that case, the landowner moved to strike the testimony of three expert valuation witnesses on the ground that the state withheld an appraisal by a fourth such expert, more favorable to the landowner than the other three. The landowner sought to equate this action with that of the state in *Brady* v. *Maryland,* 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), where evidence favorable to the defendant was withheld by the state. Naturally the court held *Brady* inapplicable. Furthermore, there the landowner knew the value put on his land by this expert.

I am willing to join with the court in holding Adams' testimony admissible when called by appellee. In that respect, I am persuaded by cases cited by appellee such as *State* v. *Steinkraus,* 76 N.M. 617, 417 P. 2d 431 (1966); *Town of Thomaston* v. *Ives,* 156 Conn. 166, 239 A. 2d 515 (1968), and cases cited in those opinions. But I also agree with the holding in *City of Baltimore* v. *Zell,* 279 Md. 23, 367 A. 2d 14, that the matter of admitting the fact that the appraiser had been employed by the condemning authority is a matter lying

in the sound judicial discretion of the trial court. The Maryland court said:

> *** We also have no disagreement with the general principle that a party ordinarily may not sustain the credibility of his own witness absent an attack upon credibility by the other side. *** Nevertheless, we believe that the opinions in the above-cited cases, and the City's position in the instant case, represent too rigid an application of the general principle.
>
> The rule that one cannot bolster the credibility of his own witness, absent an attack upon credibility by the other side, is not without exception. *** Moreover, the rule is usually applied in completely different circumstances than presented in the instant case, such as an attempt to call an additional witness to testify concerning the good character for veracity of the witness or an attempt to offer a prior consistent statement of the witness solely for the purpose of supporting his veracity. *** In those circumstances, as Wigmore points out, valuable trial time is taken up by the introduction of unnecessary and often cumbersome evidence, as an unimpeached "witness may be assumed to be of normal moral character for veracity . . . " *** However, merely asking a witness a brief preliminary question concerning his employment in connection with the case is not subject to this same objection.
>
> It is a routine practice in trials for an attorney to ask his witness certain preliminary questions which may not be relevant to the issues being litigated, which may go beyond mere identification and which are designed to show that the witness will be somewhat credible or not biased in favor of the side calling him. For example, the educational background or professional status or employment position of a non-expert witness may be asked, or the witness's lack of prior contact with the side who has called him may be brought out. These questions give the jury some knowledge of the individual and a more complete perspective in considering his testimony. *** [Citations omitted.]

I believe that the majority has gone too far in indicating that Adams' testimony was not properly admitted in rebuttal, and in attempting to control the trial court's discretion in that respect on retrial. It did tend to rebut testimony by the two expert witnesses presented by the state. One of them had been employed the week before the trial, and his identity first disclosed to appellee virtually on the eve of trial.

In all other respects, I agree with the majority opinion.

Phil BUCK *v.* STATE of Arkansas

CR 78-214 578 S.W. 2d 579

Opinion delivered April 2, 1979
(In Banc)

Philip M. Clay, for appellant.

Steve Clark, Atty. Gen., by: *Catherine Anderson,* Asst. Atty. Gen., for appellee.

FRANK HOLT, Justice. Appellant was charged with violating Ark. Stat. Ann. §§ 41-3578 and 41-3580 (Repl. 1977) (Act 411 of 1967) in that he exhibited, circulated or had in his

possession an obscene film. The jury found appellant guilty only of possession and fixed his punishment at one year's imprisonment, with 11 months suspended, and a $1,000 fine. Appellant first contends that the mere private possession of an obscene film, within the confines of his own home, is constitutionally permissible and cannot be made a crime.

Section 1 of Act 411 of 1967 (41-3578) reads:

> Hereafter, it shall be unlawful for any person knowingly to exhibit, sell, offer to sell, give away, circulate, produce, distribute, attempt to distribute, or have in his *possession* any obscene film. (Italics supplied.)

Section 3 of Act 411 of 1967 (41-3580) reads:

> Any person who knowingly exhibits, sells, offers to sell, gives away, circulates, produces, distributes, or attempts to distribute any obscene film shall be guilty of a felony, and upon conviction thereof shall be fined not more than $2,000 or be imprisoned for a period of not less than one (1) year nor more than five (5) years, or be both so fined and imprisoned. Any person who shall have in his or her *possession* such obscene film shall be guilty of a misdemeanor and upon conviction thereof shall be fined not more than $1,000 or be imprisoned in the county jail for a period not to exceed one (1) year, or both. (Italics supplied.)

It is true, as the State argues, that we have previously held portions of Act 411 of 1967 to be constitutional. *Holcombe* v. *State,* 258 Ark. 591, 528 S.W. 2d 378 (1975); *Smith* v. *State,* 258 Ark. 549, 528 S.W. 2d 360 (1975); *Herman* v. *State,* 256 Ark. 840, 512 S.W. 2d 923 (1974), cert. den. 420 U.S. 953, 95 S. Ct. 1337, 43 L. Ed. 2d 431 (1975); see *Gibbs* v. *State,* 255 Ark. 997, 504 S.W. 2d 719 (1974). In *Holcombe* and *Smith,* the appellants attacked the applicable statute on the ground that it is overbroad, because it made mere possession of an obscene film a crime. However, in both cases, the appellants were charged with *the sale* of such a film, not possession of it. In *Herman* and *Gibbs,* the statute was attacked as being overbroad in the definition of obscenity under the requirements of

Miller v. *California,* 413 U.S. 15, 93 S. Ct. 2607, 37 L. Ed. 2d 419 (1973). In *Smith,* we rejected appellant's argument and said:

> A complete answer to this argument lies in the separability of that part of the statute prohibiting the possession of an obscene film. Section 3 of the Act declares possession to be a misdemeanor, but the other prohibited acts (all of which involve conduct affecting some other person) are declared to be felonies. Ark. Stat. Ann. § 41-2731 [now Ark. Stat. Ann. § 41-3580]. We cannot say that the two provisions are so interwoven and so interdependent that the legislature would not have passed one without the other. To the contrary, it appears to be reasonably certain that the lawmakers would have prohibited the enumerated felonies even if the misdemeanor provision had been known to be invalid. Hence the latter is separable and does not affect the constitutionality of the felony provisions.

We adhere to this view that the act may be unconstitutional in part and valid in part. See also *Levy* v. *Albright,* 204 Ark. 657, 163 S.W. 2d 529 (1942).

Here, as indicated, the appellant was convicted of possession only. The evidence contained no reference to his possession of an obscene film in any place other than his home. There was considerable evidence concerning the viewing of three films by young men on a particular night while in appellant's home. The jury, however, did not find appellant guilty of the offense of exhibiting. So, for the first time we are presented with the precise question as to whether the State can constitutionally make it a criminal offense for a person to possess an obscene film within the confines of his own home. The appellant argues that the State cannot and cites *Stanley* v. *Georgia,* 394 U.S. 557, 89 S. Ct. 1243, 22 L. Ed. 2d 542 (1969). There it was noted that no "decision of this court [has] dealt with the precise problem" of possessing obscene material in one's home. *Stanley* was convicted for possession of obscene films found in his home. There, in discussing the rights and interests of a private party and the State, the court held that "the First and Fourteenth Amendments prohibit making

mere private possession of obscene material a crime." Also, "we think that mere categorization of these films as 'obscene' is insufficient justification for such a drastic invasion of personal liberties guaranteed by the First and Fourteenth Amendments." That decision holding the home area is protected from governmental intrusion was reaffirmed in *Paris Adult Theatre I* v. *Slaton,* 413 U.S. 49, 93 S. Ct. 2628, 37 L. Ed. 2d 446, reh. den. 414 U.S. 881, 94 S. Ct. 27, 38 L. Ed. 2d 128 (1973); and *United States* v. *Orito,* 413 U.S. 139, 93 S. Ct. 2674, 37 L. Ed. 2d 513 (1973).

Here we conclude that *Stanley* is controlling and the State's attempt to make mere private possession of obscene material a crime is an unconstitutional invasion of that person's First Amendment rights. Our decision does not impair the other provisions of §§ 41-3578 or 41-3580 since the provision as to possession is separable. *Smith* v. *State, supra.*

We deem it unnecessary to discuss appellant's other contentions for reversal.

Reversed and dismissed.

O. J. CHRONISTER *v.* STATE of Arkansas

CR 78-156 580 S.W. 2d 676

Opinion delivered April 2, 1979
(Division I)
[Rehearing denied June 4, 1979.]

John T. Harmon and *Russell Reinmiller,* for appellant.

Steve Clark, Atty. Gen., by: *Ray Hartenstein,* Asst. Atty. Gen., for appellee.

CONLEY BYRD, Justice. Appellant O. J. Chronister was found guilty by a jury of criminal solicitation in violation of Ark. Stat. Ann. § 41-705 (Repl. 1977) and sentenced to 30 years imprisonment. We reverse because of the action of the trial court in permitting the prosecuting attorney to testify during closing argument of appellant's counsel.

The record shows that the two key witnesses for the State were Virginia Gill and Galen Hutcheson. Their testimony, stated in the light most favorable to the jury's verdict, shows that appellant hired Galen Hutcheson, an undercover policeman, to kill his wife. Virginia Gill, who was also known by her "CB" name as Delta Dawn, assisted appellant in finding someone to kill his wife by notifying the officers and setting up the initial contact between appellant and Galen Hutcheson.

On cross-examination Virginia Gill testified that she had been married and divorced and that the custody of her two minor children born of that marriage had been awarded to the father. Shortly after receiving the subpoena, which was served some five or six days before the trial, she had gone to

Texas to visit a friend's mother. She described the friend as a man she was planning to marry. She at first stated that she was then working at the Children's Colony in Conway as a psychologist's aide. The proof then developed that she only got into the ninth grade in high school and that she did not know anyone in the psychology department of the Children's Colony. Subsequent interrogation developed that at the time she first met appellant she was living in a mobile home park in Russellville with a Bruce Kilgore. In developing her source of support at the time, she stated that she worked for the Russellville Nursing Home. Finally, in answer to the question of where she worked during the three months that she knew appellant prior to his arrest, Virginia Gill stated: "I just worked for a couple of weeks there at the Russellville Nursing Home, and I haven't worked anywhere since." While appellant's counsel was making his closing argument to the jury the record shows the following:

> "MR. HARMON: What is O.J. Chronister doing while this is happening to him? He has been separated from his wife for seven months, and Alex Streett asked him if he had been true to his wife. Don't you know that if he could find one person in Pope County that had ever been with O. J. Chronister, he would have paraded them in here to tell you about it. The man has never been unfaithful to his wife. He has been faithful to her — he has been true to her. He has supported her.
>
> MR. STREETT: I hate to keep objecting. Mr. Harmon knows better than that. He knows the Rules of Evidence, and that I can't bring in someone to prove a specific incident of misconduct.
>
> MR. HARMON: You asked him if he had been true to his wife.
>
> BY THE COURT: I'm going to sustain the objection on that point.
>
> MR. HARMON: Okay. Let's get back to the common sense that Alex Streett talked to you about. O. J. Chronister's reputation in this community seems to be

of high stature. People have testified and told you what they know about him, and find him to be a law abiding citizen. They find his reputation for truth and veracity in this community to be good. I will stake that against Galen Hutcheson — you bet I will. I'll stake it against Delta Dawn — you bet I will. Do you think that she works at the Children's Colony? That will be a question for you to decide in determining her credibility.

MR. STREETT: I hate to object on this but that is improper.

BY THE COURT: Objection sustained.

MR. STREETT: Mr. Harmon knows personally that she was working at the Children's Colony. I ask the Court to admonish him.

MR. HARMON: I don't know that.

MR. STREET: You do know.

BY THE COURT: The objection is sustained."

The State to sustain the action of the prosecuting attorney's statement that counsel for appellant knew that Virginia Gill worked at the Children's Colony contends that the error is harmless. In so doing the State, however, acknowledges that there is nothing in the record to indicate that appellant's counsel had any such knowledge. In *Brown* v. *State,* 143 Ark. 523, 222 S.W. 377 (1920), Brown's alibi defense depended upon the credibility of Mrs. Smith who ran the boarding house where Brown resided. In holding that the remarks of the prosecuting attorney were prejudicial when not supported by the evidence, we stated:

"The prosecuting attorney went out of the record and stated that he knew all about Mrs. Smith, but could not tell the jury what he knew of her and wished the jury could know. The prosecuting attorney is not allowed to state, as a matter of fact, that of which there is no evidence. His statement in the case at bar was not within the latitude of discussion the law accords to counsel. Its evil tendency and prejudice to the rights of the defendant are manifest."

Appellant also argues that the trial court erred in ruling that the State could not call witnesses to attack his credibility to prove specific acts of misconduct. The trial court correctly ruled that the State could not call witnesses to contradict appellant's testimony on cross-examination with reference to a collateral matter by showing specific acts of infidelity. See Ark. Stat. Ann. § 28-1001, Rule 608(b) (Supp. 1977) and *Spence* v. *State,* 184 Ark. 139, 40 S.W. 2d 986 (1931).

The trial court refused to instruct the jury at appellant's request, in accordance with Ark. Stat. Ann. § 41-715 (Repl. 1977), which provides:

> "It is an affirmative defense to a prosecution for criminal attempt, solicitation, or conspiracy that the conduct charged to constitute the offense is inherently unlikely to result or to culminate in the commission of a crime and neither the conduct nor the defendant presents a public danger warranting imposition of criminal liability."

We can find no error in the refusal of the instruction offered. The plan or plans discussed by which the wife could be killed — *i.e.* breaking her neck in a faked automobile wreck — certainly cannot be characterized as conduct "inherently unlikely to result or to culminate in the commission of a crime. . . " Furthermore, Ark. Stat. Ann. § 41-713(2) (b) (Repl. 1977), provides that it is no defense to the crime of solicitation that the person whom he solicits has feigned agreement.

Appellant's contention that life imprisonment for criminal solicitation is unconstitutionally excessive punishment for nothing more than the spoken word cannot be considered by us since the jury only fixed appellant's punishment at 30 years imprisonment — *i.e.* the issue is not ripe for review. See *Venable* v. *State,* 260 Ark. 201, 538 S.W. 2d 286 (1976).

The issues raised by appellant because of the denial of continuances are not apt to arise on a new trial.

Reversed and remanded.

We agree: HARRIS, C.J., and GEORGE ROSE SMITH and PURTLE, JJ.

Rehearing denied June 4, 1979; dissenting opinion on denial of rehearing.

DARRELL HICKMAN, Justice, dissenting. I would grant a rehearing in this case because in my judgment the majority was in error in reversing this case.

First of all, I do not consider the remarks of the prosecuting attorney so flagrant and improper as to warrant a mistrial. The attorneys in this case were both able trial counsel and it was a difficult case to try. It is not unusual for lawyers to argue with each other or interrupt each other during closing arguments.

I do not consider the first remarks of the prosecuting attorney objectionable. In fact, the court was quite proper in sustaining the objection to the remarks of the defense attorney. It would have been improper for the prosecuting attorney to collaterally attack the credibility of the witness by proving a specific act of misconduct by extrinsic evidence. Ark. Stat. Ann. § 28-1001, Rule 608 (b) (Supp. 1977).

The second remark the prosecuting attorney made, after an objection was made and sustained, related to whether a witness worked at the Children's Colony. There was no evidence in the record that she did not work at the Children's Colony at the time in question. Both counsel improperly "testified."

The court, at the inception of its instructions to the jury, gave the standard instruction which is given to all jurors:

> Arguments, statements, and remarks of attorneys are not evidence but are made only to help you in understanding the evidence and applicable law. Any argument, statements or remarks of attorneys having no basis in the evidence, should be disregarded by you.
>
> I have not intended by anything I have said or done, or by any questions that I may have asked, to intimate or suggest what you should find to be the facts, or that I believe or disbelieve any witness who may have testified. If anything that I have done or said has seemed to so in-

dicate, you will disregard it and form your own opinion.

Just before the colloquy occurred that is reported in the majority opinion, the judge said:

> There was an objection earlier, which I sustained. I'm not sure myself from time to time trying to recall all of the evidence. Ladies and gentlemen, it is not my decision, it's yours. You have heard the testimony and you are the ones who are to consider the evidence and the law. *I'm going to admonish you again that if a lawyer tells you something that has no basis in the evidence, disregard it.* If it does have basis in the evidence, you may consider it. [Emphasis added.]

This was a heated trial and both the State and the defendant were well represented. Both made long closing arguments to the jury, emphasizing the evidence that had been presented. The defense counsel was guilty of testifying to a certain extent. For example, he made the flat statement as quoted in the majority opinion: "The man has never been unfaithful to his wife. He has been faithful to her — he has been true to her." In another instance he said, "O. J. Chronister did not lie to you when he took the witness stand."

Most trial lawyers exaggerate or emphasize favorable testimony. I do not consider the remarks as serious enough to warrant reversing the jury's verdict and ordering a new trial. The jury had been admonished to disregard statements made by the attorneys, and this had been emphasized just before the remarks were made in this case.

Even so, all of this is academic because there was no objection whatsoever by the appellant to the remarks by the prosecuting attorney. The appellant asks us to consider the remarks as plain error and reverse the judgment of the trial court. The only case cited by the majority to justify its action in this case is *Brown* v. *State,* 143 Ark. 523, 222 S.W. 377 (1920). In the *Brown* case there was an objection to the remarks of the prosecutor. The same is true in the case of *Hays* v. *State,* 169 Ark. 1173, 278 S.W. 15 (1925). In the case of *Williams* v. *State,* 259 Ark. 667, 535 S.W. 2d 842 (1976), there was a prompt and proper objection to improper statements

by the deputy prosecuting attorney. I cannot find a case where we reversed the judgment of a trial court for improper remarks of a prosecuting attorney where no objection was made.

We have also held many times that we will not consider an issue raised for the first time on appeal. *O'Neal* v. *State,* 253 Ark. 574, 487 S.W. 2d 618 (1972). If the majority is going to depart from these rules, it should say so. Reversal is a serious matter, justified only for prejudicial error or violation of a substantial right. I cannot agree that the remarks of the prosecutor in this case were prejudicial error. The defendant has shown nothing to indicate that prejudice existed, and, most importantly, there was no objection made.

Therefore, I would grant the rehearing and affirm the trial court's judgment.

A. D. DUNAHAY *v.* ARKANSAS EMPLOYMENT SECURITY DIVISION, DEPARTMENT OF LABOR, CHARLES DANIELS, DIRECTOR

78-283 578 S.W. 2d 575

Opinion delivered April 2, 1979
(Division II)

David Hodges, for appellant.

Thelma M. Lorenzo, for appellee.

DARRELL HICKMAN, Justice. The Circuit Court of Jackson County dismissed A. D. Dunahay's suit against Charles Daniels, Director of the Department of Labor, Arkansas Employment Security Division, because the suit was brought in Jackson County and not in Pulaski County.

Dunahay appeals and alleges three errors: venue, or the place, for such a suit in Jackson County; if not, the appellee waived the right to object to venue; and, in any event, the suit should have been transferred to Pulaski County rather than dismissed.

All of these arguments are without merit.

Dunahay, a resident of Jackson County, was determined to be an "employer" as defined by the Employment Security Act, Ark. Stat. Ann., Title 81, Chapter 11 (Repl. 1976). His attorney filed a complaint for review of this decision in the Jackson County Circuit Court. The appellee moved to dismiss the action because of the lack of venue, citing Ark. Stat. Ann. § 81-1114 (b)(2) as requiring such suits to be brought in Pulaski County. The trial judge properly granted the motion for the statute is clear. It reads:

> . . . A review of the determination made by the Commissioner or the Board of Review may be had by filing in the Circuit Court of Pulaski County a petition for review within fifteen (15) days after said determination becomes final. . . .

Dunahay argues that, regardless of the statute, the appellee waived the right to object to venue because a lawyer for the appellee agreed to accept service in the case and did not inform the appellant's attorney that venue for such a case was only in Pulaski County.[1] It is undisputed that an attorney for the appellee agreed to accept service but it is also undisputed that appellee did not expressly waive the right to object to venue. In fact, according to the record, nothing was said by the appellee's attorney about venue.

Finally, Dunahay argues that the case should have been transferred to Pulaski County rather than dismissed. There is no present statutory authority for a circuit court to transfer a case to another county solely because it is filed in the wrong county.

Affirmed.

We agree. HARRIS, C.J., and FOGLEMAN and HOLT, JJ.

Mark H. WILSON *v.* Mary WHITE

78-250 578 S.W. 2d 577

Opinion delivered April 2, 1979
(Division I)

[1]One who is a "claimant", as opposed to one who is an "employer", may petition for review of a decision in either Pulaski County or the county of the claimant's residence. Ark. Stat. Ann. § 81-1107 (d)(7).

Tommy H. Russell, for appellant.

Ward, Rhodes & Garrett, for appellee.

JOHN I. PURTLE, Justice. Joan Wordehoff purchased a $10,000 Certificate of Deposit from Pulaski Federal Savings and Loan Association on May 16, 1973, payable on her death to her sister, Mary White. April 22, 1974, Joan Wordehoff went by a branch office of Pulaski Federal Savings and executed a form appointing the officers of Pulaski Federal Savings to transfer the Certificate of Deposit to Mark Wilson, her brother, at her death. Joan Wordehoff died January 16, 1975. The original Certificate of Deposit was still in her possession at the time of her death. It was turned over to the First National Bank as administrator and the bank promptly abandoned the Certificate of Deposit as an asset of the estate and held it as escrow agent until the court ruled to whom it should be delivered. Mary White petitioned the Pulaski County Probate Court to give her the Certificate of Deposit and the court did so. The court then approved the final accounting of First National Bank and delivered the Certificate of Deposit to Mary White. Mark Wilson gave notice of appeal.

At the hearing on the petition of Mary White, an employee of Pulaski Federal Savings testified it was their custom to have the customer sign a signature card which was their contract with the customer. She further testified it was their custom, when changing the name of the beneficiary, to have the customer sign an authorization card allowing the account to be closed. The next step, when changing beneficiaries, was to surrender the original certificate and then issue a new one and finally obtain a newly executed signature card.

The customer completed the first step by executing a contract authorizing Pulaski Federal Savings to transfer the account to Mark Wilson. However, she never followed through with the other requirement of Pulaski Federal Savings in completing the transfer although she was notified by letter it would be necessary to surrender the old certificate and execute a new contract. At the time of the customer's death, some nine months later, the original Certificate of Deposit was still in her possession and Pulaski Federal Savings had not accepted the transfer to the new account.

The controlling statute is Ark. Stat. Ann. § 67-1838 (Repl. 1966) which reads in part as follows:

> . . .
>
> (5) If a person opening or holding a savings account shall execute and file with the association a designation that on the death of the person named as holder, the account shall be paid to or held by another person or persons, the account, and any balance thereof which exists from time to time, shall be held as a payment on death account and unless otherwise agreed between the person or persons opening the account and the association:
>
> > (a) Upon the death of the holder of the account, the person or persons designated by him and who have survived him shall be the owners of the account (as **joint tenants with right** of survivorship if more than one) and any payment made by the association to any of such persons shall be a complete discharge of the association as to the amount paid;
> >
> > (b) The person to whom such account is issued may change during his lifetime the designation of any of the persons who are to be holders at his death, by a written direction accepted by the association;
> >
> > (c) The person to whom such account is issued may pledge, withdraw or receive payment and any

> such payment made by the association shall be a complete discharge as to the amount paid.

Evelyn Bowen, who handled the transaction for Pulaski Federal Savings, stated:

> "I told her that I would need for her to sign an authorization, bring me the certificate so that I could transfer it from one account into the other account. I couldn't transfer it without having the other certificate, the original certificate. Otherwise, the customer would have two money instruments."

The cases cited by appellant either pre-date Ark. Stat. Ann. § 67-1838 or are cases concerning bank accounts as contrasted to savings and loan accounts. None of the cited cases were controlled by the above statute. § 5(b) of the statute requires the transfer in such cases to be in writing and accepted by the association. The evidence clearly establishes that Pulaski Federal Savings never accepted the transfer of the account because the old certificate was not surrendered, nor was a lost passbook or lost instrument affidavit signed by the depositor.

In view of the fact that the depositor still retained the original Certificate of Deposit in her possession at the time of her death nine months after the original authorization was executed, we cannot say she intended to follow through with the change. Additionally, she had been told in person and notified by letter that it would be necessary for her to complete the other transactions yet she never made any attempt to do so. In any event, the association never accepted the change in beneficiaries. Therefore, the necessary documents to effect the transfer were never completed.

We agree with the learned probate judge that Mary White was entitled to receive the Certificate of Deposit according to the contract between the depositor and the association.

We do not reach the question of whether appellant had

standing to file the appeal as our decision would be adverse to his position in any event.

Affirmed.

We agree. HARRIS, C.J., and GEORGE ROSE SMITH and BYRD, JJ.

Seth WARD *v.* Thomas MEYERS

78-287 578 S.W. 2d 570

Opinion delivered April 2, 1979
(In Banc)

Rose, Nash, Williamson, Carroll, Clay & Giroir, P.A., by: *Kenneth Shemin* and *Webster L. Hubbell*, for appellant.

Dodds, Kidd & Ryan, by: *Donald S. Ryan* and *Richard N. Moore, Jr.*, for appellee.

JOHN I. PURTLE, Justice. On August 12, 1975, appellee filed a Bankruptcy Petition in the United States District Court for the Southern District of Florida. Among the creditors listed were Seth Ward and Yvonne Ward who were unsecured creditors. The notice of the bankruptcy proceedings was mailed to Seth and Yvonne Ward at the address of 11701 Fairway Drive, Little Rock, Arkansas, 72201. This notice was returned to the bankruptcy court with an indication that it was returned because the forwarding order had expired. Appellant's debt was discharged on December 18, 1975, in the Florida proceedings.

On November 23, 1976, appellant filed a complaint in the Pulaski County Circuit Court seeking to recover the balance of the promissory note which appellee had sought to discharge. Appellee made the affirmative defense that he had filed a voluntary Bankruptcy Petition which had resulted in the discharge of appellant's obligation.

In the trial of the Pulaski Circuit Court case the appellee pleaded the Bankruptcy Act as a defense. It was admitted that appellant had moved from 11701 Fairway Drive to 48 River Ridge Road, Little Rock, Arkansas, in June 1974. It was further admitted that appellee had signed as a guarantor on the note which had been executed by Bigelow Manufacturing Company, Inc. to appellant and his wife. It was further admitted that appellee had visited appellant in his new residence in Little Rock during the summer of 1974. It was stipulated between the parties that the Bankruptcy Petition listed Seth Ward and Yvonne Ward as creditors for an unsecured claim based upon the personal guarantee of the promissory note given by Bigelow Manufacturing Company, Inc. to the Wards; also that the Bankruptcy Petition did not list the street address where appellant resided at the time of the filing of the Bankruptcy Petition. It was further stipulated

that the notice sent to the Wards at 11701 Fairway Drive was returned to the bankruptcy court.

During the trial appellee testified that he had listed appellant's debt on the bankruptcy schedule and that he subsequently obtained the appellant's mailing address from the 1974 Little Rock telephone directory and furnished this to the bankruptcy court. He stated he thought the post office would forward the letter to Mr. Ward's new address as he did not remember the exact mailing address. He had not been told by the bankruptcy court or his lawyer that the notice had been returned as being unable to be delivered to the appellant at his former address. The testimony further showed that appellee and appellant had been in business together operating the Bigelow Manufacturing Company, Inc. out of Bigelow, Arkansas. Appellant was not an officer of the company but he owned about 12-1/2% of the stock in the company. Appellee testified that the Bigelow Company fell into financial difficulties, which was constantly discussed with appellant. Appellee resigned and left the company in July of 1974. Appellee then testified that he had received in the mail, in December of 1975, a communication from the bankruptcy court showing that he had been discharged. The next notice that he received from Ward was the complaint in the Pulaski County Circuit Court.

The trial court found that there was no evidence of fraudulent intent or wrongful motive on the part of appellee toward the appellant. The court further found that it was reasonable to assume that appellant had knowledge of the pending bankruptcy action in Florida but took no action in regard to the same. Appellant did not appear at the trial in Pulaski County to testify regarding the matters surrounding the notice and his interest in the company. Accordingly, the court held that the appellee was discharged in bankruptcy and that such discharge extinguished the debt of appellant; the complaint was dismissed, and appellant brings this appeal.

The only point on appeal is that the court erred in holding that Meyers had properly scheduled his debt to appellant in the Bankruptcy Petition. The pertinent section of the

Bankruptcy Act is 17a (3) which excepts from the operation of discharge in bankruptcy all provable debts which "have not been duly scheduled in time for proof and allowance, with the name of the creditor if known to the bankrupt, unless such creditor had notice or actual knowledge of the proceedings in bankruptcy." Therefore, all other debts would be discharged in the bankruptcy action. In order for a debt to be duly scheduled it must be on a list of creditors, filed in the bankruptcy court, showing the residence or place of business, if known, or if unknown that fact to be stated. The undisputed evidence in this case shows that the debt of appellant was duly listed but the mailing address was improperly stated.

Meyers' excuses for failure to notify Ward are that when he filed the petition he did not have Ward's new address "handy." He took an address from a 1974 telephone book, admittedly knowing that Ward had moved from that address at least a year before the bankruptcy petition was filed. His excuse was that he thought it would be forwarded by the Post Office Department.

In *Steele* v. *Thalheimer,* 74 Ark. 516, 86 S.W. 305, it was neither alleged nor shown that the bankrupt knew the address of the creditor or that the failure to give his correct address was intentional or fraudulent. Perhaps Meyers could not recall Ward's new address, but it is not unreasonable to assume that either he or his attorney, with only a slight inquiry, could have ascertained it. To say the least, Meyers could have told his attorney that he was giving an obsolete address. It is true that the evidence does not justify a finding that the failure of Meyers to give a correct address was fraudulent, but it cannot be said that it was not intentional. Furthermore, *American Southern Trust Co.* v. *Vester,* 183 Ark. 9, 34 S.W. 2d 747, is hardly appropriate for in that case the creditor's lawyer, who had been employed to collect the debt, had notice of the bankruptcy and the lawyer's name had been listed on the schedule as the person who held the note, evidencing the debt, for collection.

It seems clear that the debt under these circumstances was not duly scheduled, as required by the bankruptcy act.

The act requires that the bankrupt file a list of all his creditors showing their residences or place of business, if known, and if not known, a statement of that fact. Meyers failed to comply with the requirement for scheduling debts by failure to schedule any address and by later giving an address known by him to be incorrect, without even stating that the correct address was not known to him, as he should have done if he did not know it. 1A Collier on Bankruptcy (14th Ed.) 1686.2, § 17.23 (4); *Van Denburgh* v. *Goodfellow,* 19 Cal. 217, 120 P. 2d 20 (1941). Furthermore, if Meyers failed to exercise due diligence in ascertaining Ward's address (and his own testimony showed a total lack of diligence), the debt was not properly scheduled and it was not discharged. *Continental Purchasing Co.* v. *Norelli,* 135 N.J.L. 93, 48 A. 2d 816 (1946); 1A Collier on Bankruptcy (14th Ed.) 1687, § 17.23 (4). See also, *Jones* v. *Martin,* 23 Ariz. App. 182, 531 P. 2d 559 (1975); *Van Denburgh* v. *Goodfellow,* supra; *Reed* v. *Dippel,* 16 Pa. Dist. 126, 17 Am. B.R. 371 (1906); *Marlenee* v. *Warkentin,* 71 Cal. App. 2d 177, 162 P. 2d 321 (1945); *King* v. *Harry,* 131 F S 252 (D.C., 1955); *Salmon* v. *Sarno,* 265 App. Div. 114, 37 N.Y.S. 2d 870 (1942); *Taylor* v. *Thompson,* 39 S.W. 2d 923 (Tex. Civ. App., 1931). The requirement of duly scheduling the names and residences of creditors is to be strictly interpreted and applied by the courts. 1A Collier on Bankruptcy (14th Ed.) 1680, § 17.23 (1). See *Salmon* v. *Sarno,* supra, and cases cited therein; *State Farm Mutual Auto Ins. Co.* v. *Hall,* 221 Kan. 337, 559 P. 2d 357 (1977). In *Chevron Oil Co.* v. *Dobie,* 40 N.Y. 2d 712, 358 N.E. 2d 502 (1976), it is clearly recognized that a debt is not duly scheduled when the creditor's correct name and address are not given. That court said in the opinion in that case: "Consequently, a debtor who has erred in scheduling is not penalized, provided always that he has, at least, taken care to ascertain, if necessary, and schedule the creditor's correct name and address. (cf. *Miller* v. *Guasti,* 226 U.S. 170, 33 S. Ct. 49, 57 L. Ed. 173)." In that case, it was held that the debt was duly scheduled, without deciding whether previous holdings rested upon an outmoded view of the efficiency of the postal service, simply because the debtor was justified in relying on the only address ever provided him by Chevron Oil Company, the creditor, who was seeking to assert its insufficiency.

It was the intention of the bankruptcy act, as now written, to apply to bankruptcy proceedings the principle that due process of law contemplates notice of some kind to the creditor whose property is being taken in order that he may have his day in court and be heard before the court adjudicates against him. *Tyrrel* v. *Hammerstein,* 33 Misc. 505, 67 N.Y.S. 717, 6 Am. B.R. 430 (1900); *Wheeler* v. *Newton,* 168 App. Div. 782, 154 N.Y.S. 431 (1915); *Continental Purchasing Co.* v. *Norelli,* 135 N.J.L. 93, 48 A. 2d 816 (1946). The requirement of notice in the bankruptcy act is the only due process afforded to creditors. *State* v. *Bean,* 218 Ore. 506, 346 P. 2d 652 (1959); *Wheeler* v. *Newton,* supra.

If the scheduled address of the creditor is actually wrong, he will not be affected by the bankrupt's discharge, in the absence of proof that the creditor had knowledge of the proceedings. 1A Collier on Bankruptcy (14th Ed.) 1689, § 17.23 (4). The notice or actual knowledge must be actually existent and not merely constructive notice or imputed knowledge. 1A Collier on Bankruptcy (14th Ed.) 1692, § 17.23 (4); *Hunter* v. *Hall,* 60 Ga. App. 493, 4 S.W. 2d 69 (1939). The bankruptcy act contemplates that there be either personal notice or knowledge of the proceedings that is equivalent to personal notice. *Wheeler* v. *Newton,* supra; *Lynch* v. *McKee,* 214 S.W. 484 (Tex. Civ. App., 1919).

It is quite clear that the burden of showing notice or knowledge by a preponderance of the evidence was upon Meyers. *State Farm Mutual Auto Insurance Co.* v. *Hall,* supra; *Ragsdale* v. *Bothman,* 81 Mont. 408, 263 P. 972 (1928); *Venson* v. *Housing Authority,* 337 F. 2d 616 (5 Cir., 1964); *Industrial Loan & Investment Co.* v. *Chapman,* 193 So. 504 (La. App., 1940). The matter is extensively covered in 1A Collier on Bankruptcy (14th Ed.) 1696 — 1698, § 17.23 (6), where it is said:

> The superficial conflict of authority in regard to burden of proof (risk of persuasion) is reconciled by analyzing the language of § 17a(3), and by distinguishing the issues that may arise in a suit by a creditor upon a provable claim to which the bankrupt pleads a discharge in bankruptcy. The plea of a discharge in

bankruptcy is an affirmative defense, *i.e.,* a defense which the bankrupt has the burden of establishing. ***** When the bankrupt has put the certified copy of the order of discharge in evidence he has established a *prima facie* defense to any suit against him based on a debt existing at the time of the filing of his petition. The creditor then has the burden of proving that he comes within the exceptions enumerated in § 17a, which, as applied to clause (3), means that his claim was not duly scheduled in time for proof and allowance. ***** This done, the bankrupt must carry the burden of showing that the creditor comes within the "unless" clause, which reads, "unless such creditor had notice or actual knowledge of the proceedings in bankruptcy." For, as stated by the Supreme Court in *Hill* v. *Smith,* (260 U.S. 592, 2 Am. B.R. (N.S.) 537, 43 S. Ct. 219, 67 L. Ed. 419, aff'g 232 Mass. 188, 43 Am. B.R. 186, 122 N.E. 310, 2 A.L.R. 1667, noted in (1923) 36 Harv. L. Rev. 749), immediately after the quotation set out above:

> "But there is an exception to the exception, 'unless the creditor had notice,' etc., and, by the same principle, if the debtor would get the benefit of that, he must offer evidence to show his right. We agree with the court below that justice and the purpose of the section justify the technical rule that if the debtor would avoid the effect of his omission of a creditor's name from his schedules, he must prove the facts upon which he relies."

See also, *Wheeler* v. *Newton,* supra.

Since by the undisputed evidence, the debt was not duly scheduled, the burden of showing that Ward had notice or actual knowledge of the proceedings in bankruptcy rested upon Meyers. Meyers' own testimony is that the Ward claim was the biggest debt listed. He relies upon the fact that Ward owned approximately 12-1/2% of the stock in the Bigelow Manufacturing Company, a corporation, located in Bigelow (of which Meyers was president and of which Ward was not an officer), as evidence that Ward knew of the bankruptcy, simply because Bigelow was also listed as a creditor to whom

Meyers owed less than 10% of the amount listed as Ward's claim. It was prior to July, 1974, over a year before the bankruptcy petition, that Meyers was last in contact with Ward about Bigelow's financial condition. Meyers testified that he was *not* in contact with Ward about Meyers' personal finances and that he had no discussions with Ward about whether or not Meyers had paid the note. It was stipulated that after all credits had been applied, there was still a balance of $94,950 due Ward. It was also stipulated that the debt had been secured by *all* the assets of Bigelow Manufacturing Company. It was alleged in Ward's complaint, and not denied, that Ward foreclosed upon the security agreement and collected certain sums from the sale of Bigelow's assets and equipment.

Apparently the trial court gave considerable weight to the fact that Meyers had just cause to believe that mail addressed to Seth Ward, a prominent citizen and businessman in the community, would be delivered to his (proper?) address. Perhaps the trial judge felt that the court could take judicial notice of Ward's prominence. But he did not say that he was taking judicial notice of that fact, so appellant was not given an opportunity to be heard upon the propriety of that action. See Ark. Stat. Ann. § 28-1001, Rule 201 (Supp. 1977). In any event, this fact, if true, weighs heavily against appellee, because it establishes the fact that with only slight diligence, he could have ascertained Ward's correct address. *Lee* v. *Rousell,* 347 So. 2d 298 (La., 1977). It certainly is not substantial evidence that Ward either had notice or knowledge of the bankruptcy proceedings. It is not reasonable to say that Ward must have known of the bankruptcy under these conditions.

The proof presented by Meyers presented a prima facie defense to the complaint filed by appellant. However, the appellant overcame this defense by proof that appellee knew the address listed on the bankruptcy schedule was incorrect and had in fact visited appellant at his new address on several occasions. The burden then shifted back to appellee to show that appellant fit into the "unless" clause which required him to prove appellant had actual knowledge or notice of the bankruptcy proceeding as stated in § 17a, stated above. We

do not believe appellee discharged his second listed burden of proof. Therefore, the debt in question was not duly scheduled within the meaning of the act and was therefore not discharged according to the proof presented in the Pulaski County Circuit Court.

The case is reversed and remanded with directions to grant judgment to appellant for the unpaid amount of the debt owed by appellee to appellant.

Reversed and remanded.

BYRD, J., dissents.

Charles W. BOWLES *v.* STATE of Arkansas

CR 79-12 579 S.W. 2d 596

Opinion delivered April 9, 1979
(Division I)
[Rehearing denied May 21, 1979.]

Ralph E. Wilson, Sr., for appellant.

Steve Clark, Atty. Gen., by: *Robert J. DeGostin, Jr.,* Asst. Atty. Gen., for appellee.

JOHN A. FOGLEMAN, Justice. Charles W. Bowles was the operator of a liquor store in Osceola. He was approached by Jerry Baker, of Fresno, California, an undercover agent employed by the Memphis, Tennessee Police Department. He used the name of a convict serving a 75 year sentence in the State of Tennessee, as a means of introduction to Bowles. After some discussion between the two as to how they could make some money in illegal activities, unrelated to controlled substances, Baker asked Bowles where they could buy large quantities of marijuana. Baker testified that Bowles gave him names of two persons in Wilson, one of whom was H. P. Cash. According to Baker, he went to the first person named by Bowles, but this person said that he did not have any marijuana. Baker later purchased a rather large quantity of marijuana from Cash. Cash was charged with delivery of a controlled substance and Bowles with being an accomplice to the delivery of a controlled substance. They were charged in the same information and the offenses were alleged to have occurred on the same date, December 14, 1977. Cash pleaded guilty, so Bowles was tried separately and found guilty. His first four points for reversal question the sufficiency of the evidence to sustain the conviction. Since we find it insufficient, we reverse the judgment, but will not discuss the remaining point for reversal.

The particulars of the charge against Bowles were stated thus:

> The said Defendant Charles William Bowles on/or about the 14th day of December, 1977, in the Osceola District of Mississippi County, Arkansas, did unlawfully, with the purpose of promoting or facilitating the commission of the offense of delivery of marijuana, solicit, advise, encourage the Defendant Horace P. Cash or aid, agree to aid or attempt to aid Horace P. Cash in the planning and committing of the crime of delivery of a controlled substance, marijuana, in violation of Ark. Stat. 41-303 ***

Insofar as applicable, Ark. Stat. Ann. § 41-303 (Repl. 1977) provides that a person is an accomplice of another in the commission of an offense if, with the purpose of promoting or facilitating the commission of an offense, he solicits, advises, or encourages the other person to commit it, or aids, agrees to aid or attempts to aid the other person in planning or committing it.

Viewing the evidence in the light most favorable to the state, it showed that:

> After getting Cash's name from Bowles, Baker took a note introducing him to Cash and talked to Cash about buying large quantities of marijuana. Baker told Cash that Bowles had sent him to see Cash. Cash told Baker to check back with him. Later Baker was told by Cash that Cash had checked him out and he was all right. Cash said that he was going to get a sample of marijuana for Baker to show to people who were prospective purchasers. Baker then, by a telephone call, arranged with Cash for a meeting on December 13, 1977 at Bowles' liquor store to pick up the sample. When Baker was a little late arriving, he saw Cash pulling out of the parking lot at Bowles' liquor store. Cash made a gesture directing Baker to follow him. Baker did follow Cash into a residential area, where Cash pulled his car over and Baker went up to Cash, talked a few minutes, obtained the sample and arranged to meet Cash in Wilson at 11:30 p.m. the next night. They actually met at about 1:00 a.m. and Cash gave Baker fifty pounds of

marijuana in exchange for $3,750. Baker had no contact with Cash prior to Bowles' introduction. Two days after the purchase, Baker went to Bowles' liquor store, on December 16, told Bowles that he had bought the marijuana and made a little money off it, and offered Bowles $100. Bowles declined the offer, saying that he had done what he did as a favor and that Baker had then established a good contact. Baker and Bowles then had a conversation about selling a stolen automobile. Bowles gave Baker the name and address of a man who was interested in buying stolen automobiles. Baker had no conversation with Bowles between the time he first met Cash and the time of the purchase of the marijuana. Bowles was not involved in the transaction except for the introduction. Baker had no knowledge that Bowles knew of the sale of the marijuana when Baker offered him $100.

Cash checked Baker out by asking Bowles if Baker was all right, i.e., if it was safe to do business with him. Cash said that all that Bowles did was introduce Baker and assure Cash that it was safe to do business with Baker. There was no testimony that anyone paid Bowles any money in connection with the sale and delivery.

In *Henderson* v. *State,* 255 Ark. 870, 503 S.W. 2d 889, we were faced with the question whether a witness was an accomplice of one charged with the delivery of a controlled substance. In holding that he was not, we said:

There is some apparent conflict in the authorities from other jurisdictions as to whether one who recommends, or directs a purchaser to, a seller of illicit drugs is an accomplice of the seller. In Arkansas, an accomplice, under the statute forbidding conviction of a felony on uncorroborated testimony of an accomplice, is one who could be convicted of the offense of which the defendant is charged. *** In *Rich* v. *State,* 176 Ark. 1205, 2 S.W. 2d 40, we held, upon the authority of *Wilson* v. *State,* 124 Ark. 477, 187 S.W. 440, that one who assists a purchaser in buying intoxicating liquors and confines his participation in the transaction exclusively to the

> buying, not the selling, is not guilty of the offense, and not an accomplice. *** We have also held that one who was employed as a laborer in the operation of a whiskey still and was an accomplice in its operation and in manufacturing liquor, was not an accomplice of his employer in the possession of the still, because he could not be convicted of the crime of possessing a still, either as a principal or accessory. *** In *Beck* v. *State,* 141 Ark. 102, 216 S.W. 497, we held that one who acted only as the agent of the buyer of intoxicating liquors and had no other interest in the sale, was not an accomplice of the seller. So long as one acts solely on behalf of the purchaser, he is not an accomplice of the seller. *** [Citations omitted.]
>
> Under the same rationale, other jurisdictions have held that a "facilitator" of a sale of illicit drugs is not an accomplice of the seller, so long as he is interested only on behalf of the buyer. See *U.S.* v. *Moses,* 220 F. 2d 166 (1955); *People* v. *Branch,* 13 App. Div. 2d 714, 213 N.Y.S. 2d 535 (1961); *Commonwealth* v. *Harvard,* 356 Mass. 452, 253 N.E. 2d 346 (1969); *People* v. *Lindsey,* 16 App. Div. 2d 805, 228 N.Y.S. 2d 427, aff'd 12 N.Y. 2d 958, 238 N.Y.S. 2d 956, 189 N.E. 2d 492 (1963). These holdings are more compatible with our general test of the status of a witness as an accomplice and with our cases relating to dealing in intoxicating liquors than decisions in jurisdictions holding to the contrary.

This case was decided before Ark. Stat. Ann. §41-303 was adopted. Although the coverage of this statute may be slightly broader than former Ark. Stat. Ann. § 41-119 (Repl. 1964), defining an accessory before the fact, changes in the pre-existing law wrought by the new one do not materially affect what we had to say in *Henderson,* at least as it applies to this case. The strongest evidence that Bowles solicited, advised or encouraged Cash to commit the crime was Cash's testimony that Bowles advised him it was safe to do business with Baker. There is nothing more than a suspicion that Bowles aided Cash in the transaction. We do not consider this sufficient evidence to show that Bowles was not acting

only on behalf of the purchaser, or in his interest, as the "facilitator" of the sale of marijuana.

Since we find the evidence insufficient to support the verdict, we must dismiss the charge in order to prevent placing appellant in double jeopardy. *Pollard* v. *State*, 264 Ark. 753, 574 S.W. 2d 656 (1978).

The judgment is reversed and the case dismissed.

We agree. HARRIS, C.J., GEORGE ROSE SMITH and PURTLE, JJ.

HANNA LUMBER CO. *v.* Cleman NEFF, d/b/a CLEMAN NEFF DESIGN BUILDER

78-280 579 S.W. 2d 95

Opinion delivered April 9, 1979
(Division II)

Jones & Segers, for appellant.

Kelly, Luffman & Matthews, P.A, for appellee.

FRANK HOLT, Justice. Appellee brought suit against appellant to recover damages allegedly caused by the failure of a truss system manufactured by appellant. The jury awarded appellee $9,500. The court ordered a remittitur of $1,930.57. We first discuss appellant's contention that the court erred in admitting certain checks into evidence to prove damages.

Appellee purchased prefabricated wood trusses from appellant to be used in appellee's construction operations. During construction of a building for which the trusses were purchased, the entire truss system collapsed after a bottom

cord broke when one of appellee's workmen stood on it. In support of its proof of damages, over appellant's objection, the court admitted into evidence certain checks signed by appellee or his employee on appellee's bank account. The checks were offered to establish amounts paid by appellee to various parties for building new trusses and repairing damages to the building caused by the failure of the trusses. Some of the checks covered payments on other projects not relevant to the job in the case at bar. The checks (totaling $12,723.23) contained "little notations" on them (totaling $6,304.46). These notations indicated the amount included in each check which was attributable to the job or damages in question. It is these notations to which the appellant objected. It argues that the admission of these checks, with the notations, into evidence violated the hearsay rule of evidence. The appellee responds that the checks fall within the business record exception to that rule as set out in Ark. Stat. Ann. § 28-1001, Rule 803 (6) (Supp. 1977).

We agree with appellant that the checks constituted a violation of the hearsay rule. Neither do they fall within the business records exception. There was no showing that the notations were made at the time the checks were written or that it was a regular practice of the business to make such notations. Appellee's testimony as to his damages was based upon these notations; he could not identify the source of the notations; he did not bring his business ledgers or books; and he could not testify from memory as to the work done by the parties to earn the amount noted on the checks. Error is presumed to be prejudicial unless it is demonstrated to be otherwise or is manifestly not prejudicial. *Buckeye Cellulose* v. *Vandament,* 256 Ark. 434, 508 S.W. 2d 49 (1974). Here we cannot say with confidence that the asserted error was not prejudicial.

Appellant also contends that the court erred in not directing a verdict in its favor as there was no evidence that its negligence in constructing the alleged defective trusses or its breach of a warranty was the proximate cause of appellee's damages. We cannot agree with these contentions. On appeal we view the evidence in the light most favorable to the appellee. *Green* v. *Harrington,* 253 Ark. 496, 487 S.W. 2d 612

(1972). If there is any evidence in favor of the party against whom the directed verdict is sought, it is error for the court to take the matter from the jury. *Home* v. *Mutual Fire Ins. Co.* v. *Cartmell,* 245 Ark. 45, 430 S.W. 2d 849 (1968). In *St. Louis-San Francisco Ry. Co.* v. *Bishop,* 182 Ark. 763, 33 S.W. 2d 383 (1930), in discussing proximate cause, we said: "It will be sufficient if the facts proved are of such a nature and are so connected and related to each other that the conclusion therefrom may be fairly inferred."

As indicated, the appellee purchased prefabricated wooden trusses from the appellant. They were manufactured according to preengineered specifications. The truss system collapsed the day following its installation. This occurred when a truss on which appellee's employee was standing broke causing the remaining truss system to fall. According to appellee's evidence, an inspection following the collapse revealed that pin knots went all the way through the trusses which weakened the tensile strength of them. This would affect the capability of the trusses to withstand shifting. The joints showed weather cracking. The weak and defective condition of the trusses was the cause of the collapse of the trusses. Before they fell, a loud "pop" was heard. The trusses did not fall in the same direction, although it was indicated that, if trusses fell due to inadequate bracing, they would topple in the same direction like dominoes. We hold there was sufficient evidence to enable fair-minded men to draw the inference that the negligence of appellee proximately resulted in the injuries to appellee.

In its argument as to breach of warranty, appellant cites *Jones* v. *Atkins,* 254 Ark. 472, 494 S.W. 2d 448 (1973), as standing for the proposition that a buyer is precluded from recovering consequential damages in a breach of warranty action when the buyer uses the nonconforming goods. A reading of that case shows, however, that the mere acceptance of the goods does not bar a claim for damages due to nonconformity. When it is reasonable to use the goods without inspection, recovery is not precluded. Ark. Stat. Ann. § 85-2-715 (2) (b) Comment 5 (Add. 1961). Here it was not the policy of the appellee to inspect the trusses when they were delivered inasmuch as they were represented and

accepted as structurally sound. Upon delivery, they were stacked and banded together which prevented inspection. A limited inspection could only be made as the prefab material or section (250 to 550 lbs.) was hoisted into place during installation. The installation process itself made it virtually impossible to inspect the prefabricated truss system. In summary, the truss system was manufactured by appellant according to preengineered specifications, stamped and approved by appellant for use. It was accepted and understood by appellee as being reliable or fit for the purpose or use for which the trusses were designed and assembled, i.e., roof support. A cursory inspection would not reveal the flaw in the design or material which proximately caused the collapse of the system. The court did not err in failing to direct a verdict on the basis of lack of evidence of proximate cause on the issue of a breach of warranty.

It is also contended that the court erred in admitting evidence of the cost of replacement trusses, because appellee had not paid for the original trusses, and the court incorrectly gave jury instruction No. 11. With regard to the evidence of the cost of replacement trusses, appellant argues that the evidence was irrelevant and confusing and should have been excluded under Ark. Stat. Ann. § 28-1001, Rules 402 and 403 (Supp. 1977). Appellee responds that the evidence was properly admitted, arguing that he, as was his right under Ark. Stat. Ann. § 85-2-608 (Add. 1961), revoked his acceptance of the trusses and, under § 85-2-711, "covered" or purchased substitute goods in good faith and without reasonable delay. Thus, the difference in the price of the original trusses bought from appellant and the replacement trusses was the "essence" of what appellee was seeking to recover, as provided for in § 85-2-712. Further, the appellee contends that, if he did not effectively pursue this remedy, the evidence was relevant to the issue of damages for breach of warranty of accepted goods. Finally, he argues that, if the difference in value test is used, the evidence was relevant in determining both the reasonable market value of the trusses if they had been as warranted and the value of the collapsed trusses as salvage.

We agree that the evidence was relevant in determining

the amount of damages attributable to a breach of warranty. § 85-2-714 provides that, in a proper case, any incidental and consequential damages stemming from a breach in regard to accepted goods may be recovered. The difference in the cost of the original and replacement trusses could be a proper element of such consequential damages. Accordingly, the court was correct in its admission of the evidence.

As to appellant's argument that the court incorrectly gave Instruction No. 11, we point out that AMI Civil 2d 2221, from which that instruction was formulated, does, as appellee notes, permit the insertion of the elements of damages. However, in the "Note on Use" for that instruction, it is provided that the instruction must be completed by inserting the appropriate element of damage from among AMI 2222 through 2228; there is no provision for the court to insert language such as was used in the instruction here. We have said that it is impermissible to use a substitute instruction in place of an applicable AMI and, if an applicable AMI is not used, the court must state the basis for its refusal to use it. *Gatlin* v. *Cooper Tire & Rubber Co.,* 252 Ark. 839, 481 S.W. 2d 388 (1972). See also *C.R.I. & P.R.R. Co.* v. *Hughes,* 250 Ark. 526, 467 S.W. 2d 150 (1971). Here the court gave no reason for its modification of the applicable AMI provisions, and in view of a possible retrial, we cannot agree that the instruction, as given, was not confusing.

The appellant next asserts that the trial court erred in its entry of judgment on the jury's findings inasmuch as the jury's answers to the interrogatories were inconsistent with its general verdict. We need not discuss this contention since it is not likely to happen upon retrial.

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

Reversed and remanded.

We agree: HARRIS, C.J., and FOGLEMAN and HICKMAN, JJ.

TRACE X CHEMICAL, INC. *v.* HIGHLAND RESOURCES, INC., ET AL

78-292 579 S.W. 2d 89

Opinion delivered April 9, 1979
(In Banc)

E. E. Maglothin, Jr., for appellant.

Hamilton H. Singleton and *Dennis L. Shackleford* of *Shackleford, Shackleford & Phillips,* P.A., for appellees.

FRANK HOLT, Justice. Appellee Highland brought suit alleging that appellant, its lessee, had breached various lease agreements and sought possession and damages for accrued rent. Appellant answered and counterclaimed alleging compliance with the lease agreements and asserted that appellee Highland was the party who had breached the leases. By counterclaim appellant sought damages for improvements made by it to the leased premises and requested that the cause be transferred to a court of law. Appellee Highland filed a motion for summary judgment, stating that there was no issue of fact as to the breach of the leases since both parties had alleged a breach. The chancellor granted Highland's motion, finding that both had alleged breaches and that, based upon those allegations the lease agreements were terminated. Possession of the property was awarded to appellee Highland with the right to remove appellant's property from the premises. The chancellor transferred the issues of liability and damages to the circuit court for determination. Hence this appeal.

We first consider appellee Highland's motion to dismiss this appeal, asserting that the chancellor's order is not appealable. We hold that the order is appealable since it concluded the parties' rights to possession of the property. See *Ark. Hwy. Comm'n.* v. *Kesner,* 239 Ark. 270, 388 S.W. 2d 905 (1965); and *Johnson* v. *Johnson,* 243 Ark. 656, 421 S.W. 2d 605 (1967). Accordingly, we deny appellees' motion to dismiss.

We next discuss appellant's contention that the court erred in granting a summary judgment and awarding appellee Highland possession of the property. A summary judgment, being an extreme remedy, should only be granted when it is clear there is no issue of fact to be litigated; and, before one is entitled to a summary judgment, it is incumbent upon the movant, here the appellee, to show there is no existence of a fact issue. *Robinson* v. *Rebsamen Ford, Inc.,* 258 Ark. 935, 530 S.W. 2d 660 (1975). The object of a summary judgment is not to try the issue but to determine if there are issues to be tried. *Ashley* v. *Eisele,* 247 Ark. 281, 445 S.W. 2d 76

(1969). If there is any doubt whatever, it should be denied. *Southland Ins.* v. *Northwestern Nat'l. Ins. Co.* 255 Ark. 802, 502 S.W. 2d 474 (1973).

Here, as noted, appellee Highland alleged, *inter alia,* that appellant had breached in various ways the lease agreements between them. Appellant denied that allegation and alleged that appellee Highland was the breaching party. Appellees argue that appellant conceded that the leases had been breached in its response to the motion for summary judgment and supporting brief, where it made the statement: "True, there may not be a question that the leases have been breached . . . Both . . . allege in their pleadings that the leases have been breached . . . This fact may not be controverted." We do not agree that this was a concession that no controversy existed; appellant merely recognized the fact that it "might not," which is different from saying that it "does not" exist. Each alleged a different basis of a breach or breaches. The issue was which one breached the leases. An issue is not decided simply because both parties to a lawsuit allege the same conclusion of law. Here, both or either party could fail to meet the required burden of proof to show that the other breached the leases.

Appellant sought in its counterclaim to have the entire case transferred to a court of law. The chancellor, as indicated, after granting Highland possession of the property based upon its motion for summary judgment, transferred the remaining issues of liability and damages to a court of law. Since we hold the motion for summary judgment was incorrectly granted, we are of the view that the entire cause should be transferred to a court of law.

Reversed and remanded.

FOGLEMAN, J., dissents.

JOHN A. FOGLEMAN, Justice, dissenting. Many years ago, this court was admonished not to reverse a case for an error that is not prejudicial, i.e., does not affect a substantial right of any party. Ark. Stat. Ann. § 27-1160 (Supp. 1977). No citation of authority is necessary to show that we have, on

hundreds of occasions, given heed to the admonition. I do not concede that there was any error in the action of the trial court here, but if there was, it was not only harmless, it was innocuous, insignificant and trivial. The reversal in this instance is purely ceremonial and wholly unnecessary.

The trial court transferred the issues of liability and damage to the circuit court. The majority holds that the summary judgment was incorrect and that the entire case should be transferred to a court of law. There really is no difference at all in what the chancery court did and what the majority says should be done.

The trial court held that there had been a breach of the lease contract. It left the question of *liability* to be determined by the trial court. The question of liability depends entirely upon the answer to the question, "Who breached the contract?" Who says the contract was not breached? Appellant does not; appellees do not; the trial court does not; and this court does not. Beyond the shadow of a doubt, the lease contract has been breached. Each of the parties contended that the lease was terminated by the other's breach. This may be the only thing on which the parties agree, but they certainly agree upon that and there is not one word in their pleadings to indicate that they did not. What was wrong with the chancery court's saying so?

Highland's suit was one in unlawful detainer dressed in declaratory judgment clothing. It alleged that the lease had been breached by appellant and sought possession by mandatory injunction to appellant to remove its property from the leased premises. All the relief sought could have been obtained through an unlawful detainer action, without a mandatory injunction, an equitable remedy granted only when there is no adequate remedy at law and, actually, when there is no other remedy in equity.

Text writers have spoken clearly on the subject of mandatory injunction. See 43 CJS 751, Injunctions § 8, where we find:

> *** While it has been said that the granting of mandatory injunctions is governed by the same rules as the

> granting of preventative injunctions, mandatory injunctions are viewed as harsh remedial process, and are not favored by the courts.
>
> Indeed, mandatory injunctions are rarely granted; and it has been noted that the courts are more reluctant to grant a mandatory injunction than a prohibitory one, that the requirements for the issuance of a mandatory injunction are stricter than for issuance of a prohibitory one, and that generally an injunction will not lie except in prohibitory form. . .
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> * * * *
>
> While mandatory injunctive relief may be appropriate in a clear case, and, indeed, will not issue except on the clearest equitable grounds, even if the right is clear, it does not follow that a mandatory injunction must be granted. In fact, such relief will be issued only in cases of extreme, great, or urgent necessity, or compelling circumstances, where the right invaded is material and substantial, and where adequate redress at law is not afforded, or where the injury is not compensable in damages.

And see, 42 Am. Jur. 2d 751, Injunctions § 20, where it is said:

> *** The basic principles upon which the mandatory and prohibitory injunctions are granted do not differ materially, although the courts are perhaps more reluctant to interpose the mandatory injunction. It has been said that relief by mandatory injunction is not regarded with judicial favor and is used only with caution and in cases of great necessity. A mandatory injunction, it is said, should be granted only under compelling circumstances. When the court is thus asked to undo something that has been done, it must, for obvious reasons, act in a careful and conservative manner and grant the relief only in situations which so clearly call for it as to make its refusal work a real and serious hardship and injustice; otherwise, it may inflict on the defendant

> the very irreparable injury which it is alleged he has done or is about to do against the plaintiff.

The case should never have been in the equity court.

Then the court held that Highland was entitled to possession. All parties agree by their pleadings that Highland is entitled to possession. Highland brought the suit seeking a mandatory injunction as the instrument for obtaining possession by removing appellant's property from the premises. Appellant alleges that there has been a breach of the covenant for quiet enjoyment by Highland. It also alleges that it has been constructively evicted by the actions of Highland. Perhaps appellant has used two means of saying the same thing. In any event, retention of possession is inconsistent with the allegations of appellant's pleadings and appellant does not allege that it is in possession. Appellant seeks only to be relieved of its obligations under the lease and to recover damages for breach of the covenant of quiet enjoyment and for constructive eviction.

The concepts of constructive eviction and breach of the covenant for quiet enjoyment are very closely related, if not just different names for the same concept. An excellent discussion of the relationship between the covenant of quiet enjoyment and constructive eviction can be found in *Reste Realty Corp.* v. *Cooper,* 53 NJ 444, 251 A. 2d 268 (1969). Portions of that discussion follow:

> The great weight of authority throughout the country is to the effect that ordinarily a covenant of quiet enjoyment is implied in a lease [Citations omitted.] . . . Where there is such a covenant, whether express or implied, and it is breached substantially by the landlord, the courts have applied the doctrine of constructive eviction as a remedy for the tenant. Under this rule any act or omission of the landlord or of anyone who acts under authority or legal right from the landlord, or of someone having a superior title to that of the landlord, which renders the premises substantially unsuitable for the purpose for which they are leased, or which seriously interferes with the beneficial enjoyment of the premises, is

a breach of the covenant of quiet enjoyment and constitutes a constructive eviction of the tenant.

Another discussion of the relationship between the two principles can be found in *Petroleum Collections Inc.* v. *Swords,* 48 Cal. App. 3d 841, 122 Cal. Rptr. 114 (1975). That court was faced with the appeal of the action by the lessor's assignee against the lessee for rent due and owing. The trial court held for the lessee and the court of appeals held that, although the covenant of quiet enjoyment had been breached by the lessor's removing a large advertising sign from the premises without adequate replacement, the lessee was not relieved of the obligation to pay rent because he and his sublessee remained in possession of the premises after removal of the sign. From the opinion:

> It has long been the rule that in the absence of language to the contrary, every lease contains an implied covenant of quiet enjoyment. . .
>
> *****
>
> If, on the other hand, the tenant elects to surrender possession of the premises, a *constructive* eviction occurs at that time and, as in the case of an actual eviction, the tenant is relieved of his obligation to pay any rent which accrues thereafter . . . It is this doctrine, known as the doctrine of constructive eviction, " . . . which expanded the traditional 'covenant of quiet enjoyment' from simply a guarantee of the tenant's possession of the premises to a protection of his 'beneficial enjoyment' of the premises . . ."
>
> Stated in another manner, the covenant of quiet enjoyment is not broken until there has been an actual or constructive eviction; an actual eviction takes place when the tenant is physically dispossessed of the property; a constructive eviction occurs when the act of molestation merely affects the beneficial use of the property, causing the tenant to vacate the premises. If the tenant is evicted or if he surrenders possession of the premises within a reasonable time after the act of

> molestation has occurred, he is relieved of his obligation to pay rent accruing as of the date he surrendered; he also may sue for his damages or plead damages by way of offset in an action brought against him by the landlord to recover any unpaid rent that accrued prior to the surrender of the premises. [Citations omitted.] *If, in the case of an interference with the tenant's beneficial enjoyment of the premises, the tenant does not surrender the premises within a reasonable time after the date of the interference, he is deemed to have waived his right to abandon; what constitutes a reasonable time is a question of fact to be determined by the trier of fact after considering all of the circumstances.* [Citations omitted.] [Emphasis mine.]

Arkansas cases on the subject are sparse, but in harmony with the majority view expressed above. In *Duprec* v. *Worthen Bank & Trust Co.,* 260 Ark. 673, 543 S.W. 2d 465, we recognized that, in the absence of language to the contrary, every lease contains an implied covenant of quiet enjoyment, citing *Petroleum Collections, Inc.* v. *Swords,* supra. In *Smiley* v. *Thomas,* 220 Ark. 116, 246 S.W. 2d 419, the court cited an earlier case which apparently recognized the covenant for the quiet enjoyment of land. Although the *Smiley* case was concerned with the alleged breach of the covenant of warranty of title, the opinion contains the following quote:

> *** This court held in *Gibbons* v. *Moore,* 98 Ark. 501, 136 S.W. 937, (Headnote 3): "A covenant for quiet enjoyment of land is a covenant which runs with the land, for breaches whereof the grantee, his heirs or assigns, may sue as if it were expressly inserted in the conveyance." (Headnote 4) "Same — When Broken. — A covenant for quiet enjoyment *** was broken where a title paramount to that of the grantee's was held valid in a suit against them to which their grantor was a party," . .

Although not explicit in the *Gibbons* opinions, it appears that the court felt that eviction from the premises was a necessary element of a breach of the covenant for quiet enjoyment, as evidenced by the following language: "Appellee having been brought into a suit against appellants on their motion as a

voucher, in which a title paramount to theirs received from said appellee was held valid and they were evicted by judgment therein from said lands, the breach of the covenant of quiet enjoyment and warranty created by the statute was established."

It is well established that there can be no constructive eviction if the tenant continues in possession. Black's Law Dictionary, De Luxe 4th Edition, contains the following definition of constructive eviction:

> Any disturbance of the tenant's possession by the landlord whereby the premises are rendered unfit or unsuitable for occupancy in whole or in substantial part for the purposes for which they were leased amounts to a constructive eviction, *if the tenant so elects and surrenders his possession.* [Emphasis mine.] [Citing *Murray* v. *Merchants' Southwest Transfer & Storage Co.,* 98 Okla. 270 255 P. 547, 549.]

From 52 CJS 289, Landlord & Tenant § 445, there is this:

> An eviction may be constructive in character, and a constructive eviction is some act of a permanent character which, although not amounting to an actual eviction, is done by the landlord or someone under his authority with the intention and effect of depriving the tenant of the beneficial enjoyment of the demised premises, or some part thereof, or materially obstructing or interfering with such enjoyment, and *to which the tenant yields by abandoning possession within a reasonable time. It involves a surrender of possession by the tenant on justifiable grounds* rather than a deprivation of actual occupancy. A claim of constructive eviction is only an election to terminate a lease because of a breach thereof. [Emphasis mine.]

Proceeding to 52 CJS 293, Landlord & Tenant § 447 (b), I read:

> In order to constitute an eviction by a landlord, the tenant must cease to retain possession of the premises, and either he must be dispossessed or he must abandon

> the premises because of the landlord's acts or omissions; *there is no eviction where he continues in possession . . .* [Emphasis mine.]

And further, at 52 CJS 306, Landlord & Tenant § 457, I find:

> Constructive eviction of a tenant by his landlord requires that the tenant abandon, vacate or surrender possession of the premises. Accordingly, it is held that there is no constructive eviction where the tenant continues in possession, however much he may be distrubed in the beneficial enjoyment of the premises; *nor is there a constructive eviction where the tenant is conducting litigation and seeking to remain in possession of the premises.* [Emphasis mine.]

And from 49 Am. Jur. 2d 318, Landlord & Tenant § 303, the following:

> Abandonment of premises by the tenant within a reasonable time after the wrongful act of the landlord is essential to enable the tenant to claim a constructive eviction based upon that wrongful act, or to defend against liability for rent, on account of such act. *However much the tenant may be disturbed in the beneficial enjoyment of the premises by the landlord's wrongful act, there is no constructive eviction if he continues in possession of the whole of the premises. Possession must be given up by the tenant in consequence of the landlord's act,* and those acts must be such as to justify the tenant in doing so. [Emphasis mine.]

It seems quite obvious from a reading of these passages that retention of the possession of leased premises is wholly inconsistent with a claim of constructive eviction. In *Lori, Limited* v. *Wolfe,* 85 Cal. App. 2d 54, 192 P. 2d 112 (1948), the lessor sought to have a lease reformed in order to prevent assignment or subletting. The lessee filed a cross-complaint, praying for declaratory judgment, an injunction and damages. The plaintiff appealed from an unfavorable judgment. The trial court found that the waiver of a right the appellant had under the lease relating to the sale of intoxicating beverages on the premises constituted a construc-

tive eviction. The court of appeals disagreed. From the opinion:

> *** *In order that there be a constructive eviction it is essential that the tenant should vacate the property. There is no constructive eviction if the tenant continues in possession of the premises however much he may be disturbed in the beneficial enjoyment. Veysey* v. *Moriyama,* 184 Cal. 802, 805, 195 P. 662, 20 ALR 1363; *Tregoning* v. *Reynolds,* 136 Cal. App. 154, 157, 28 P. 2d 79. [Emphasis mine.]

In *Steinberg* v. *Medical Equipment Rental Services, Inc.,* 505 S.W. 2d 692 (Tex. Civ. App. 1974), that court set out the four essential elements of constructive eviction. They are:

> (1) an intention on the part of the landlord that the tenant shall no longer enjoy the premises, which intention may be inferred from the circumstances; (2) a material act by the landlord or those acting for him or with his permission that substantially interferes with the use and enjoyment of the premises for the purpose for which they are let; (3) the act must permanently deprive the tenant of the use and enjoyment of the premises; (4) *the tenant must abandon the premises within a reasonable time after the commission of the act.* [Emphasis mine.]

And finally from *Reste Realty Corp.* v. *Cooper,* supra, in which the relationship between the covenant for quiet enjoyment and constructive eviction was first pointed out herein, the court said:

> *** *The general rule is, of course, that a tenant's right to claim a constructive eviction will be lost if he does not vacate the premises within a reasonable time after the right comes into existence* . . . 1 American Law of Property, § 3.51, p. 282. What constitutes a reasonable time depends upon the circumstances of each case. [Emphasis mine.]

Although dealing with the concept of warranty of title under Texas law in *Elliott* v. *Elliott,* 252 Ark. 966, 482 S.W. 2d 123, we also dealt with constructive eviction, saying:

> *** We have concluded that they correctly contend that before there can be any recovery for breach of warranty [of title] under Texas law [the opinion also held that the law was the same in Arkansas, citing *Lammers* v. *American Southern Trust Co.,* 172 Ark. 1013, 291 S.W. 437], there must have been an eviction, a surrender of possession to the one asserting a paramount title or a purchase of paramount title asserted, but that one who remains in possession, and successfully defends his title is not evicted, actually or constructively.

For other cases supporting the proposition that a tenant must abandon or vacate the leased premises before he can claim constructive eviction, see generally: Annot., 91 ALR 2d 638; *Indiana State Highway Com'n.* v. *Pappas,* 349 N.E. 2d 808 (Ind. App. 1976); *Lippman* v. *Harrell,* 39 Ill. App. 3d 308, 349 N.E. 2d 511 (1976); *Thompson* v. *Shoemaker,* 7 N.C. App. 687, 173 S.E. 2d 627 (1970); *Gillette* v. *Anderson,* 4 Ill. App. 3d 838, 282 N.E. 2d 149 (1972); *Meerbaum* v. *Crepes D'Asie, Inc.,* 85 Misc. 2d 345, 378 N.Y.S. 2d 874 (1975); *Brine* v. *Bergstrom,* 4 Wash. App. 288, 480 P. 2d 783 (1971); *McNabb* v. *Taylor Oil Field Rental Co.,* 428 S.W 2d 714 (Tex. Civ. App. 1968); *Sewell* v. *Hukill,* 138 Mont. 242, 356 P. 2d 39 (1960); *Richards* v. *Dodge,* 150 So. 2d 477 (Fla. App. 1963); *Venters* v. *Reynolds,* 354 S.W. 2d 521 (Ky. 1961); *McNally* v. *Moser,* 210 Md. 127, 122 A. 2d 555 (1956); *Maki* v. *Nikula,* 224 Ore. 180, 355 P. 2d 770 (1960); *Candell* v. *Western Federal Savings & Loan Association of Denver,* 156 Col. 552, 400 P. 2d 909 (1965); *Yaffe* v. *American Fixture, Inc.,* 345 S.W. 2d 195 (Mo. 1961); *E. B. Jones Motor Co.* v. *Niedringhaus,* 323 S.W. 2d 31 (Mo. App. 1959); *Baker* v. *Simonds,* 79 Nev. 434, 386 P. 2d 86 (1963); *Weiss* v. *I. Zapinsky, Inc.,* 62 N.J. Super. 351, 167 A. 2d 802 (1961).

So, from either party's view, Highland was entitled to possession. Why should the court not have said so? What issue remained as to possession?

A partial summary judgment specifying the facts not in issue is permissible when there is no material justiciable issue as to those particular facts on which the judgment is rendered or order made. Ark. Stat. Ann. § 29-211 (d) (Repl. 1962). Actually we have held that it is error for the trial court to *fail* to specify facts that appear to be without controvery. *Young* v.

Dodson, 239 Ark. 143, 388 S.W. 2d 94. The summary judgment was partial and covered only those matters as to which there can be no issue, i.e., that the lease had been breached and Highland is entitled to possession. The remaining issues, liability and damages, were transferred to law. What error did the trial court commit? I submit, none. What substantial right of any parts has been affected? Again, I say none. In substance, if not in form, the chancellor did what we have said he should do.

I would affirm the decree.

In the Matter of
Wayne R. WILLIAMS

79-145 592 S.W. 2d 438

April 9, 1979

PER CURIAM. It appears to the court that:

This court accepted the surrender of the license of Wayne R. Williams to practice law in the State of Arkansas upon his petition and the recommendation of the Supreme Court Committee on Professional Conduct, upon conditions set out in a per curiam order entered July 19, 1976, viz:

> 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.

The State Board of Law Examiners has certified that it has conducted a hearing as a result of which it found:

> (a) that Wayne R. Williams has satisfactorily shown that his character and integrity are such that he deserves readmission; and,
>
> (b) that Wayne R. Williams has refrained from assisting any attorney engaged in the practice of law and has not accepted employment from any attorney in any capacity during the term of his suspension.

It is therefore ordered that Wayne R. Williams be readmitted to the practice of law and that his license to do so be reissued.

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

CARLETON HARRIS, Chief Justice, dissenting. The Committee order entered when Mr. Williams surrendered his license provided that petitioner will not be automatically reinstated at the end of the two year period, but "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".

Since this court has the final responsibility, I likewise feel that this language is properly interpreted to the effect that the showing must also be satisfactory to the members of this court.

While I have every confidence in the members of the Committee, and normally accept their findings, there are still, to me, some matters wherein the investigation failed to establish to my satisfaction that Williams should be reinstated at this time.

CONLEY BYRD, Justice, dissenting. For the reasons hereinafter stated I cannot accept the recommendation of the State Board of Law Examiners that Wayne R. Williams should be reinstated as a member of the Bar of Arkansas.

In Williams' 1976 petition for the surrender of his license [the petition is set out in full in Justice Hickman's dissent] we see that, through his lust for filthy lucre, Williams in 1973 cheated the man that he had been employed to help. When his infidelity was shown to public light, Williams, for no apparent purpose other than having someone to share his shame, falsely swore that he was cheating his benefactor to bribe the deputy prosecuting attorney. Based upon Williams' statements of his conduct, on July 19, 1976, we entered the following order, to-wit:

> "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.* . . . The burden of proof shall rest upon petitioner in making those showings to the Board of Law Examiners."

The terms "character" and "integrity" both have well defined and readily understandable meanings. Black's Law Dictionary, 3rd ed., defines "character" as:

> "That moral predisposition or habit, or aggregate of ethical qualities, which is believed to attach to a person, on the strength of common opinion and report concerning him. A person's fixed disposition or tendency, as evidenced to others by his habits of life, through the manifestation of which his general reputation for the possession of a character, good or otherwise, is obtained. . . . "

> " 'Character' is what a man is, and 'reputation' is what he is supposed to be. *Hopkins* v. *Tate,* 99 A. 210, 211, 255 Pa. 56; *State* v. *Picket,* 202 Iowa 1321, 210 N.W. 782, 783.

> 'Character' depends on attributes possessed, and 'reputation' on attributes which others believe one to possess. *Bills* v. *State,* 187 Ind. 721, 119 N.C. 465. The former signifies reality and the latter what is accepted to be reality at present. *State* v. *Leabo,* 120 Or. 160, 249 P. 363."

The same authority defines "integrity" as:

> "As occasionally used in statutes prescribing the qualifications of public officers, trustees, etc., this term means soundness of moral principle and character, as shown by one person dealing with others in the making and performance of contracts, and fidelity and honesty in the discharge of trusts; it is synonymous with 'probity,' 'honesty,' and 'uprightness.' . . . "

Now, obviously, Williams' *moral predisposition and habits* as shown by his own petition demonstrate that he lacks that *moral principle of fidelity and honesty in the discharge of trusts* that would qualify under the definition of "integrity" as shown above. How did the State Board of Law Examiners arrive at a different conclusion? The record, page 12, shows that the State Board of Law Examiners chose to consider none of Williams' conduct prior to July 19, 1976, the date we accepted the surrender of his license and considered only his conduct subsequent to that date for the purpose of determining his "character and integrity." Apparently, the majority, in accepting the recommendation of the State Board of Law Examiners to reinstate Williams, are condoning that action on the part of the Board. Now obviously, the majority cannot explain to me why the State Board of Law Examiners should place such a limitation on their inquiry into the *character and integrity* of Williams, but I submit that the majority owe an explanation to the citizens of this State why the State Board of Law Examiners can take such a short circuited view of Williams' character and integrity.

For the reasons herein stated, I respectfully dissent.

DARRELL HICKMAN, Justice, dissenting. I respect the majority's position in standing behind its per curiam decision

which in effect suspended Wayne R. Williams' right to practice law for two years. This was done upon the recommendation of the Supreme Court Committee on Professional Conduct that Williams be allowed to surrender his license for two years, and that, after such time and upon a satisfactory showing that his character and integrity deserved readmittance, he be readmitted.

My dissent is that the majority was wrong in the first place.

Williams' misconduct can best be described in his own words. His original petition is set forth in full.

I.

> That there is presently pending before the Supreme Court Committee on Professional Conduct a complaint and investigation against me concerning my professional conduct including the following allegations, to-wit:
>
> (a) That Frank S. Wheat was arrested on or about August 30, 1973, by Clark County and Arkadelphia authorities on criminal charges including narcotics violations. I was employed by Frank S. Wheat and his father, B. F. Wheat, Jr. to defend Frank S. Wheat. I quoted a fee of Five Hundred Dollars ($500.00) which was paid in two installments of Two Hundred and Fifty Dollars ($250.00) each.
>
> (b) Thereafter on September 5, 1973, I falsely stated to B. F. Wheat, Jr. that an additional sum of Five Thousand Dollars ($5,000.00) would have to be paid to get probation for his son.
>
> (c) That at the time I informed B. F. Wheat, Jr. he would have to pay Five Thousand Dollars ($5,000.00) in addition to the Five Hundred Dollars ($500.00) previously paid, I knew that arrangements had already been made (on September 3, 1973) for Frank S. Wheat to be recommended for a probationary sentence con-

tingent upon both his and my assistance (working as a go between) with certain narcotics undercover agents. We fulfilled this role to the satisfaction of authorities between September 3, 1973 and September 13, 1973, and on the latter date I was advised that the probationary sentence would be recommended and that sentencing would take place on September 14, 1973, in Miller County. In view of the circumstances, this additional Five Thousand Dollars ($5,000.00) was clearly an excessive fee.

(d) That unknown to me and on September 6, 1973, B. F. Wheat, Jr. contacted another Arkadelphia attorney and discussed the Five Thousand Dollars ($5,000.00) I had stated would have to be paid. Following this conference and discussions with other persons, B. F. Wheat, Jr. agreed to wear an electronic listening device upon his person and to return to my office on September 10, 1973, to engage me in a conversation regarding the nature of the additional Five Thousand Dollars ($5,000.00) payment.

(e) That in the course of my discussion of September 10, 1973 with B. F. Wheat, Jr., I stated to B. F. Wheat, Jr. that this Five Thousand Dollars ($5,000.00) was not a legal fee for me and I falsely implied to B. F. Wheat, Jr. that the Five Thousand Dollars ($5,000.00) would be used by me to influence unnamed and undescribed third persons in order to secure favorable treatment for his son. B. F. Wheat, Jr. gave me One Thousand Dollars ($1,000.00) of the Five Thousand Dollars ($5,000.00) in my office on September 10, 1973.

(f) That on September 14, 1973, Frank S. Wheat received a probationary sentence in the Miller County Circuit Court. Following the sentencing, B. F. Wheat, Jr. gave me Four Thousand Dollars ($4,000.00). Following the delivery of the Four Thousand Dollars ($4,000.00) to me, I was arrested by police officers with the City of Texarkana and was subsequently charged with bribery and related crimes.

(g) That on September 14, 1973 following my arrest, I gave a statement to the law enforcement authorities in which I did not make any admissions of bribery and did not implicate anybody else, and in which I claimed any money I received from B. F. Wheat, Jr. was solely to be my fee.

(h) That on September 17, 1973, in the presence of my attorney, I gave a free and voluntary oral statement to Texarkana police officers in which I stated this Five Thousand Dollars ($5,000.00) was the sum of money Deputy Prosecuting Attorney Travis Mathis had agreed to accept in order for him to recommend a probationary sentence for Frank S. Wheat; and that the One Thousand ($1,000.00) given to me by B. F. Wheat, Jr. on September 10, 1973 had been turned over to Travis Mathis by me on the same day; and that the FourThousand Dollars ($4,000.00) I received from Mr. Wheat on September 14, 1973, was also to be turned over by me to Travis Mathis. All of the information in this statement implicating Mr. Mathis was a falsehood.

(i) That on September 19, 1973, in the presence of my attorney, I gave another free and voluntary statement to law enforcement authorities in which I reiterated much of what I had said on September 17, 1973 and which was false. In that statement, I declared that the Honorable John Goodson, Circuit Judge, was in no way involved in any bribery scheme.

(j) That my actions as related above resulted in Attorney Travis Mathis being indicted on November 7, 1973 by Clark County Grand Jury on a bribery charge, accompanied by newspaper publicity giving details of my allegations against Mr. Mathis.

(k) That I did not publically acknowledge the innocence of Mr. Mathis of the bribery charge until my letter to him dated March 18, 1974, in which I related he was never involved in any bribe concerning the Frank S. Wheat case.

(l) That on the 27th and 28th days of June, 1974, I

was tried on a bribery charge in the Clark County Circuit Court during which I testified that the Five Thousand Dollars ($5,000.00) from B. F. Wheat, Jr. was solely to be my fee, which fee was in addition to the Five Hundred Dollars ($500.00) previously paid to me, and no part of the money was to be used as a bribe. On June 28, 1974, the petit jury of Clark County was discharged by the Trial Judge before a verdict was reached, but while the jury stood eleven to one for acquittal. The case against me was later dismissed, the trial court holding a new trial would result in double jeopardy.

(m) That following the dismissal of the bribery case against me, the Prosecuting Attorney dismissed the bribery charge against Travis Mathis by court order dated September 27, 1974.

II.

I hereby admit that the allegations against me contained in this petition are substantially true and correct. I know that if charges were brought against me based on the allegations herein, I could not successfully defend myself against them. In order to avoid further proceedings in this matter, I have decided to resign and surrender my license to practice as an attorney in the State of Arkansas for a period of two (2) years in the hope that the Court will consider such suspension an adequate punishment for my actions as aforesaid. This resignation is freely and voluntarily given. I have not been coerced, nor intimidated into surrendering my license, nor have I been made any promise of benefit nor given any inducement whatever to do so, and I am fully aware of the implications of this resignation.

III.

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 readmission including, but not limited to, establishment of my then good character and my good conduct during the suspension period.

IV.

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.

/s/ Wayne R. Williams
Wayne R. Williams

Williams' misconduct, then, was that he had committed several felonies, that he had led a layman to believe that the legal system was corrupt and that he had caused a fellow lawyer to be indicted by a grand jury. It would be difficult for me to think of misconduct of a more serious nature by any lawyer. While Williams had only been admitted to practice for a few months, he was of mature age; for his misconduct there can be no excuse.

The right to practice law is a privilege granted according to the laws of this State. While Williams has not been convicted of a felony, he has admitted that he committed several felonies. I believe the original judgment should have been that proceedings for disbarment should have been initiated — not to accept a voluntary surrender of the license.

Every week we review cases where individuals have been sentenced to the Arkansas penitentiary for less serious offenses. It is difficult for me to justify the majority's action in comparison.

While our profession is not held in high regard by all, it is an honorable one, composed of many honorable people who support and defend the profession against corruption and unfounded rumors of corruption. Our system of govern-

ment depends upon such people, and the integrity of such people. Their ranks must be limited to those deserving such a responsibility.

I find no evidence in the record regarding why Wayne R. Williams did what he did; perhaps such actions are self-explanatory. I only find in the record that he has not practiced law for two years, as he was prohibited from doing by law; that some local judicial officials and lawyers feel he deserves another chance. Certainly, Williams should not be unduly punished for his misconduct, but I am of the opinion that he has forfeited his right to practice law, and he has not demonstrated by evidence that he is of good moral character deserving readmittance to the bar.

Therefore, I respectfully dissent from the majority opinion.

Shirley CLARK, Widow *v.* PEABODY TESTING SERVICE

78-288 579 S.W. 2d 360

Opinion delivered April 16, 1979
(Division II)

[redacted]

[redacted]

Joseph W. Swaty, for appellant.

Wright, Lindsey & Jennings, for appellee.

JOHN A. FOGLEMAN, Justice. This claim arises from the death of William Robert Clark, aged 38, on the job site where he was employed by appellee, Peabody Testing Company. The circuit court affirmed the Workmen's Compensation Commission's denial of the claim. Appellant asserts four points for reversal. We find no reversible error.

Point No. 1

THE CIRCUIT COURT ERRED IN AFFIRMING THE COMMISSION'S OPINION BECAUSE SUCH OPINION REFLECTS THE FULL COMMISSION GAVE WEIGHT TO THE ADMINISTRATIVE LAW JUDGE'S OPINION.

Appellant's argument on this point is based upon these elements: The commission stated, in its opinion, that it

agreed with the decision of the administrative law judge; it followed the statement of the case made by this judge in his opinion; it quoted verbatim a hypothetical question (which appellant says was improper) propounded to a physician and the physician's answer (which appellant calls inconsistent); it used the same reasoning used by the administrative law judge; the commission cited, but did not follow, *Harper* v. *Henry J. Kaiser Construction Co.,* 233 Ark. 398, 344 S.W. 2d 856.

Certainly the commission's agreement with the referee's findings based only upon the evidence presented to the referee is not to be taken to mean that the commission accorded any weight to the referee's findings. Such cases as *Potlatch Forests, Inc.* v. *Smith,* 237 Ark. 468, 374 S.W. 2d 166, cited by appellant, have no bearing, because there is no indication whatever that the commission here only determined that there was substantial evidence to support the administrative law judge's findings. Furthermore, we give the law judge's findings no weight whatever. *Lane Poultry Farms* v. *Wagoner,* 248 Ark. 661, 453 S.W. 2d 43. See also, *Allied Telephone Co.* v. *Rhodes,* 248 Ark. 677, 454 S.W. 2d 93.

Point No. 2

THE CIRCUIT COURT ERRED IN FAILING TO FIND THERE WAS SUBSTANTIAL EVIDENCE, BOTH LAY AND MEDICAL, ON WHICH TO BASE ITS AFFIRMANCE.

According to appellant, her main point is that the circuit court made no specific finding that the evidence upon which the commission based its decision was substantial. Apparently appellant feels that it was reversible error for the circuit court to affirm the judgment without setting out the specific evidence it found to be substantial. The court's order stated that upon review of the entire file the order of the commission should be affirmed. There is no requirement in the Workers' Compensation Law that the circuit court, on review of the commission's decisions, make detailed findings of fact or state specific conclusions of law. In this case, the only question that could have been decided by the circuit court was whether the commission's action was supported by substantial evidence,

since there was no suggestion that the commission acted without, or in excess of, its powers, or that the award was procured by fraud. See Ark. Stat. Ann. § 81-1325 (b) (Repl. 1976). The question is one of law. *Cummings* v. *United Motor Exchange,* 236 Ark. 735, 368 S.W. 2d 82; *Mohawk Rubber Co.* v. *Buford,* 259 Ark. 614, 535 S.W. 2d 819. The findings of fact of the commission are conclusive and binding on the courts in the absence of fraud, and are not for de novo determination by the courts. Ark. Stat. Ann. § 81-1325 (b); *Oak Law Farms* v. *Payne,* 251 Ark. 674, 474 S.W. 2d 408; *Lane Poultry Farms* v. *Wagoner,* supra. The order of the circuit court is clearly indicative of a finding that there was substantial evidence to support the denial of compensation. In any event, we review the decision of the commission without regard to the action of the trial court. *Miller* v. *Everett,* 252 Ark. 824, 481 S.W. 2d 335; *Allied Telephone Co.* v. *Rhodes,* supra. See also, *Lane Poultry Farms* v. *Wagoner,* supra. Therefore, the failure of the circuit court to specify the evidence it found to be substantial, in support of the commission's action, is of no consequence.

Point No. 3

THE CIRCUIT COURT ERRED IN FAILING TO DETERMINE, AS A MATTER OF LAW, THAT THE COMMISSION RESOLVED ALL DOUBTS IN FAVOR OF THE CLAIMANT.

In her argument of this point, appellant argues that before either the circuit court or this court can affirm the commission, there must be a finding that the commission has viewed the evidence liberally in favor of the claimant. In this, appellant is mistaken, and as a matter of fact, has correctly predicted that we will say that there is no inconsistency in these statements: (1) that the commission must resolve all doubts in favor of the claimant and (2) that we must affirm the commission's decision if it is supported by substantial evidence. The resolution of doubts and factual issues favorably to the claimant is a function of the commission, not of the courts, which must view and interpret the evidence and all reasonable inferences deducible therefrom in the light most favorable to the findings of the commission and give the testimony its strongest probative force in favor of the action of

the commission, whether it favored the claimant or the employer. *Mass Merchandisers, Inc.* v. *Harp,* 259 Ark. 830, 536 S.W. 2d 729; *Turner* v. *Lambert Construction Co.,* 258 Ark. 333, 524 S.W. 2d 465; *Barksdale Lumber Co.* v. *McAnally,* 262 Ark. 379, 557 S.W. 2d 868; *Home Insurance Co.* v. *Logan,* 255 Ark. 1036, 505 S.W. 2d 25; *Warwick Electronics, Inc.* v. *Devazier,* 253 Ark. 1100, 490 S.W. 2d 792. On appeal, we resolve all doubts in favor of the commission's findings.[1] *Bale Chevrolet Co.* v. *Armstrong,* 241 Ark. 705, 409 S.W. 2d 328. We must affirm if we find any substantial evidence to support the commission's ruling. *Dura Craft Boats* v. *Daugherty,* 253 Ark. 340, 485 S.W. 2d 739; *Turner* v. *Lambert Construction Co.,* supra; *Potlatch Forests, Inc.* v. *Smith,* supra. So, the extent of our inquiry is limited to the determination whether there is any substantial evidence to support the commission's findings. *Sneed* v. *Colson Corp.,* 254 Ark. 1048, 497 S.W. 2d 673; *Superior Improvement Co.* v. *Hignight,* 254 Ark. 328, 493 S.W. 2d 424; *Dura Craft Boats, Inc.* v. *Daugherty,* supra. We will affirm the decision of the commission on the question of causation, unless there is *no* substantial evidence to support it. *Turner* v. *Lambert Construction Co.,* supra. Even if the preponderance of the evidence would indicate a different result, we will affirm the commission if reasonable minds could reach the conclusion reached by the commission. *Superior Improvement Co.* v. *Hignight,* supra. Or conversely, we will not reverse the commission's finding that the claimant failed to meet his burden of proof on causation unless fair-minded men could not have arrived at a finding adverse to the claimant. *Turner* v. *Lambert Construction Co.,* supra. The circuit courts must take the same view of the evidence we do.

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[1]It is true that we said that, in determining the sufficiency of the evidence, doubts should be resolved in favor of the claimant in *Johnson Auto Co.* v. *Kelley,* 228 Ark. 364, 307 S.W. 2d 867, relied upon by appellant. In that case, however, the commission had found in favor of the claimant, and the statement was correct in that situation. This case has never been cited on this point except in a dissenting opinion in *Latimer* v. *Sevier County Farmers' Cooperative Inc.,* 233 Ark. 762, 346 S.W. 2d 673, where we affirmed the commission's holding that a widow had failed to establish a causal relation between her husband's employment and his death. The authority cited in *Kelley* was *Herron Lumber Co.* v. *Neal,* 205 Ark. 1093, 172 S.W. 2d 252, where we were also reviewing the evidence in a case where the commission awarded compensation. The correct rule is stated in *Bale Chevrolet Co.* v. *Armstrong,* and is consistent with our holding in both *Kelley* and *Latimer.*

Point No. 4

THE CIRCUIT COURT ERRED IN AFFIRMING THE COMMISSION BECAUSE THE COMMISSION FAILED TO RESOLVE DOUBTFUL MEDICAL TESTIMONY IN FAVOR OF APPELLANT.

There is no distinction between medical testimony and other evidence insofar as the resolution of doubts is concerned in workers' compensation proceedings. In arguing this point, appellant relies upon *Dougan* v. *Booker,* 241 Ark. 224, 407 S.W. 2d 369, where this court reversed the action of the circuit court and of the commission, without regard to the substantial evidence rule. While this 4-2 decision (one justice not participating) would seem to lend some support to appellant's argument, there are some important distinctions. The claimant there had suffered a previous heart attack, for which he had been treated by a physician who advised him not to overtax himself and to stop and rest if he had any pain or fatigue. The undisputed evidence in *Dougan* was that the employee collapsed on the job as a result of *unusual* exertion and strain. The only evidence of a preexisting condition in this case is testimony relating to chest pains and shortness of breath, which may or may not have been symptoms of cardiac disease. There is testimony in this case from which it would not be unreasonable to infer that there was no *unusual* strain or exertion in the work being done by Clark. The two dissenting justices in *Dougan* pointed out that the court should affirm if there was any substantial evidence to support the verdict. They felt that the expert opinion testimony of a physician constituted substantial evidence to support the commission's denial of the death claim in that case. In view of the many cases decided since that decision on the extent of appellate review, *Dougan* v. *Booker* cannot be considered as authoritative on the facts in this case, insofar as the substantial evidence rule is concerned.

SUBSTANTIAL EVIDENCE

Appellant does not state any point for reversal based upon her contention that there was no substantial evidence to support the commission's denial of her claim. Since that argument, however, is woven into her argument on every

point stated, we must consider it. We do find substantial evidence, when the evidence is viewed in the light in which we must view it. We must also keep in mind the requirement that the dependent claimant show by a preponderance of the evidence that the death of the employee arose out of and in the course of his employment. *Asphalt Materials Co.* v. *Coleman,* 243 Ark. 646, 420 S.W. 2d 921; *Wilson* v. *United Auto Workers International Union,* 246 Ark. 1158, 441 S.W. 2d 475; *Brooks* v. *Wage,* 242 Ark. 486, 414 S.W. 2d 100. See also, *Voss* v. *Ward's Pulpwood Yard,* 248 Ark. 465, 452 S.W. 2d 629.

The claimant, Shirley Clark, is the widow of William Robert Clark, who was 38 years of age when he died on July 19, 1977. He had been employed as a driller for Peabody Testing Service since January, 1977. Clark had lived continuously with Mary Collins, daughter of Olene Bates, in Sheridan since 1974. Mrs. Bates also lived in Sheridan. Mrs. Bates had a close relationship with Clark after she first met him in October, 1974. She testified that, during all the time she knew him, he never went to a doctor in Sheridan or Little Rock or any place she knew about, that he did not take medicine, and that she did not know of his being hospitalized. He smoked but did not use alcohol at all. He fished, hunted, wrestled with his 16-year-old son, played ball with his boys and played with his dogs. He was a real active individual. Some of these activities were rather strenuous. Mrs. Bates said that he never complained of excessive fatigue, chest pains, shortness of breath or dizziness. She never heard him complain about anything. She said he had no complaints after any of the activities in which he engaged, and that she was around him enough to have been aware of any such complaints if he had made them. She had never heard Clark say anything about his having any history of high blood pressure. She said she did not know of, or ever discuss with him, any history of diabetes. He was over six feet tall, was slender and not overweight. He took regular exercise. Mary Collins testified that Clark had no problem with his heart while he lived with her.

David Thompson, general manager for appellee, testified that Clark was accustomed to fairly strenuous work. Just prior to the commencement of the job on which Clark

was working when he died, he had worked on a job at Ozark during May and June. He worked ten hours a day, five days per week. He called in sick on a Thursday after that job was complete and was given Friday off, after which he took a one week vacation. He was off the job for a total of ten days. According to Horace Helms, Clark's helper in the two-man drilling crew, the work at Ozark was strenuous and the weather was hot. Helms never heard Clark complain of any illness while they worked at Ozark. Clark had never complained of shortness of breath, chest pains, excessive fatigue, or anything of that sort.

When Clark returned from his vacation, he and Helms commenced a job at Greenwood, which, according to Helms, should have been less strenuous work than that done at Ozark. The first day they just drove from Little Rock to Greenwood, located the site on which they were to drill and went to a motel. Helms said that Clark complained of chest pains that night and said that he was having a hard time breathing. Clark did not complain of any difficulty in breathing before he went to work, but Helms said that when they started drilling, Clark started talking about chest pains and having difficulty breathing. Clark and Helms had difficulty in keeping their rig drilling. Helms said this made Clark angry, but he characterized him as being rather calm. Helms said that he reckoned it was a pretty normal day, but that they had been working in hot weather all summer.

Both Clark and Helms called appellee's office that day. Sharon Allen, who worked in the office of the First Baptist Church of Greenwood, said that Clark and Helms were drilling about 50 yards across a courtyard from her office. She said that they came in the office to call their boss after the drilling rig had stopped. She described the day as humid. She recalled that the temperature was 101 or 102 degrees. She said Clark and Helms were in the office about 15 or 20 minutes before Clark died and that he looked real dark — his face was gray looking. He made no complaint about chest pains and the only thing Miss Allen noticed about him was the unusual facial color. According to her, Clark went back to the rig about five minutes before Helms did, and that just a few minutes later, she saw Helms pass the window, carrying

Clark. Helms brought him inside the building and laid him on the floor. Ms. Allen said that Clark didn't seem "to have any life" at that time.

Helms said that Clark had sat under a tree and said that he was going to rest. Helms stated that he then went to use a telephone, and when he returned, Clark was lying on the grass and beginning to turn blue.

Clark was taken by ambulance to the emergency room at Saint Edward Mercy Medical Center in Fort Smith. Resuscitation efforts in the ambulance and in the emergency room failed.

According to Dr. Stephen C. Graves, the emergency room physician, Clark arrived without heart beat or respirations and his pupils were fixed and dilated. A hospital report showed that Dr. Graves attributed death to cardiac arrest. The death certificate executed by the coroner showed that Clark died of "apparent natural causes." No autopsy was performed. Appellant filed a letter report of Dr. Graves in which he stated that he did not know whether Clark had any preexisting cardiovascular or cerebrovascular disease, but expressed the opinion that strenuous physical labor on a hot day *could result in,* or *could have* contributed to, his death.

Dr. Graves also testified by deposition. He stated that he had been unable to determine the cause of Clark's death in the emergency room and had notified the coroner. He had talked with Helms, who had come to the emergency room in the ambulance, and Helms had said that Clark had complained of chest pains on the day of his death and the preceding night. He was unable to give an affirmative or negative answer to the question whether high temperature or hard work, sweating and little rest *can* precipitate certain illnesses and cause death. He found nothing in the transcript of testimony in the case to indicate that Clark was engaged in extra hard work that might have caused him to have those "precipitating factors." Although he felt that heat would have an effect, if accompanied by sweating and loss of a lot of

body fluid, he said that Helms did not mention this. In his review of the transcript, the only suggestion he found that Clark was not in good health was Helms' statement relating to chest pains and shortness of breath, which Graves said *could be* due to intrinsic cardiac disease or coronary artery disease, but might not. He said he had no way of knowing whether Clark was predisposed to heart attack and other cardiac ailment, since he had not had any information on the considerations for determining predispositions, i.e., history of parental heart disease, high blood pressure, smoking, excessive caffeine, and being overweight, except for knowing that Clark was not overweight. The only history that Graves found that might have been a factor was the history of pain the night before Clark's death. A hypothetical question of the doctor on cross-examination, and his answer, were:

> Q. Doctor, I believe one of the witnesses at the hearing, a Mrs. Olene Bates, testified that Mr. Clark had no history of heart disease; that he was accustomed to work; that he regularly exercised; that he was not taking any medication; that he did smoke; that he had no history of diabetes or high blood pressure, or any other chronic illness of that type. If you assumed those facts, and based on that information which Mrs. Bates testified, would you feel that Mr. Clark would be predisposed to any type of heart attack?
>
> A. No. Given that information I would say that he was probably not predisposed.

On redirect examination, Dr. Graves stated that he was of the opinion that the chest pains Clark experienced the night before his death were either a heart attack or early warning signs of an attack that probably was the cause of Clark's death, but said that he could not be certain. He also said that it was not unusual for one to die after suffering heart pains during the preceding night, whether or not he had any history of heart problems, but it was unusual, though not unheard of, for a person of Clark's age to die of a heart attack; and, if there had been a heart attack the night before Clark's death, it would not be unusual for him to die the next day. All his information about Clark and the possibility of his having

had a heart attack came from Helms and the transcript. The doctor felt that using a large wrench in an effort to turn a bit would probably not bring about a second heart attack, but that getting out and working the day after a heart attack would more likely cause sudden death than staying in bed and seeing a doctor. He said that if Clark was performing the activity about which he read in the transcript, he would "probably be more likely" to have suffered a second heart attack.

On recross-examination, Graves said he "had an idea" that Clark had experienced a heart attack the night before his death and said that most "patients" who are undergoing a heart attack have an increased probability of additional heart disease or even death, as a result of physical activity, but that he would not say that Clark might not have died during the next day in any event and that he did not find anything in the transcript that happened to Clark on the day of his death that necessarily contributed to it. He found nothing to indicate that Clark had done anything extra hard that day that might have precipitated his death.

We should first dispose of appellant's contention that the commission could not have made the decision it made if it had followed *Harper* v. *Henry J. Kaiser Construction Co.*, 233 Ark. 398, 344 S.W. 2d 856. The impact of this decision insofar as this case is concerned, is that, since medical science has been unable to agree as to what causes, contributes to, or hastens a heart attack, the Workmen's Compensation Commission must make the decision in each case based upon the evidence in that case, but that in every such case the causal relation of the employment must be shown by a preponderance of the evidence. The mere fact that only one doctor testified does not diminish the impact of that decision, lighten the burden of the claimant or dictate the result the commission must reach. It is for the commission to determine the extent to which credit is given to testimony, even when it is undisputed. *Wilson* v. *United Auto Workers International Union,* 246 Ark. 1158, 441 S.W. 2d 475. It is quite clear that there was, to say the least, considerable uncertainty in the mind of Dr. Graves as to the cause of Clark's death. The commission took note of the fact that there were important factors militating

against resolving that uncertainty favorably to the party having the burden of proof. Among them were Clark's age, the lack of a history of heart disease, high blood pressure or chronic disease, his being accustomed to strenuous work, the lack of evidence that Clark had been sweating and losing body fluid, and the fact that he was not overweight. The uncertainty of the doctor's opinion that Clark's death was attributable to a heart attack causally related to his employment and the adverse factors admitted by the doctor were sufficient basis for the commission to find that there was no fair and reasonable basis for that opinion, and that the real import of his testimony was that it was his opinion that Clark was not predisposed to any type of heart attack, that there was nothing in the evidence before the commission to lead him to believe that either the weather or the work Clark was doing had anything to do with his sudden death and that the chest pains and shortness of breath experienced by Clark might or might not have been indicative of cardiac or coronary artery disease.

The evaluation of this testimony as to medical soundness and probative force was a question for the commission. *Barksdale Lumber Co.* v. *McAnally,* 262 Ark. 379, 557 S.W. 2d 868. It is the responsibility of the commission to draw inferences when the testimony is open to more than a single interpretation, whether controverted or uncontroverted; and, when it does so, its findings have the force and effect of a jury verdict. *McCollum* v. *Jones Truck Lines, Inc.,* 244 Ark. 762, 427 S.W. 2d 18; *Abbott* v. *C. H. Leavell & Co.,* 244 Ark. 544, 426 S.W. 2d 166; *Missouri City Stone, Inc.* v. *Peters,* 257 Ark. 917, 521 S.W. 2d 58. We cannot reverse such a finding unless we could reverse a jury verdict on the same question. *Barksdale Lumber Co.* v. *McAnally,* supra; *Mass Merchandiser, Inc.* v. *Harp,* 259 Ark. 830, 536 S.W. 2d 729; *Ark. Coal Co.* v. *Steele,* 237 Ark. 727, 375 S.W. 2d 673. The question presented to us is not whether there was either substantial evidence or a preponderance of the evidence to support appellant's claim, or a result contrary to that reached by the commission; it is whether there was any substantial evidence to support the finding in favor of the employer. *Barksdale Lumber Co.* v. *McAnally,* supra; *Mosley* v. *El Dorado School District,* 254 Ark. 326, 493 S.W. 2d 427. Even though the evidence might sup-

port a result different from that reached by the commission,[2] we must be convinced that fair-minded men could not have reached the conclusion it reached upon the evidence submitted, before we reverse the commission's findings for want of substantial evidence. *Purdy's Flower Shop* v. *Livingston,* 262 Ark. 575, 559 S.W. 2d 24; *Mass Merchandisers, Inc.* v. *Harp,* supra; *Julian Martin, Inc.* v. *Indiana Refrigeration Lines,* 262 Ark. 671, 560 S.W. 2d 228. In our determination of this question, we have considered only that evidence, and that version of it, which is most favorable to the appellee. See *Stephens & Stephens* v. *Logan,* 260 Ark. 78, 538 S.W. 2d 516; *Mass Merchandisers, Inc.* v. *Harp,* supra; *Clark* v. *Shiloh Tank & Erection Co.,* 259 Ark. 521, 534 S.W. 2d 240.

We are unable to say that fair-minded men could not reach the conclusion upon which the commission denied this claim. We most assuredly would not overturn a jury verdict based on the evidence here. In so concluding, we find that portions of Dr. Graves' testimony which were favorable to appellee were not incredible as a matter of law, or so contrary to common sense or so clearly based upon conjecture that we should disregard it. See *Barksdale Lumber Co.* v. *McAnally,* supra. Even though we might feel that the commission reached the wrong result, we are not at liberty to upset its finding; because we find substantial evidence to support it. *Potlatch Forests, Inc.* v. *Smith,* 237 Ark. 468, 374 S.W. 2d 166.

There are two other contentions made by appellant however, which we must consider, because if we agreed with either of them, our result might be different. First, appellant contends that the doctor's answer to the hypothetical question earlier set out should not be considered because some of the assumed facts were not supported by the evidence. She then invokes *Rhea* v. *M-K Grocer Co.,* 236 Ark. 615, 370 S.W. 2d 33, to support the conclusion that the key medical opinion was elicited by an improper hypothetical question. In the first place, we disagree with appellant's interpretation of the

[2]As we pointed out in *Ocoma Foods* v. *Grogan,* 253 Ark. 1111, 491 S.W. 2d 65, we have approved some commission awards where those furnishing the medical evidence used the terms "possible," "might" and "could cause." Such an uncertainty of opinion can hardly afford a basis for reversal of a commission's finding, adverse to the claimant, after it evaluated the medical testimony.

evidence upon which the hypothetical question was based. It seems to us that the question was based upon inferences fairly drawn from the testimony set out herein rather fully. We must remember that the commission is not bound by strict rules of evidence in the admission or consideration of any evidence, including medical testimony. *Barksdale Lumber Co.* v. *McAnally,* supra; *Davis* v. *Arkansas Best Freight System,* 239 Ark. 632, 393 S.W. 2d 237, 17 ALR 3d 986. It has broad discretion with reference to admission of evidence. *Northwestern National Insurance Co.* v. *Weast,* 253 Ark. 710, 488 S.W. 2d 322. It is free to make such inquiry and to conduct the proceedings in such a manner as to best ascertain the rights of the parties. Ark. Stat. Ann. § 81-1327 (a) (Repl. 1976). It certainly is not to be held in error where it does follow the rules of evidence, so long as there is no abuse of its discretion.

There was no objection made to the hypothetical question asked or to the answer given. If it should have included other facts or if it included facts not established by the testimony, an objection should have been made, and, not having been made, it cannot be made for the first time on appeal. *Chapman* v. *Finkbeiner,* 230 Ark. 655, 324 S.W. 2d 348. See also, *Southwestern Gas & Electric Co.* v. *Halter,* 200 Ark. 244, 138 S.W. 2d 793. If objection had been made, the question could easily have been reworded to meet any valid objection.

We do not read *Rhea* as dictating a reversal, where the basis given for the expert opinion is clearly stated. Furthermore, we do not consider the statement quoted from 3 Larson, Workmen's Compensation Law, 15-406, § 80.20, that an award could not stand where the medical opinion on which it is based was elicited by an improper hypothetical question to apply to a question to which no objection was made and which was not totally improper.

Appellant also contends in her reply brief that the commission should not have considered the answer given by Dr. Graves, which was based upon his review of the transcript. She again relies upon *Rhea,* in which we said that permitting a doctor to simply read the entire record and base his opinion upon that record without stating the particular testimony or facts upon which the opinion is based, makes him a trier of

the facts and usurps the function of the commission. Dr. Graves' opinion favorable to appellee was not based entirely upon his review of the testimony, as can be seen from our extensive outline of the evidence. On the other hand, his review of the transcript, to a considerable extent, was directed to the absence of facts to support his opinion that there was a possible causal relation, rather than the presence of facts to support the contrary conclusion. A critical factor in *Rhea,* not present here, was the fact that the medical expert who based his opinion on a review of the record did not have the complete record before him, as some of the pertinent evidence had not even been introduced when he gave his opinion. Here, again, no objection was interposed. Even if there had been, the commission might well have chosen to follow the rule of evidence now in force in judicial proceedings, eliminating objections to opinion evidence on the basis that it embraces an ultimate issue to be decided by the trier of fact. See Ark. Stat. Ann. § 28-1001, Rule 704 (Supp. 1977).

Another argument advanced by appellant in response to appellee's brief is the contention that the commission's findings of fact were deficient in that they were not in sufficient detail to permit the courts to ascertain whether the commission had applied the correct rules of law. We think that appellant might have been in position to complain had the commission merely stated its conclusion that appellant had failed to meet her burden of proof or that the evidence was insufficient to show that Clark had suffered an accidental injury arising out of and in the course of his employment. We do not deem a full recitation of the evidence to be required, so long as the commission's findings include a statement of those facts the commission finds to be established by the evidence in sufficient detail that the truth or falsity of each material allegation may be demonstrated from the findings, the losing party can specify the particulars in which they are not supported by the evidence and the reviewing court may perform its function to determine whether the commission's findings as to the existence or non-existence of the essential facts are or are not supported by the evidence.[3] 82 Am. Jur. 2d 287, et

[3]For an extended discussion of the various approaches to questions pertaining to the necessity, form and contents of findings of fact to support administrative determinations relating to workmen's compensation, see Annot. 146 ALR 123.

seq, Workmen's Compensation, §§ 558, 560, 563; 100 CJS 910, Workmen's Compensation, § 630 et seq; *Simmons Co.* v. *Industrial Accident Commission,* 70 Cal. App. 2d 664, 161 P. 2d 702 (1945); *Metros* v. *Denver Coney Island,* 110 Col. 40, 129 P. 2d 911 (1942); *Swan* v. *Williamson,* 74 Idaho 32, 257 P. 2d 552 (1953). The findings of the commission in this case cannot be held deficient.

The judgment is affirmed.

We agree. HARRIS, C.J., and HOLT and HICKMAN, JJ.

THE EXCHANGE BANK & TRUST CO. *v.* GLENN'S MARINE, INC.

78-300 579 S.W. 2d 358

Opinion delivered April 16, 1979
(Division II)

Spencer & Spencer, for appellant.

Nolan, Alderson & Jones, for appellee.

FRANK HOLT, Justice. Appellant brought this replevin action against appellee to recover possession of an outboard motor. This appeal follows the jury's verdict for appellee. Appellant asserts that neither the court's instruction No. 8 concerning sale on approval nor the jury's verdict was supported by substantial evidence. We discuss these contentions together.

James Beeson executed a promissory note to appellant in the amount of $4,088.52 on May 6, 1977, in order to finance his purchase of a boat, trailer and 55 h.p. motor from appellee. On that date he granted appellant a security interest on the boat rig. Appellant properly filed the financing statement covering the collateral. About three days later, unknown to appellant, Beason exchanged the mortgaged motor with the appellee-seller for a larger one. Beason defaulted on the note. Appellant brought a replevin action against the appellee-seller seeking return of the collateral (the smaller motor) or its value plus damages for wrongful detention by appellee. At trial the court gave the following instruction No. 8:

> In this connection you are instructed that if it is agreed that personal property delivered may be returned by the buyer even though it conforms to the agreement, the transactions is a sale on approval.
>
> And you are told title to personal property held on approval does not pass until the property is accepted by

> the buyer provided that, unless otherwise agreed, failure to notify the seller within a reasonable time of the election to return the property is acceptance. What is a reasonable time to give notice of the election to return the property is a question of fact for you to determine taking into consideration the nature, purpose and circumstances of the sale on approval.

Appellant does not question the instruction as a correct declaration of law. It argues that there was no substantial evidence presented which would support the instruction. Ark. Stat. Ann. § 85-2-326 (Add. 1961) provides:

> (1) Unless otherwise agreed, if delivered goods may be returned by the buyer even though they conform to the contract, the transaction is
>
> (a) a 'sale on approval' if the goods are delivered primarily for use . . . .

The comment to that provision states:

> The type of 'sale on approval' . . . . dealt with involves a contract under which the seller undertakes a particular business risk to satisfy his prospective buyer with the appearance or performance of the goods in question. The goods are delivered to the proposed purchaser but they remain the property of the seller until the buyer accepts them. The price has already been agreed. The buyer's willingness to receive and test the goods is the consideration for the seller's engagement to deliver and sell.

§ 85-2-327 provides:

> (1) Under a sale on approval unless otherwise agreed
> (a) although the goods are identified to the contract the risk of loss and the title does not pass to the buyer until acceptance; and
> (b) use of the goods consistent with the purpose of trial is not acceptance but failure seasonably to notify the seller of election to return the goods is acceptance . . . .

Here the facts are undisputed. When Beason purchased the boat rig, the appellee-seller agreed that if Beason was satisfied after a weekend trial period, he could keep the smaller motor or return it and exchange it for a larger one. Appellee made Beason two price offers, one on the smaller motor, the other on the larger motor. Appellee did not consider the sale consummated at the time Beason took the smaller motor and required Beason to obtain insurance since the total loss would fall on appellee if anything happened to the "rig." At the time Beason took the smaller motor, he left a deposit with appellee to "assure . . . . that he was going to buy it one way or the other. It was just a question of which motor." Within 48 hours, Beason exchanged motors with appellee.

Appellant contends that such an arrangement alone does not create a sale on approval. It argues that, under the general Code provision, § 85-2-401, title to the smaller motor passed to Beason on May 4, 1977, at the time the property was physically delivered to him, and therefore appellant's security interest is enforceable. According to appellant, the testimony indicated that the transaction was, in fact, an absolute sale, with "right to rescind and return," and there was no evidence of a sale on approval. It further cites Anderson, Uniform Commercial Code, 2d, Vol. 1 § 3-236:15, quoting from § 3-326:14 and *Gantman* v. *Paul,* 199 A. 2d 519 (Pa. 1964), as standing for the proposition that where "invoices and documents give the appearance of an absolute sale, it will not be converted into a sale on approval and that the buyer had never approved." However, the *Gantman* case, the only case cited in Anderson, *supra,* as authority for the stated proposition, dealt with a situation where the seller attempted to replevy articles to which the buyer asserted title, claiming that it had sold the goods on approval and the buyer had never accepted. Such a situation is not applicable here. We think the passage of title here is governed by § 85-2-327 rather than the general rule relied upon by appellant as expressed in § 85-2-401. § 85-2-327 provides that on a sale on approval, unless otherwise agreed, title passes only at the time the buyer accepts.

After viewing the evidence in the light most favorable to

the appellee, there was substantial evidence to warrant the court's instructing the jury on the issue of a sale on approval and for the jury to resolve the issue in favor of appellee.

Affirmed.

We agree: HARRIS, C.J., and FOGLEMAN and HICKMAN, JJ.

LITTLE ROCK POLICE DEPARTMENT, ex rel. Lee A. MUNSON, Prosecuting Attorney *v.* ONE 1977 LINCOLN CONTINENTAL MARK V and Fred B. SANDS

78-302 580 S.W. 2d 451

Opinion delivered April 23, 1979
(Division I)
[as amended on Denial of Rehearing May 21, 1979.]

Lee A. Munson, Pros. Atty.; *John Wesley Hall, Jr.,* Deputy Pros. Atty; and *R. Jack Magruder, III,* Little Rock City Atty., for appellant.

Jack Holt, Jr., and *Deborah Davies Cross,* for appellees.

GEORGE ROSE SMITH, Justice. At about 2:15 a.m. on December 10, 1977, the appellee Fred B. Sands, 22, a college student, drove his 1977 Lincoln Continental car to the SAE fraternity house in Little Rock. Several police officers, on the basis of an informer's tip, were waiting for Sands and the car. They conducted a warrantless search of the car and found 3.14 pounds of marihuana in the trunk. The Little Rock

Police Department, on the relation of the prosecuting attorney, then brought this action for a forfeiture of the car as a vehicle that had been used in the transportation of drugs. Ark. Stat. Ann. § 82-2629 (Supp. 1977). The trial judge dismissed the action, finding that the search of the car was illegal. The appellant seeks to sustain the search on two different grounds.

First, it is argued that the officers had probable cause to search the car. Officer Dawson testified that the confidential informer telephoned three times, at about 9:00 p.m., at about 10:00 p.m., and shortly before 2:15 a.m. The informer described Sands and the car, including its license number, and said that Sands was on his way to the SAE house with ten pounds of marihuana. Officer Dawson said that he had met the informer, but he did not know him well and had never worked with him on a case, though "the office" had. The informer's description of Sands and of the car proved to be correct. At the hearing counsel for the prosecution intimated that other witnesses from the narcotics division could be brought in to show that the informer had been used before, but no such proof was actually submitted.

The trial judge was right in holding that the State's testimony did not meet the recognized two-prong test for determining the existence of probable cause. That test was laid down in *Aguilar* v. *Texas,* 378 U.S. 108 (1964), where the court held that an officer may obtain a search warrant on the basis of an informer's statements, but the magistrate must be supplied with (1) some underlying circumstances showing that the informer is reliable and (2) some underlying circumstances from which the informer concluded that the contraband was where he said it was.

Here neither requirement was satisfied. As to reliability, Officer Dawson had not previously acted upon information supplied by the informer, nor is it shown that the officer had any other basis for believing the informer to be reliable. The hearsay statement that "the office" had worked with him is not enough. Nor was the second requirement met. The informer merely said that Sands would be driving a certain car in delivering ten pounds of marihuana to the SAE house. He did not indicate in any way whatever how he reached that conclusion. Thus none of the underlying circumstances es-

sential to a finding of probable cause were shown to exist. In the absence of probable cause there was no basis for a search as being incidental to an arrest or as being within the automobile exception to the basic rule against warrantless searches.

The appellant argues, however, that the information given by the informer in describing Sands and the car was so precise and so detailed as to be self-verifying and therefore sufficient to meet both prongs of the *Aguilar* test. Reference is made to *Spinelli* v. *United States,* 393 U.S. 410 (1969), where the court, in discussing a pre-*Aguilar* case, said: "A magistrate, when confronted with such detail, could reasonably infer that the informant had gained his information in a reliable way." The court did not suggest, however, the second prong of the test could be satisfied in the same way.

In the case at bar we certainly cannot say that the details supplied by the informer were sufficient to dispense with the requirement that there be shown the underlying circumstances from which the informer concluded that marihuana would be in Sands' car. It is important to note that the details supplied by the informer related solely to innocuous facts; that is, the physical description of Sands and of his car. But in *Spinelli* the court pointed out that "it is especially important that the tip describe the accused's criminal activity." To the same effect is this statement from *Nance* v. *United States,* 377 A. 2d 384 (D.C. Cir., 1977):

> Arguably, then, if his tip was true in part, it may be inferred it was true in whole. We note, however, that courts and commentators have rejected the proposition that police investigation which substantiates only *innocuous* aspects of a tip will suffice to establish that the informant was telling the truth about the remaining critical part, i.e., the allegation of criminal conduct. [Citing authorities.]

We agree with that view and therefore hold that in the present case the informer's description of Sands and his car cannot dispense with the requirement that there also be shown

the underlying facts that led the informer to believe that the car would contain marihuana.

Second, it is argued that Sands consented to the search. The officers testified that Sands voluntarily opened the trunk of his car when they asked him to. Sands testified, however, with corroboration by the girl who was with him, that there were several uniformed policemen present, that they demanded that he open the trunk, that he was scared, and that he opened the trunk because the officers said they could open it anyway. The State must prove consent to a search by clear and positive testimony, with no duress or coercion, express or implied. *White* v. *State,* 261 Ark. 23-D, 545 S.W. 2d 641 (1977). We are unable to say that the trial judge was wrong in finding the evidence insufficient to establish voluntary consent.

Affirmed.

We agree. HARRIS, C.J., and BYRD and HICKMAN, JJ.

Charles Parker HARRIS *v.* STATE of Arkansas

CR 79-8 580 S.W. 2d 453

Opinion delivered April 23, 1979
(Division I)
[Rehearing denied May 29, 1979.]

Ralph M. Cloar, Jr. and *Robert L. Lowery,* for appellant.

Steve Clark, Atty. Gen., by: *Ray Hartenstein,* Asst. Atty. Gen., for appellee.

GEORGE ROSE SMITH, Justice. On the night of November 17, 1976, Harris shot and killed his wife while the couple were sitting in a booth in a tavern in Little Rock. Charged with second degree murder, Harris was found guilty and sentenced to 10 years' imprisonment "and/or" a $5,000 fine. We reversed the judgment, owing to the ambiguity in the verdict, and ordered a new trial. *Harris* v. *State,* 262 Ark. 680, 561 S.W. 2d 69 (1978). At the second trial Harris was again convicted and was sentenced to 20 years' imprisonment. Two points for reversal are argued.

At both trials the defense attempted to prove that Harris was engaging in horseplay and that the shooting was accidental. At the second trial the State, doubtless anticipating that defense, introduced testimony showing that Harris and his wife, during their two years of married life, had frequent quarrels. On several occasions Harris threatened to kill her, and in one instance he beat her so severely that she was hospitalized for a substantial period. It was also shown that at the time of the homicide a divorce suit was pending and the parties had agreed upon an uncontested decree.

On the first appeal Harris argued that the State had not proved an intent to kill; but we pointed out that the culpable mental state required for second-degree murder is not an intent to kill, but rather to "knowingly" cause that result. Ark. Stat. Ann. § 41-1503 (Repl. 1977). At the second trial the court instructed the jury in the language of the statute.

It is now argued that, since proof of an intent to kill was not essential, the State should not have been allowed to prove that Harris had threatened to kill his wife and had severely beaten her. That evidence, however, was relevant, because it tended to prove that Harris, in shooting his wife, acted knowingly rather than accidentally. That the testimony could also be taken to imply that Harris intended to kill his wife did not render it inadmissible. The State is entitled to prove its case as conclusively as it can. *Reeves* v. *State,* 263 Ark. 227, 564 S.W. 2d 503 (1978). It frequently happens, in a prosecution for second-degree murder, that the State's proof could be interpreted to support a finding of first-degree murder, but that does not mean that the testimony is therefore inadmissible. Relevant proof is not to be excluded merely because in-

ferences going beyond the State's burden of proof might be drawn if the issues were different.

It is also argued that the more severe punishment imposed at the second trial demonstrates vindictiveness on the part of the prosecution, as a reaction to Harris's success in taking his first appeal. Counsel rely upon the holding in *North Carolina* v. *Pearce,* 395 U.S. 711 (1969). There, however, it could be inferred that the trial judge acted vindictively in increasing the severity of the sentence, to punish the defendants for having obtained postconviction relief. Here the two trials were heard by entirely different juries. The second jury is not shown to have known anything about the first sentence or about the successful appeal. Consequently there is no basis for a finding of vindictiveness, and the more severe sentence is valid. *Chaffin* v. *Stynchcombe,* 412 U.S. 17 (1973).

Affirmed.

We agree. HARRIS, C.J., and FOGLEMAN and BYRD, JJ.

B. J. McADAMS, INC. *v.* BEST REFRIGERATED EXPRESS, INC., AMERICAN EQUIPMENT CO., INC. and TEX-AM CARRIERS, INC.

78-312 579 S.W. 2d 608

Opinion delivered April 23, 1979
(Division II)

Paul J. Nicholson and *James W. Woods,* for appellant.

Laser, Sharp, Haley, Young & Huckabay, P.A., for appellees.

JOHN A. FOGLEMAN, Justice. Each of the appellees, Best Refrigerated Express, Inc., American Equipment Co., Inc., and Tex-Am Carriers, Inc., filed a separate suit against appellant B. J. McAdams, Inc., seeking recovery of unpaid bills based upon trip leases of highway tractor and trailer rigs for the transportation of goods. The cases were consolidated for trial by agreement of the parties. Appellant defended on the ground that it was entitled to a set-off in the amount of $8,981.87, because that amount was owed it by American Beef Packers, Inc. Appellant contended that each of the appellees had acted as an agent for American Beef Packers, Inc., in the transactions on which the suits were based and that the leases inured to the benefit of American Beef Packers. The trial of the case to the court without a jury resulted in a judgment for each of the appellees in the amount sued for and a denial of the set-off.

Appellant's first point for reversal is the assertion that the trial court erred in failing to grant its motion for a continuance because of the absence of a material witness. Appellant admits that the granting or refusal of a continuance lies in the sound judicial discretion of the trial court, and that, on first review, it would appear that the court did not act arbitrarily or capriciously and that the weight of precedents is against its present contentions. It seeks to show abuse of discretion, however, on the basis that the defense required the establishment of the relationship of four separate entities who had dealt with appellant; that the cases were not consolidated as early as the trial judge had indicated in denying the motion; and that, although this material witness was outside the jurisdiction of the court, he had previously consented to appear, but it had become apparent to appellant only two hours before trial that he would not appear, so it was impossible for it to prepare an affidavit setting out the materiality and truth of the witness's potential testimony. Appellant further asserts that the absent witness was the "prime and possibly the only 'material' witness per se."

It certainly is not possible to sustain appellant's statement that the overall considerations in this case are such that denial of the continuance constituted a gross abuse of discretion. The oral motion by appellant's attorney was:

> Your Honor, I would like to move that this case be continued on the basis that we have located a witness who is material, who is unable to be here today and who is necessary for putting on the defendant's case.

This is the complete record on the presentation of this motion to the trial judge. It would be arbitrary for this court to hold the trial court in abuse of discretion in denying the motion based upon the absence of a witness whose identity and whereabouts have never been disclosed, without the reason for his absence, the prospects of obtaining his testimony at a later date, the facts to be shown by his testimony, or appellant's efforts to obtain his attendance at the trial ever having been revealed to the trial judge. It may well be that appellant was not afforded sufficient time for the preparation of an extensive motion or affidavit. There was nothing to prevent the critical information from having been communicated to the trial court orally. To say the least, a statement of these facts could have been proffered for the record. There was no abuse of the trial court's discretion in this respect.

Appellant's other point for reversal is that the court's denial of a set-off was not supported by sufficient evidence and was against the clear preponderance of the evidence. Of course, we are not concerned with the question of preponderance. The scope of our review is to determine whether there was any substantial evidence to support the trial judge's holding. Appellant admits that this is an established rule, but asserts that this court has held on many occasions that a trial court's judgment will be set aside when the preponderance against it is great and it appears to be clearly wrong. Appellant cited only two cases as example. Not only do they fail to support its statements, both were chancery cases in which the review is de novo.

It was the contention of appellant that each of the appellees acted as an agent for American Beef Packers, Inc., in soliciting and negotiating the "trip lease" agreements for

which these plaintiffs sought compensation in their separate actions, and that, for this reason, appellant was entitled to set off the indebtedness of American Beef Packers, Inc. against claims asserted in the suits brought by these agents in their own names. We need not pursue that question, because, assuming that appellant is correct, we find adequate evidentiary support for the judgment.

Appellant admits that there is no direct evidence of agency, but asserts that circumstances, such as the relationship of the parties, their conduct in reference to the subject matter of the contract, and previous instances of the alleged principal's treatment of each of the purported agents as an agent constitute proof of agency. It must be remembered, however, that appellant bore the burden of proving agency. *Bell* v. *State*, 93 Ark. 600, 125 S.W. 1020. We also held in *Bell* that agency could be proved by circumstantial evidence, if the facts and circumstances introduced in evidence are sufficient to induce in the minds of the jury the belief that the relation did exist and that the agent was acting for the principal in the transaction involved. Obviously, the evidence did not induce that belief in the mind of the fact-finder here. Appellant seizes upon a statement of the trial judge at the conclusion of the trial that "we have absolutely no evidence in this record that would be considered substantial that would cause the court to make a finding that American Beef Packers had any connection or control over the leased equipment," and argues that it was erroneous. We do not take this statement to mean that there was no evidence tending to establish agency. We do take it to mean that appellant had not met its burden of proof of agency when the test of circumstantial evidence was applied.

The normal practice in transactions of the sort involved here was established by the evidence. The lessor of tractor-trailer rigs for transportation of goods on the highways (appellees in this case) contacts the dispatcher of the lessee (appellant in this case) and negotiates a "trip lease" of equipment owned by the lessor, for one trip only. The dispatcher for the lessee records information given him by the lessor's dispatcher to be used in the preparation of the lease. The lessee's dispatcher prepares a lease from this information and

mails it to the driver of the truck which is the subject of the lease, for signature by the driver.

Appellant's dispatcher testified that he prepared the leases in question. He said that it was customary for the dispatcher or driver to take the copy of the vehicle registration and "copy down who the vehicle was registered to" and the "registration of the tractor and trailer numbers, the serial identification numbers and the respective states the trucks were licensed in." He said that this was done to ascertain the name of the true owner.

Appellant then argues that the agency was established by the leases on which the suits were brought. There were 17 leases in all. Appellant was the lessee in all of them. In one, American Beef Packers was named as lessor. The lease was signed by Marc Robinson on January 20, 1975, for American Beef Packers as lessor. Robinson was a truck driver. Another lease, dated February 7, 1975, showed American Beef Packers as lessor, but no one signed for the lessor. Douglas E. Harkalis, a truck driver, signed a certification as to the time he had previously been on duty and as to his familiarity with the safety regulations of the Interstate Commerce Commission. A third lease was signed by Dennis Buss for American Beef Packers as lessor on February 3, 1975. Still another was signed by Richard Sloat on January 25, 1975. This lease showed American Beef Packers as lessor in the introductory clause, but the signature line did not identify the lessor. These four leases were all prepared by Randy Day, appellant's dispatcher.

Frank Myers, who testified for appellees, stated that he was closely associated with, and familiar with, the operations of all the appellees in the latter part of 1974 and the first part of 1975. When he testified, he was traffic and sales manager for Best Refrigerated Express, Inc. He stated that he had been employed by American Equipment Company for 14 months beginning on July 11, 1977, and by Tex-Am Carriers in 1976 for approximately one year. He stated that he had been an employee of American Beef Packers for approximately five years, prior to January 11, 1975. He testified that the drivers who signed these leases were employees of American Equipment Company at the time they signed, although they

had previously been employees of American Beef Packers. All of these trip leases were entered into subsequent to January 11, 1974, when American Beef Packers filed a petition in bankruptcy. Myers testified that, after that date, there was no relationship between American Beef Packers and American Equipment Company, but that prior to that time, American Equipment Company had leased equipment to American Beef Packers. Myers stated that all of the four leases mentioned above had been negotiated by American Equipment Company and prepared by employees or agents of appellant. He said that all of the equipment listed in those leases belonged to American Equipment Company. He testified that putting the name of American Beef Packers on the leases was an error on the part of the preparer, and implied that it was done deliberately, with a set-off in view. He also testified that, although Tex-Am Carriers was no longer in business, it had been a contract carrier for American Beef Packers, as an independent contractor and that American Beef Packers had no control over it. According to Myers, there was only a shipper-carrier relationship between American Beef Packers and Best Refrigerated Express, a common carrier.

Robert E. Lee, vice-president of American Beef Packers in charge of production and cattle procurement since 1972, and a member of its board of directors from 1969 until its bankruptcy, testified that he was familiar with parent companies and subsidiaries of American Beef Packers and was familiar with Best Refrigerated Express, Inc. and American Equipment Company, but not Tex-Am Carriers. He testified that none of them were owned by, subsidiaries of, or agents of, American Beef Packers, that the only relationship between American Beef and appellees was a normal shipper-carrier relationship, and that none of them were authorized to represent themselves as a subsidiary or agent of American Beef Packers. He also said that the traffic manager of American Beef Packers had no such authority. He had no recollection of either the name Bob Badboys or Bob Stout.

William D. Shipley, operations manager of appellant, testified that he "checked out" the three appellees by talking with a man named Bob Gadforth. He believed Gadforth was traffic manager at the American Beef Packers' "location" at Dumas, Texas.

Appellant argues that the evidence showed that appellees were representing themselves as agents of American Beef Packers, Inc. and that American Beef Packers was notified of these representations and ratified them by silence. There are obstacles to the acceptance of this testimony as establishing the alleged agency. One of them is the fact that, even though the statements and actions of an alleged agent may be admissible to corroborate other evidence tending to establish agency, neither agency nor the scope of agency can be established by declarations or actions of the purported agent. *Mark* v. *Maberry,* 222 Ark. 357, 260 S.W. 2d 455; *Zullo* v. *Alcoatings, Inc.,* 237 Ark. 511, 374 S.W. 2d 188; *Smith* v. *Hopf,* 219 Ark. 127; 240 S.W. 2d 2. Another obstacle is the fact that the evidence appellant relies upon to show ratification is far from satisfactory. Shipley expressed a belief that Bob Gadforth was the gentleman he talked with at American Beef Packers. When asked what American Beef Packers said about the two carriers who had approached him, he said that Gadforth "advised us they had referred us to American Beef Packers whenever we talked to them or whenever I talked to them," and that he believed Gadforth to be the traffic manager at the American Beef Packers' "location." Gadforth was not otherwise identified. His authority or connection with American Beef Packers was not shown.

On appellate review, all the evidence must be viewed, with every reasonable inference derived therefrom, in the light most favorable to appellees. *Zullo* v. *Alcoatings, Inc.,* supra. When the evidence is circumstantial only, it is always very difficult to say that a finding adverse to the party offering it to prove a fact is erroneous, because a fact may be shown by circumstantial evidence when the circumstances are such that reasonable minds might draw different conclusions. *Woodward* v. *Blythe,* 246 Ark. 791, 439 S.W. 2d 919; *Myers* v. *Hobbs,* 195 Ark. 1026, 115 S.W. 2d 880; *Arkmo Lumber Co.* v. *Luckett,* 201 Ark. 140; 143 S.W. 2d 1107. Thus, when all reasonable inferences are drawn favorably to the finding of fact and the evidence is viewed in the light most favorable to that finding, it can hardly be said a reasonable mind could not reach the conclusion reached by the fact-finder.

It is only where there is no substantial evidence to support a verdict, where fair-minded men can only draw a con-

trary conclusion or where there is no reasonable probability that an incident involved occurred according to the version of the prevailing party, that a jury verdict will be disturbed. *Blissett* v. *Frisby,* 249 Ark. 235, 458 S.W. 2d 735. The judgment of a court sitting without a jury has the same binding force and effect on appeal as a jury verdict, even when the fact-finding consists only of drawing inferences and conclusions from the evidence. *Garrison Properties, Inc.* v. *Branton Construction Co.,* 253 Ark. 441; 486 S.W. 2d 672; *Mid-South Ins. Co.* v. *Dellinger,* 239 Ark. 169, 388 S.W. 2d 6; *Cox* v. *State Farm Fire & Casualty Co.,* 240 Ark. 60, 398 S.W. 2d 60, 17 ALR 3d 1376. There was direct evidence that there was no agency. We cannot say that the finding that appellant had failed to meet its burden of proof was erroneous.

The judgment is affirmed.

We agree. HARRIS, C.J., and HOLT and HICKMAN, JJ.

Charles COBB *v.* STATE of Arkansas

CR 78-207 579 S.W. 2d 612

Opinion delivered April 23, 1979
[Rehearing denied May 21, 1979.]

William B. Howard, for appellant.

Steve Clark, Atty. Gen., by: *Catherine Anderson,* Asst. Atty. Gen., for appellee.

JOHN A. FOGLEMAN, Justice. Appellant Charles Cobb was sentenced to two years in prison and fined $2,000 upon a jury verdict that he was guilty of selling a controlled substance to Jerry Leon Way, an "undercover" officer employed by the Lake City Police Department. Appellant raises six points for reversal. We find no reversible error and affirm.

Appellant first contends that the court erred in overrul-

ing his motion for new trial. It was based upon the allegation that Patricia Adams, the foreman of the jury, had concealed the fact that she had previously served on a jury that found another person guilty of a like charge in a case in which Way had testified, and thus prevented appellant from challenging her peremptorily. In his motion, appellant conceded that this juror had not told an untruth, but charged that she had deliberately concealed this fact.

Appellant raised this question after trial in May, 1978, but before he was sentenced. The juror was then questioned by the trial judge. She admitted that she had served as a juror in a case in which Way was a witness during the January, 1978, term of court in the Eastern District of Craighead County, the same district in which Cobb was tried.

During the voir dire examination of this juror by the trial judge, she had been asked if she was acquainted with, or related to, Way. She answered in the negative and added, "I know of him. I wouldn't know him even to speak to him." The matter was pursued by appellant's attorney on voir dire. The questions and answers so far as material, were:

Q. Mrs. Adams, I believe you indicated that you know Jerry Way Sr. casually, is that correct?

A. I don't know him to speak to him. I know who he is.

Q. You recognize him when you see him?

A. Yes.

Q. I take it there is nothing in that that would cause you to give his testimony —

A. No, sir.

Q. — any unusual weight? Now, of course, my client has been charged with having sold marijuana. I know there is a lot of feeling among most people with reference to the use of marijuana and the sale of marijuana. I don't have any criticism of that. I fall in the same category. I don't approve of either. In this particular

case my client is charged with selling marijuana. Do you feel that you would have any difficulty in approaching this from an objective standpoint in being completely unbiased where the charge is selling marijuana as contrasted to say a situation of where the charge was burglary or larceny, something of that nature?

A. No, sir. It wouldn't be any different.

*****

Q. Now, you have been interrogated by the Prosecuting Attorney about this matter of determining the credibility of the witnesses. Now, in this connection, a lot of people have this feeling. I don't have any criticism of it, but I need to know it. A lot of people feel that if an individual is an official, connected with the law, a law enforcement officer, that is more likely that that person will tell the truth in a criminal trial than, that is for example, for the Defendant to tell the truth. Do you have any such feelings?

A. No, sir.

Q. You don't believe then given this star and this gun makes everything an officer says the gospel truth?

A. Right. I can believe anybody else as much as I can an officer.

*****

Q. In other words, do you think the Defendant ought to have to offer any evidence in order to prove his innocence?

A. No, he's innocent until proven guilty.

Q. And he doesn't have to do anything to prove that. Is that the way you feel?

A. Well, I mean, he can get up there and testify and I'll take what he says as the truth like I would everyone else, but I will weigh the scales.

Q. What I am getting at — I guess it's my own fault, but we really got away from what I originally asked you. Assume for the moment that the State says, all right, we're through. We've offered all the proof we have. At that time, you sit there and say, well, I've got a reasonable doubt as to this man's guilt. Now, if you were in that state of mind, would you feel like the Defendant ought to come forward and offer anything else about it to prove anything else about it?

A. Well, if I believe that he was innocent —

Q. When the State got through with its evidence?

A. — when the State got through — I believe in listening to both sides. I don't know if I can answer your question.

*****

Q. Well, let me say this to you ma'am. I imagine it's the first time you've ever served on a Jury, is it not?

A. No, it's not.

Q. It's not?

A. No.

*****

Q. Would you give any more weight to the testimony of witnesses called by the State of Arkansas as contrasted to witnesses called by the Defendant?

A. No, sir.

We do not agree that this record discloses a deliberate concealment of the juror's previous service in a case in which Way testified. We do not consider that her statement that there was nothing that would cause her to give Way's testimony any unusual weight was contradicted by the fact that she had joined in returning a guilty verdict in another

case in which Way had testified for the state. At any rate, the granting or denial of a motion for a new trial lies within the sound judicial discretion of the trial judge, whose action will be reversed only upon a clear showing of an abuse of that discretion or manifest prejudice to the defendant. We are certainly unable to say that there was any abuse of discretion in this case, and prejudice is not manifest. *Newberry* v. *State,* 262 Ark. 334, 557 S.W. 2d 864; *Hewell* v. *State,* 261 Ark. 762, 552 S.W. 2d 213; *Wright* v. *State,* 35 Ark. 639.

Appellant next argues that the trial court erred in refusing his motion for mistrial or a stronger admonition than that given "after the court had erroneously admitted a collateral attack on the testimony of defendant's witness, Joe Pardi."

Pardi had testified that Cobb had not attempted to sell marijuana to Way, but that Way had actually attempted to sell it to Cobb, and that Way had the marijuana in question in his own possession at all times. On cross-examination, Pardi had denied that marijuana had been smoked in a house in which he had lived with Cobb, or in any house in which he had lived. He also denied that Officer Bill Hook had come to Cobb's house while a marijuana party was in progress. Cobb's attorney, on redirect examination of Cobb, asked him about the implication that Hook had come to Cobb's house while a marijuana party was in progress. Cobb denied that Hook had ever come to his house and denied that marijuana had ever, to his knowledge, been in his house. On recross-examination by the prosecuting attorney, Cobb denied any knowledge of any such party and denied that Hook had ever had any occasion to remove a juvenile runaway from Cobb's residence. Cobb also stated that he had never been present at a party anywhere at which such an activity had occurred.

Hook was then called as a witness by appellant, whose attorney asked whether Hook had ever gone to the home of Charles Cobb when a party was in progress. Hook gave a negative answer. On cross-examination, the prosecuting attorney asked whether Hook had made some statement to him during the preceding day regarding a party at which this officer had occasion to remove a juvenile from the appellant's presence. Appellant's attorney objected that the question related to a hearsay statement and that it did not tend to im-

peach the witness. There was no abuse of the trial court's discretion in the overruling of appellant's objection to this question, which was directed toward explaining the basis for the prosecuting attorney's cross-examination of Cobb, invited by questions asked on direct examination of Hook on a collateral matter after Cobb had denied that any such incident had taken place. Hook then answered that he had stated to the prosecuting attorney that he had gone to Joe Pardi's house prior to the time that Pardi and Cobb had lived together. A motion to strike this testimony and for an admonition to the jury to disregard it as an improper collateral matter was denied. When the prosecuting attorney asked Hook to relate the circumstances relative to the incident at Pardi's house, appellant's objection was at first sustained. When the prosecuting attorney reminded the trial judge that Pardi had testified that he did not use marijuana and that he could not remember Hook's ever being at his house and argued that the testimony was relevant on the question of Pardi's credibility, the trial judge reversed his rulling and allowed further inquiry by the prosecuting attorney, over appellant's objection, on the ground that it constituted an attempt to impeach Pardi on a collateral matter. The witness then testified that he had gone to Pardi's house and had removed a juvenile, but that Pardi was not present at the time. After the witness responded affirmatively to the prosecuting attorney's inquiry whether Hook smelled marijuana on that occasion, appellant's attorney asked the court to instruct the jury to disregard the testimony. The trial judge stated, "The motion will be granted. The jury will be told to disregard the testimony."

Appellant's attorney requested no further action until after the state called a rebuttal witness, whose testimony was excluded by the court, and the state had made a proffer of the testimony expected from this witness. For the first time, just prior to discussion of instructions to be given the jury, appellant's attorney moved for a mistrial on account of the admission of Hook's testimony on cross-examination with reference to Pardi, stating that, even though the trial judge had told the jury to disregard the testimony, the admonition was not sufficient to cure the prejudice that resulted from two or three separate objections, and the court's overruling of them. When this motion was denied, appellant's attorney

asked the trial judge to admonish the jury that the "testimony was highly improper, it should not be considered for any purpose and it never should have been admitted." The judge responded that he had already admonished the jury and no further admonition would be given.

We have said many times that the declaration of a mistrial is a drastic remedy to be resorted to only when the prejudice is so great that it cannot be removed by an admonition to the jury. *Limber* v. *State,* 264 Ark. 479, 572 S.W. 2d 402. The matter lies largely within the discretion of the trial judge. *Cary* v. *State,* 259 Ark. 510, 534 S.W. 2d 230. We find no abuse of discretion in the denial of appellant's motion for mistrial.

When we consider the background from which the prosecuting attorney's inquiry was initiated, the fact that Hook stated that Pardi was not present when the officer had gone to the house and had smelled marijuana, and the time at which the request was made we cannot say that the failure to give a further admonition to the jury was prejudicial error.

The court denied appellant's request for an instruction that the jury should not show prejudice against defendant because his attorney made objections to evidence; that the trial judge's allowing testimony over the objection of an attorney was no indication of an opinion as to its weight or effect; and that, when an objection to a question was sustained, the jury could neither draw an inference from the wording of the question or speculate as to what the answer of the witness might have been. We find no merit in appellant's argument that failure to give one part of this instruction denied appellant effective assistance of counsel and failure to give another violated Art. 7, §23 of the Constitution of Arkansas, prohibiting judges from charging juries with regard to matters of fact. Although there may be nothing in the instruction that was incorrect, it was only cautionary. The giving or refusal of such an instruction lies within the sound discretion of the trial court. *Fields* v. *State,* 255 Ark. 540, 502 S.W. 2d 480; *Williams* v. *State,* 254 Ark. 940, 497 S.W. 2d 11. There is no ground for reversal in the refusal to give such an instruction in the absence of gross abuse of discretion. *Williams* v. *State,* supra. We find none here. The trial judge did instruct the jury that it was the sole judge of the credibility of the

witnesses and the weight to be given to the testimony of any and all witnesses and that these were matters with which the court had nothing to do. The instruction also stated that each juror must decide the case for himself, after impartial consideration of the evidence in the case, that the sole interest of the jury was to seek the truth from the evidence in the case and that it was the duty of the jury to return a verdict in accordance with the law declared by the court and the testimony.

Appellant also argues that there was error in the court's failure to give his requested instructions on the effect of the filing of the information by the prosecuting attorney and the presumption of innocence. Appellant admits that his requested instruction as to the information was covered by the court's instruction that the information did not constitute evidence against him. The instruction given actually went further. By it, the jury was told that the information was a mere formal charge or accusation, and that the state had the burden of making out its case to the satisfaction of the jury beyond a reasonable doubt. This instruction also defined reasonable doubt and informed the jury that appellant was presumed to be innocent until proven guilty and that it should acquit him if it had a reasonable doubt as to his guilt. We find no merit in appellant's argument that more emphasis should have been given to the lack of evidentiary effect of the information.

Appellant admits that the substance of his requested instructions on the presumption of innocence was covered by instructions given. He complains, however, that one of his requested instructions should have been given in preference to the instruction given because the jury was not told that the presumption of innocence served appellant as evidence in his favor throughout the trial and entitled him to an acquittal unless the evidence adduced by the state convinced the jury, beyond a reasonable doubt, that he was guilty of the crime charged.

Appellant confesses that the only question is whether one or the other of his requested instructions should have been given in preference to that given. We think that the requested instructions were sufficiently covered by those given. In such a case, the trial court is not required to instruct the

jury in every possible manner, even though a party's offered instruction may not be incorrect. *Butler* v. *State,* 261 Ark. 369, 549 S.W. 2d 65; *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.

The judgment is affirmed.

We agree. HARRIS, C.J., and HOLT and HICKMAN, JJ.

FARM BUREAU INSURANCE COMPANY *v.*
Avery LUBIN

78-201 580 S.W. 2d 447

Opinion delivered April 23, 1979
(In Banc)
[Rehearing denied May 29, 1979.]

Hale, Fogleman & Rogers, for appellant.

Kent J. Rubens and *Jake Brick,* for appellee.

CONLEY BYRD, Justice. Appellant Farm Bureau Insurance Company issued a comprehensive automobile insurance policy to Milton Lubin, M.D., providing automobile liability and collision coverage to Milton Lubin and the members of his household. Milton Lubin is the father of Avery Lubin and Nathan Lubin. Nathan Lubin lived approximately 200 to 300 yards from Milton Lubin. A limited partnership between Nathan Lubin and Zusman Bensky had purchased a jeep but had neglected to acquire insurance on the jeep. On July 22, 1973, Avery Lubin borrowed the jeep to go frog gigging. While the jeep was thus borrowed, Avery Lubin ran the jeep into a ditch, causing extensive damage. When Farm Bureau failed to pay for the damages, Nathan Lubin filed suit against Avery Lubin and recovered a judgment for $1600 damages to the jeep. Thereafter, Avery Lubin filed this action against Farm Bureau to recover a judgment for the $1600 plus an attorney's fee of $500 for defending Nathan's action against him and also for a 12% penalty and an attorney's fee in this action. Farm Bureau defended on the basis that its liability under Coverage "B" was excluded by Exclusion "K" since Avery Lubin was in charge of the jeep at the time of the accident. The trial court held Farm Bureau liable for the $1600 judgment, for $500 attorney's fee in defending Nathan's action against Avery, for the statutory 12% penalty in the amount of $192.00 and for an additional attorney's fee of $700 in this action. For reversal Farm Bureau contends:

> "I. The trial court erred in failing to rule that Exclusion K was applicable to exclude liability coverage for property damage under Coverage "B" since Avery Lubin was in charge of or transporting the vehicle at the time the collision causing the damage occurred; and
>
> II. The trial court erred in ruling that appellant had a duty to defend appellee and pay any judgment rendered therein."

The policy issued by Farm Bureau, in so far as here applicable, provides:

"INSURING AGREEMENTS:

1. LIABILITY

COVERAGES A, BODILY INJURY AND B, PROPERTY DAMAGE.

1. To pay on behalf of the insured all sums except punitive damages, which the insured shall become legally obligated to pay as damages:

COVERAGE A — Because of bodily injury sustained by any person, and

COVERAGE B — Because of injury to or destruction of property, caused by accident and arising out of ownership, maintenance or use of any automobile, including loading and unloading thereof;

2. To defend any suit against the insured for such damages even if groundless, or fraudulent; * * * *

III. DAMAGE TO OWNED AUTOMOBILES

COVERAGE D, COMPREHENSIVE: E, COLLISION: AND F, FIRE THEFT AND C.A.C.

1. To pay for direct and accidental loss of or damage to the automobile, including its equipment and other equipment permanently attached thereto and described in the Declarations and indicated by a specific premium charge or charges and including reasonable expenses to protect it from further loss, all of which shall hereinafter be called loss.

. . .

COVERAGE E — COLLISION: By collision with

another object or by upset of the automobile but only for the amount of each such loss in excess of the applicable deductible indicated in the Declarations. * * * *

IV. DEFINITION OF INSURED

The unqualified word "INSURED" includes the named insured and if the named insured is an individual, his spouse and dependent children residing in the household and also includes: * * * *

V. OTHER DEFINITIONS

* * * * *

(1) "OWNED AUTOMOBILE" — an automobile owned by the named insured.

(2) 'HIRED AUTOMOBILE' — means an automobile used under contract in behalf of, or loaned to the named insured provided such automobile is not owned by or registered in the name of (a) the Named Insured, (b) a partner or executive officer thereof, (c) * * * * *

(3) 'NON-OWNED AUTOMOBILE' means any automobile other than an owned automobile or hired automobile.

VI. USE OF OTHER AUTOMOBILES — COVERAGES D, E AND F.

A. If during the policy period this policy provides coverage D, E, or F to a private passenger or a non-commercial vehicle, such insurance applies to the use of any non-commercial vehicle used by the insured.

EXCLUSIONS

THIS POLICY DOES NOT APPLY:

* * *

(k) under Coverage B, to injury to or destruction of

property (1) owned or transported by the insured; (2) rented to or in charge of the insured other than a residence or private garage damage or destroyed by a private passenger automobile covered by this policy; * * *"

The front page of the policy shows that there is a $100 deductible on the '73 Ford "2DHDT" owned by Avery Lubin.

POINT I. When we zero in on this policy we find that Farm Bureau agrees:

"INSURING AGREEMENTS:

COVERAGES A, BODILY INJURY AND B, PROPERTY DAMAGE.

1. To pay on behalf of the insured all sums except punitive damages, which the insured shall become legally obligated to pay as damages:

. . .

COVERAGE B — because of injury to or destruction of property, caused by accident and arising out of ownership, maintenance or use of any automobile, including loading and unloading thereof;

2. To defend any suit against the insured for such damages even if groundless, or fraudulent; . . ."

EXCLUSIONS

THIS POLICY DOES NOT APPLY:

(k) under Coverage B, to injury to or destruction of property (1) owned or transported by the insured; (2) rented to or in charge of the insured other than a residence or private garage damaged or destroyed by a private passenger automobile covered by this policy; . . ."

In contending that it had no liability under Coverage "B", Farm Bureau relies upon *Northwestern Mutual Insurance Company* v. *Haglund,* (1965 Mo. App.) 387 S.W. 2d 230; *Middlesex Mutual Fire Insurance Co.* v. *Ballard,* (La. App. 1963) 148 So. 2d 865; and *Wyatt* v. *Wyatt,* 239 Minn. 434, 58 N.W. 2d 873 (1953). On page 8 of appellee's brief we find the following statement:

> "The failure of Appellant to acknowledge its liability and to pay for the damage to the Jeep caused the original litigation against the insured Avery Lubin by the partnership of Nathan G. Lubin and Zusman Bensky. The ingenious argument advanced by Farm Bureau is to the effect that the suit (Case No. 8938) (Tr. 4) was based on negligence and therefore came under Coverages B — Property Damage — Liability and therefore was subject to Exclusion K. *If Liability Coverage — Property Damage were the only coverage which existed by reason of Farm Bureau's policy, the Appellee would be inclined to concede that the exclusion might apply.*" [Emphasis ours]

Again in his conclusion on pages 14 and 15 of appellee's brief we find the following:

"CONCLUSION

> Appellee contends that the Circuit Judge was correct in the Judgment awarded to him. That the ruling of the Court and its findings that neither Exclusion D or K applied were correct. That the theory of Farm Bureau contradicts the plain terms of the policy issued by it and attempts to ignore or render ineffective the collision coverage agreements contained therein.
>
> As indicated, appellee has no argument with the law cited by appellant, were this a case where liability coverage alone is involved; but Appellee deems such law inapplicable where as an admitted insured he had collision coverage which Appellant refused to honor, thus causing him to incur expenses and a Judgment against him.

This matter having been fully developed, the Appellee respectfully submits that the decision of the Trial Court should be affirmed."

We fail to see how the fact that the insured has Coverage E under "III DAMAGE TO OWNED AUTOMOBILES" should have any effect upon the construction that should be given to Exclusion (k). This Farm Bureau policy, like most comprehensive automobile policies, is designed so that the insured can pay only for liability coverage on his vehicle or, by the payment of an additional premium, also acquire collision coverage. In fact an owner of multiple vehicles can acquire liability on some of the vehicles and both liability and collision on other vehicles.

If we should accept appellee's contention with reference to the Exclusion under subsection (K), then in a policy covering multiple vehicles some of which had only liability coverage and some of which had liability and collision coverage, subsection (K) would get two different interpretations in the same policy. We submit that such a result would be absurd. Thus it follows that the trial court erred in holding that Exclusion (K) did not apply to Coverage B under LIABILITY.

POINT II. As can be seen from the policy provisions set out above, Farm Bureau only owed a duty to defend a suit against its insured under the liability portion of its policy. Since Farm Bureau, because of Exclusion (K), provided no liability coverage to appellee for damage to a non-owned automobile being driven by appellee, it follows that the trial court erred in holding that Farm Bureau had a duty to defend.

Finally we note that Farm Bureau does not deny that it furnished Collision Coverage E to appellee and that it did not object to the proof as to the amount of the damages to the jeep or the introduction of the policy. Farm Bureau only asserts that appellee did not plead the application of Coverage E. However, we note that by an amended complaint appellee alleged that Farm Bureau issued its comprehensive automobile policy purporting to provide coverage "for various situations provided pursuant to the terms of the

general policy to which this Form had reference." Accordingly if appellee, within 17 juridical days will enter a remittitur for all of its judgment in excess of $1500 — *i.e.* the $1600 damages less the $100 deductible — the judgment will be modified and affirmed. Otherwise the judgment will be reversed and remanded for further proceedings.

Modified and affirmed.

FOGLEMAN, J., not participating.

PURTLE, J., dissents.

JOHN I. PURTLE, Justice, dissenting. The majority opinion sets out the pertinent parts of the insurance policy and I will not restate them. It is undisputed that appellant's policy covered the damaged vehicle under its collision coverage. Neither is it disputed that the loss was timely reported nor that appellant failed to pay for the loss.

Appellee could not force appellant to pay its legal and valid loss without filing suit. Apparently he did not want to be out the time and expense for services he was entitled to under his insurance policy and therefore simply waited until he was sued.

At no time did appellant offer to pay for the collision damages which it owed appellee or the owner of the damaged vehicle which was covered under the "use of other automobiles" clause in the policy. Appellee would not have incurred the attorneys' fees and costs if appellant had paid the collision loss. Now the majority of this Court penalizes the insured for the failure of the insurer to do that which it was bound by contract to do.

As I view this case, it clearly falls within the category of cases where a claimant is entitled to collect penalty, interest and attorneys' fees when he has to sue his own company and recovers the amount sued for. I do not believe in rewarding anyone for breach of contract, especially when it is to the detriment of an innocent party.

It makes no difference which clause of the policy should

have covered the loss. It was covered and appellant failed to pay. This may be another case where the appropriate department should remedy such an unjust result.

I would affirm the judgment and allow an additional fee for the appeal. Appellant has, no doubt, expended much more money in defense of a just and valid claim than it would have cost to pay it out without all the trouble and expense. There is no saving to the appellant or its policyholders in this case. Neither is it a matter of principle. It is simply a case where appellant has successfully ducked behind a technical term in its ambiguous policy and caused its policyholder to suffer the results.

William A. DUNKUM et al *v.*
R. C. MOORE et al

78-290 580 S.W. 2d 183

Opinion delivered April 23, 1979
(In Banc)

Purtle, Osterloh & Weber, by: *John I. Purtle,* for appellants.

Patten, Brown, Leslie & Davidson, by: *Robert B. Leslie,* for appellees.

CONLEY BYRD, Justice. A petition containing the signatures of 227 registered voters was filed for the incorporation of Shannon Hills. The county court heard the matter and entered an order approving the proposed incorporation of the designated areas as Shannon Hills. Appellants William A. Dunkum, et al., pursuant to Ark. Stat. Ann. § 19-105 (Repl. 1968) and within the proper time, filed a petition for an injunction to prevent the incorporation, alleging that (1) the legal description was incorrect, (2) a majority of the in-

habitants of the area proposed for incorporation did not sign the original petition and (3) the governing body of a town within three miles of Shannon Hills did not affirmatively consent to the incorporation. After hearing proof only with reference to the number of qualified voters and the number of inhabitants residing within the area, both appellants and appellees moved for a ruling in their favor. From a judgment of the trial court denying the petition for injunction, appellants appeal, contending:

> POINT I. A majority of the inhabitants in the area proposed for incorporation did not sign the petition.
>
> POINT II. The legal description and notice were incorrect thereby voiding the action for lack of notice.
>
> POINT III. The city of Alexander did not legally consent to the incorporation.

The Saline County Clerk, George Ramsey, testified that he was familiar with the proposed area to be annexed, that it lay within two voting precincts — Otter "A" and Otter "B" — and that there would be no way of knowing for sure how many registered voters resided in the area. However, based upon his knowledge of the area, the people who came into his office from the area, the voter registration records kept in his office and his experience based upon the records, Mr. Ramsey estimated that there would be between 410 and 414 registered voters residing in the area proposed to be incorporated. Mr. Ramsey stated "that probably would be as close as you can get as far as an educated guess."

The testimony of appellant Dunkum showed that he had actually counted 448 residences in the proposed area and that, based upon a census report showing 3.32 persons per household, he calculated there would be 1,466 inhabitants, including children and imbeciles, in the area. The testimony of Jean Higgins, an employee of Shannon Hills Water Company, showed that there were 444 water meters in operation when the petition was filed.

POINT I. Appellants contend that the term "inhabitants" in Ark. Stat. Ann. § 19-101 (Supp. 1977) and

Ark. Stat. Ann. § 19-106 (Repl. 1968) must be construed to mean residents — *i.e.* include children and imbeciles. For the reasons hereinafter stated, we construe the term "inhabitants" as used in the subject statutes to mean qualified voters residing within the proposed town.

Ark. Stat. Ann. § 19-101 (Supp. 1977), in so far as pertinent, provides:

> "When the inhabitants of a part of any county, not embraced within the limits of any city or incorporated town, shall desire to be organized into a city or town, they may apply by petition, in writing, signed by not less than one hundred fifty (150) qualified voters residing within the described territory, to the county court of the proper county, which petition shall describe the territory proposed to be embraced in such incorporated town, and have annexed thereto an accurate map or plat thereof shall state the name proposed for such incorporated town, and also name the person or persons authorized to act in behalf of the petitioners in prosecuting said petition. The county court shall not approve the incorporation of any municipality if any portion of the territory proposed to be embraced in such incorporated town shall lie within three (3) miles from the corporate limits of an existing municipal corporation unless the governing body of said municipal corporation has by written resolution affirmatively consented to said incorporation. . . ."

Ark. Stat. Ann. § 19-103 (Repl. 1968), provides for a hearing to be held before the county court, and Ark. Stat. Ann. § 19-105 (Repl. 1968), gives anyone opposed to the incorporation the right to file a complaint in the circuit court for purpose of having the incorporation by the county court annulled. Ark. Stat. Ann. § 19-106 (Repl. 1968), provides:

> "It shall be the duty of the court or judge to hear such complaint in a summary manner, receiving answers, affidavits and proofs, as may be deemed pertinent; and if it shall appear to the satisfaction of the court or judge that the proposed incorporated town does not contain the requisite number of inhabitants, or that a

majority of them have not signed the original petition, or that the limits of said proposed incorporated town are unreasonably large or small, or are not properly and sufficiently described, then the said court or judge shall order the record of said incorporated town to be annulled; . . ."

Acts 1975, No. 635 (Ark. Stat. Ann. § 19-101, *supra*), provides that, "When the *inhabitants* of a part of any county . . . shall desire to be organized into a city or town they *may apply by petition in writing signed by not less than one hundred fifty (150) qualified voters* residing within the described territory. . . ." Likewise, Ark. Stat. Ann. § 19-106, *supra,* provides that if it shall appear to the satisfaction of the court or judge that the proposed incorporated town does not contain "*the requisite number of inhabitants* or that *a majority of them has not signed the petition,*" then the judge shall annul the incorporation by the county court.

Simple sentence structure shows that the 1975 Act, *supra,* [Ark. Stat. Ann. § 19-101] qualified the term "inhabitants of a part of a county" to be qualified voters because it says that the inhabitants "may apply by petition . . . signed by not less than one hundred fifty (150) qualified voters residing within the described territory. . . ." Furthermore, the provision of Ark. Stat. Ann. § 19-106, *supra,* which authorizes the circuit court to annul the incorporation when it appears to the satisfaction of the court "that the proposed incorporated town does not contain the requisite number of inhabitants or that a majority of them have not signed the original petition. . .," must refer back to the term "inhabitants" as used in Ark. Stat. Ann. § 19-101, *supra.* Since Ark. Stat. Ann. § 19-101, *supra,* authorizes the inhabitants to petition through qualified voters and Ark. Stat. Ann. § 19-106, *supra,* refers to "a majority of them [who] have not signed the original petition," the term majority can only refer to the persons authorized to sign the petition — *i.e.* qualified voters.

In *Town of Wrightsville* v. *Walton,* 255 Ark. 523, 501 S.W. 2d 241 (1973), the argument made was that since Ark. Stat. Ann. § 19-101 then permitted the inhabitants to petition by 20 qualified voters, the proposed incorporators could incorporate by showing that of the 20 signers on the petition, only

11 had to be qualified voters. We were not there required to interpret what the term inhabitant meant.[1]

In *Town of Walnut* v. *Wade,* 103 U.S. 683, 26 L. Ed. 526 (1880), there was before the court an Illinois Act which provided that a city or town could issue bonds for railroad stock when the amount thereof had been "first submitted to the inhabitants of such city . . . and approved by them; and upon application of any ten voters . . . it shall be the duty of the clerk . . . to immediately call an election. . . ." In answer to the contention that the term inhabitants should include children and imbeciles the court stated: "To require the approval by a vote of the 'inhabitants' in this sense would be an absurdity."

In *Brown* v. *Rushing,* 70 Ark. 111, 66 S.W. 442 (1902), we had before us an act approved March 22, 1881, providing for the sale of school lands "whenever the inhabitants of any congressional township in this state shall desire the sale of the sixteenth section of such township . . . they may by petition, signed by a majority of the male inhabitants of such township, require the collector of taxes of the county wherein such school land is situated to sell the same," and that "upon reception of such petition the collector shall ascertain that it is signed by a majority of the male inhabitants of such township." In concluding that male inhabitants under the age of 21 years should not be counted we said:

> "The word 'inhabitant' has many meanings. It has been construed to mean an occupier of lands; a resident; a permanent resident; one having a domicil; a citizen; a qualified voter. Its construction has generally been governed by the connection in which it has been used. In *Walnut* v. *Wade,* 103 U.S. 683, the construction of an act was involved which authorized towns and cities to subscribe for stock in railroad companies, with the consent

[1]The trial court in *Wrightsville* v. *Walton, supra,* with reference to the statute stated: "This simply means that upon its adjudication in Circuit Court, the court must be satisfied that a majority of the qualified voters inhabiting a proposed town must have indicated their preference for incorporation upon the initial petition filed in the County Court." The appellee for affirmance also contended that inhabitant simply meant qualified voters. See brief filed on behalf of Fred Walton.

of the inhabitants of such city or town, to be ascertained by an election held for that purpose. The court held that the word 'inhabitant,' in that act, meant legal voters. In that case the meaning of the word was determined to some extent by the nature of the act to be done. In this case it should be determined in the same manner.

Under the statutes of this state a male person under the age of twenty-one years is incapable of managing his estate, or absolutely binding himself for the payment of money for anything except necessaries. He cannot devise his lands, nor participate in the annual school meetings nor vote in any election. As a general rule, he cannot do any act necessary to be done in the management and disposition of his lands, except subject to avoidance or ratification when he reaches the age of twenty-one years. In view of these laws, he was certainly not intended to be included in that class of inhabitants authorized to petition for the sale of a sixteenth section of land. The object of the act of 1881 in making a petition signed by a majority of the male inhabitants of a township necessary to procure such sales was doubtless for the purpose of enabling them to protect the interest of their township in such land; and this precludes the idea that any person the law presumes and pronounces, and is generally known to be, incompetent to perform such acts, should form any part of the majority. The act does not provide for its own defeat, and it would tend to do so if it included infants in the word 'inhabitants.' For in that event it would make the child in arms and male persons of all ages competent petitioners, and in some cases place it within the power of children to control such sales, and thereby rob the townships of the safeguards it intended to throw around them. If such was its intention, why were females, and especially adults, excluded? No such construction can reasonably be placed upon the act."

The county clerk estimated that there were no more than 410 or 414 registered voters in the area proposed to be incorporated. If we follow appellants' contention that the word "inhabitants" is equivalent to population, keeping in mind that only qualified voters are allowed to sign the petition, an

anamolous result ensues. The circuit court in this case would have been required to annul the incorporation approved by the county court upon a petition signed by all 410 registered voters upon a mere showing that the total population — including children and imbeciles — was 1411 people. Even a showing of the proponents by calling all of the 1411 people in the area old enough to talk except appellant Dunkum to testify that they desired the area to be incorporated would not suffice, because the statute permits only qualified voters to sign the petition and then specifically requires that the petition be signed by a "majority" of the inhabitants. Appellants' contention that the term "inhabitants" should be construed to include children and imbeciles is just as absurd as that proposed in *Town of Walnut* v. *Wade, supra.*

Appellants under this point also contend that appellees never proved that a majority of qualified voters in the proposed area signed the petition. We find no merit to this contention. In the first place, appellants in the trial court admitted that the burden of proof was upon them. In the second place the testimony of the county clerk as to the number of qualified voters in the area — *i.e.* 410 to 414 — was properly admitted, whether the testimony of the county clerk be considered opinion testimony of a lay witness, or an opinion of an expert. See Ark. Stat. Ann. § 28-1001, Rule 701 et seq.

POINT II. Appellants concede that there is evidence from which the trial court could conclude that the description in the petition was correct as filed. However, they contend that because the published notice used township 3 instead of township 1, the erroneous legal description in the published notice voids the incorporation. We disagree with appellants because Ark. Stat. Ann. § 19-101 (Supp. 1977) only requires the published notice to contain the substance of the petition and the time and place of the hearing thereof. The published notice here complied with those limited requirements.

POINT III. Finally, appellant contends that the City of Alexander did not legally consent to the incorporation — *i.e.* it did not affirmatively consent by written resolution as required by Ark. Stat. Ann. § 19-101 (Supp. 1977). Appellants did not ask the trial court to rule upon this issue, and of course we will not consider an issue raised for the first time on

appeal. Furthermore, the burden of proof was admittedly upon appellants, and any failure of the record to contain any evidence on the issue is chargeable to the appellants rather than the appellees. In other words, the burden was upon appellants to show no consent by written resolution was obtained from the City of Alexander.

Affirmed.

FOGLEMAN and HOLT, JJ., dissent.

PURTLE, J., not participating.

JOHN A. FOGLEMAN, Justice, dissenting. I cannot agree with the majority's construction of the governing statute. In my opinion, there is no substantial evidence that a majority of the inhabitants had signed the petition for incorporation. Under Ark. Stat. Ann. § 19-106 (Repl. 1968), the circuit court was required to annul the incorporation if it appeared to its satisfaction that a majority of the inhabitants had not signed the petition. *Town of Wrightsville* v. *Walton,* 255 Ark. 523, 501 S.W. 2d 241.

The trial judge's decision does not indicate its basis or his interpretation of the statute. I do not agree with the majority's sustaining the judgment on its interpretation that the word "inhabitants" in Ark. Stat. Ann. § 19-106 means "qualified electors." An inhabitant is a person who resides or dwells permanently in a place, as distinguished from a transient lodger or visitor. Webster's 3rd New International Dictionary; Webster's New International Dictionary, 2d Edition. See also, Black's Law Dictionary (DeLuxe 4th Ed.), p. 921. This was the meaning given this word in *Wilson* v. *Lawrence,* 70 Ark. 545, 69 S.W. 570. Many meanings have been given the word, such as, an occupier of lands, a resident, a permanent resident, one having a domicile, a citizen, a qualified voter; however, the word should be accorded its ordinary meaning unless the context in which it is used or the nature of the act to be done is such as to indicate that the legislature intended that it be given some other meaning. See *Brown* v. *Rushing,* 70 Ark. 111, 66 S.W. 442. We have excluded children when the word adult was used as a limiting adjective. *Wilson* v. *Lawrence,* supra. We have also said that children are ex-

cluded when the act involved required the signatures of a majority of the *male* inhabitants, partly because the nature of the proceedings was such that it was illogical to include infant males and exclude females, especially those who were adults. *Brown* v. *Rushing;* supra. I find no indication that the General Assembly intended that the word inhabitants in this section of the statute be given anything other than its ordinarily accepted meaning, which requires that children and imbeciles be included, even assuming that their numbers are significant.

It is true that in some cases the word "inhabitants" is taken to mean qualified electors. Of course, the context demands that it be given that meaning when an election is involved. No election is involved here. I have already pointed out the contrast which dictated the result in *Brown* v. *Rushing,* supra, quoted in the majority opinion. It is also significant, however, that the "nature of the act" there was the sale of lands, and particular emphasis was given in the opinion in *Brown* to the fact that, generally, a minor male "cannot do any act necessary to be done in the management and disposition of his lands."

Furthermore, I cannot agree with the interpretation given *Town of Wrightsville* v. *Walton,* supra. In order to attempt to distinguish this case, the majority resorts to information not available to the bench, bar and public who read the opinion. Nor do I agree with appellees' argument that Act 635 of 1975 makes the case cited inapplicable. The amendment simply changed the language of § 19-101, so that, instead of requiring a minimum of 20 qualified voters of the area as petitioners for incorporation, regardless of the total number of inhabitants, a minimum of 150 qualified voters is now required. The requirement that the incorporation be annulled in the circuit court if a majority of the inhabitants did not sign the petition was not affected in any way by this act. In the *Wrightsville* case, we said:

> We have no way of knowing why the legislature provided that articles of incorporation can be granted by the county court upon petition of twenty qualified electors and then provides that if complaint is timely filed in circuit court, the signatures of a majority of the in-

> habitants would have to be shown. Nevertheless, we are unable to arrive at any conclusion other than § 19-106 requires the signatures of a majority of the inhabitants. We would point out that the proceeding in circuit court is not an appeal from the county court. The jurisdiction of the circuit court is invoked by the filing of a complaint which, of course, constitutes an entirely new proceeding.

I point out that there is *no* statutory requirement that *only* qualified electors sign a petition for incorporation. It is only required that there be a *minimum* of 150 qualified electors included among the signers.

The meaning of a statute must be determined from the language used by the legislature, rather than by speculation as to its unexpressed intention. " 'The question for the interpreter is not what the Legislature meant, but what its language means.' " *Hodges* v. *Dawdy,* 104 Ark. 583, 149 S.W. 656.

If the General Assembly intended that inhabitants mean qualified electors, it should have said so. The very use of the different terms indicates to me that the legislature intended that they be given different meanings. This is a general rules of statutory construction. See 73 Am. Jur. 2d 417, Statutes, § 236; 82 CJS 638, Statutes, § 329.

Pertinent illustrations of the application of the rule are found in *Nelson* v. *Union Wire Rope Corp.,* 31 Ill. 2d 69, 199 N.E. 2d 769 (1964); *Jackson State National Bank* v. *Merchants' Bank & Trust Co.,* 177 La. 975, 149 So. 539 (1933); and *Metropolitan Life Ins. Co.* v. *Mason,* 21 F.S. 704 (E. D. Penn. 1937), rev'd. on other grounds, 98 F. 2d 668 (3 Cir., 1938). In the first case cited, the Illinois Supreme Court said:

> Similarly, the use of the word "employer" in some sections of the act, while using the words "employer, or his insurer" in others, has significance under the rules of construction which state that words employed are to be given their plain meanings, and that the use by the legislature of certain language in one instance and wholly different language in another indicates that different results were intended. ***

In the second, the court approached the matter by applying the general rule that no sentence, word or clause should be constructed as without meaning and as surplusage, if a construction can be legitimately found which will give force and effect to, and preserve, all the words of the statute, and said:

> *** In applying this rule, where possible, the same meaning should not be given to two distinct words, and thereby make one of them a useless repetition of the other, but the appropriate meaning should be given each word with the end in view of giving full effect to the legislative intent.

In the last, the court said:

> *** Giving effect to the canon of statutory construction that each word in the statute must be given a distinct meaning if possible, we construe the word "value" to mean the present or cash surrender value of the policy and the word "amount" to mean the face amount or the amount payable in case of death. ***

By applying basic general rules of construction, the words "inhabitant" on the one hand, and "qualified electors" on the other, should be presumed to have different meanings. There is nothing in the language of the statutes to indicate any legislative intent to the contrary.

R. C. Moore, who had resided at 11208 Shannon Hills Drive for two years, was one of the petitioners for incorporation. He testified that he had no idea how many inhabitants lived in the area. He said that no one except registered voters over 18 years of age signed the petition and that the signers represented 177 households. William A. Dunkum, one of the appellants, who lives at 14103 Sardis Road, had made an actual count of the dwelling houses in the area. He found 458, some of which were mobile homes. He exhibited a document from the Bureau of Census showing that in its Tract 104, which includes the area proposed for incorporation, there were an average of 3.32 residents per household. Using only 3.2 residents per household, he concluded that there were 1466 inhabitants of the area. He showed the location of each house on a map he prepared in October, 1977. Jean Higgins,

an employee of Shannon Hills Water Company, testified that in July, 1977, she sent water bills to 406 residences, and that the company did not serve all the area proposed for incorporation, but she knew of approximately 35 residences in the area to which water was furnished by "District 2," which bought water from the company on a wholesale basis. George Reissman, a witness for the incorporators, "guessed" that there were less than 500 residents of the area, but admitted that there could be 600 and that he didn't know how many there were.

Appellees seek to show that there was substantial evidence to support the circuit court's judgment in several ways, none of which have merit. First, they multiply the number of households (177) represented by the signers by 3.2 residents per household and say that this shows that they represented 587.64 inhabitants which was more than a majority of the inhabitants according to the testimony of Reissman. As a matter of fact, this would exceed Reissman's "guess" as to total population of the area. The fallacies in this approach are obvious. There is nothing whatever in the statutes on incorporation indicating that a single signer, or any number less than all those living in a household, represents or binds everyone in the household. This would be necessary in order for us to sustain this rather unusual theory, for which appellees cite no authority. Furthermore, I do not consider Reissman's testimony to be substantial evidence of the number of households in the area. To be substantial, evidence must be valid, legal and persuasive. *Arkansas Pollution Control Com'n.* v. *Coyne,* 252 Ark. 792, 481 S.W. 2d 322. The conclusion of a witness is not substantial when he gives no satisfactory explanation how he arrived at it and leaves the fact finder to speculation and conjecture in arriving at its conclusion. *Arkansas State Highway Com'n.* v. *Byars,* 221 Ark. 845, 256 S.W. 2d 738. Reissman's testimony on this point was speculative, at best.

The only substantial evidence as to the number of inhabitants in the Shannon Hills area is the testimony of Dunkum and Higgins. The lowest number of households which would be indicated by this testimony is 441. The census figures, or at least the figure used by Dunkum, would indicate that there were 1411 inhabitants of the area. If this

were the case, then 706 signatures would have been required. Even if Reissman's guess were considered, for 227 signers to constitute a majority, less than 500 would have to be translated to mean 453 or less.

I note that the last portion of the petition necessary to the incorporation proceeding was filed June 8, 1977. The water company billings in July appear to have been the next billing after the filing of the petition. In spite of the fact that there was testimony that several houses are being built each month, there was no testimony that would indicate that the number of households in July, 1977, was more than double the number in that area as early as May 18, 1977, the first day any of the petitions were filed. This fantastic increase would have been necessary to a finding that 227 signers constituted a majority of the inhabitants calculated according to the only substantial evidence.

Appellees argue that appellants have no grounds for appeal to this court because they failed to ask that the trial court make specific findings of fact pursuant to Ark. Stat. Ann. § 27-1744 (Repl. 1962). None of the cases cited by appellees support that argument and I know of no authority that would.

I also disagree with the majority's treatment of the testimony of the county clerk. This testimony was not admitted in the trial court. Most of it constituted a proffer only. I agree with the trial judge that when the whole of this testimony is considered, it was rank speculation or the expression of an opinion only. It was without any satsifactory explanation, and should not be considered substantial evidence.

I would reverse the judgment.

I am authorized to state that Mr. Justice Holt joins in this opinion.

Carthal Deane HARPER and Loraine HARPER *v.* James Dennis CASKIN

78-301 580 S.W. 2d 176

Opinion delivered April 23, 1979
(In Banc)

Henry & Graddy, for appellants.

No brief for appellee.

CONLEY BYRD, Justice. Appellants, Carthal Deane Harper and Loraine Harper, the stepfather and mother of James Dennis Caskin, Jr., a minor, sought to adopt James Dennis Caskin, Jr. without the consent of the minor's father, appellee James Dennis Caskin. In doing so appellants relied upon Ark. Stat. Ann. § 56-207(a)(2) (Supp. 1977), which provides:

> "Consent to adoption is not required of a parent of a child in the custody of another, if the parent for a period

> of at least one [1] year has failed significantly without justifiable cause (i) to communicate with the child or (ii) to provide for the care and support of the child as required by law or judicial decree, . . ."

The trial court denied appellants' petition finding that "it has not been shown that the Respondent . . . failed for a period of (1) year, significantly without justifiable cause to communicate with and/or provide care and support for James Dennis Caskin, Jr."

The record shows that appellee and appellant, Loraine Harper, were formerly husband and wife. James Dennis Caskin, Jr. was born to that marriage. Appellee and Loraine were divorced in July, 1973, and Loraine was awarded custody of James Dennis Caskin, Jr. Loraine married appellant Carthal Deane Harper in December, 1973. A prior petition for adoption was dropped in 1975.

Carthal Deane Harper testified that he had not communicated with appellee in the past two years. He did not remember receiving any support from appellee since January of 1977. He did not know of any communications his wife may have had with appellee.

Loraine Harper, the natural mother, testified that she did not recall communicating with appellee between Christmas of 1976 and the filing of the petition in March, 1978. The last child support she received from appellee was $100 in January, 1977. She remembered calling appellee once in North Carolina, but she did not remember the date. Appellee had visited with the child three or four times since April of 1978. She is presently under court orders to let appellee visit with the child.

Carolyn Caskin, the wife of appellee, testified that Mrs. Harper called her landlord in North Carolina in June of 1977 but that Mrs. Harper refused to talk to her when she called Mrs. Harper back. The Caskins sent $50 in July, 1977, when appellee was in the hospital. Appellee, while in the Armed Services, developed epileptic seizures in October, 1976, and was in and out of the hospital during 1977. Appellee was severed from the Marines in October, 1977, with a lump sum

payment of $19,000. Appellee is now an out patient at the V.A. Hospital in Little Rock. Mrs. Caskin says that she and appellee had visitation problems with Mrs. Harper. They did not contact her about visitation upon returning to Little Rock in November, 1977, because they thought it would do no good. When they did visit, Mrs. Harper required that the visiting be done in Mr. Harper's home. Appellee is still having seizures and has been unable to obtain employment since his discharge.

Appellee testified that he made his child support payments in 1975 and 1976. He last visited the child Thanksgiving, 1975. Mrs. Harper has prevented him from seeing the child since that time. Mrs. Harper called him in June, 1977, and told him that she needed $300 because the child was sick. At the time he was in the hospital receiving only one-half pay; he sent $50 in July, 1977. He could only communicate with his child through Mrs. Harper. He did not ask to speak to the child because he thought it would do no good. He had had three seizures since returning to Little Rock in November 1977, and has been an out patient from the V.A. Hospital since returning to Little Rock. He is not presently working and has no income. He has visited the child four times since April, 1978. He says the child is entitled to V.A. benefits, but Mrs. Harper told him she was not interested in V.A. benefits.

On rebuttal Mrs. Harper said she had been reluctant to let the child visit with appellee over night because he was not properly cared for on one occasion when he was sick.

In arguing that the trial court erred, appellants accentuate the small amount of child support paid during the 12 months preceding the filing of the petition and the lack of communication and argue that under the statute, *supra,* they are entitled to adopt without the parent's consent when the parent has "substantially" failed in his legal duty to be a parent for a period in excess of one year. In making their contentions, appellants overlook the provision of the statute which requires that the parent's failure to support and communicate be "*without justifiable cause. . . .*" They also overlook the heavy burden of proof placed upon one wishing to adopt a child without the consent of the parent, *i.e.,* by clear and con-

vincing evidence. See *In re Cozza,* 163 Cal. 514, 126 P. 161 (1912) and *In Re Adoption of Porras,* 13 App. Div. 2d 239, 215 N.Y.S. 2d 778 (1961).

With respect to the burden cast upon one wishing to adopt a child against the consent of a parent, 2 Am. Jur. 2d *Adoption* § 60 states:

> "The judge before whom an application or petition for adoption is brought must determine from extrinsic evidence whether, under the circumstances of the case, the consent of the natural parent of the child is necessary to adoption, and if required whether that consent has been given. In order to grant an order or decree of adoption in opposition to the wishes and against the consent of the natural parent, the conditions prescribed by statute which make that consent unnecessary must be clearly proven and the statute construed in support of the right of the natural parent. Natural rights of parents should not be passed over lightly, even though the court is given power to enter decree of adoption without the consent of the parent or guardian when the judge considers that the best interests of the child will be promoted. The law is solicitous toward maintaining the integrity of the natural relation of parent and child, and where the absolute severance of the relation is sought without the consent and against the protest of the parent, the inclination of the courts is in favor of maintaining the natural relation.
>
> Where the controversy is whether the parent has abandoned the child so as to dispense with the necessity of his consent, the burden of proof is on the petitioner to justify the adoption on that ground, and it is often said that the evidence to show abandonment must be clear and convincing. . . ."

In 2 C.J.S. Adoption of Persons § 96 under the title "Weight and Sufficiency of Evidence" the matter is stated:

> "In an adoption proceeding contested by a natural parent the facts justifying the adoption must be established by clear and convincing evidence."

In *People ex rel. Buell* v. *Bell,* 20 Ill. App. 2d 82, 155 N.E. 2d 104, the burden is stated:

> ". . . Adoption, which affects the course of inheritance, deprives the child of the place in which it was placed by nature, and by force of law thrusts the child into another relationship, while severing conclusively the rights and interests of the natural parents, is a very different, and more drastic matter than a change of custody; the rights of natural parents to their children must not be terminated unless a clear and convincing case is made in strict compliance with the adoption statute. . . . "

In *Re Cozza,* 163 Cal. 514, 126 P. 161 (1912), the burden on one wishing to adopt a child without the consent of a parent is stated:

> "The power of the court in adoption proceedings to deprive a parent of his child being in derogation of his natural right to it, and being a special power conferred by the statute, such statute must be strictly construed, and in order to warrant the exercise of the special power and sustain an order for adoption made in opposition to the wishes and against the consent of the natural parent on the ground that conditions prescribed by statute exist which make that consent unnecessary, the existence of such conditions must be clearly proven, and the evidence bring them within the terms and intent of the statute. The law is solicitous toward maintaining the integrity of the natural relation of parent and child, and in adversary proceedings in adoption, where the absolute severance of that relation is sought, without the consent and against the protest of the parent, the inclination of the courts, as the law contemplates it should be, is in favor of maintaining the natural relation. . . ."

When we consider that the failure of the parent must be *without justifiable cause,* we cannot say that the trial court erred in holding that appellants had not sustained the heavy burden of proof placed upon them.

Affirmed.

HARRIS, C.J. and FOGLEMAN, J., concur.

JOHN A. FOGLEMAN, Justice. I concur in the affirmance of the judgment denying the petition for adoption, because I, cannot say that the finding that it had not been shown that the natural father's failure to communicate or to provide care and support for the child was without justifiable cause is clearly against the preponderance of the evidence. I feel that the portion of the opinion relating to the quantum of proof required is not only unnecessary to the decision, it is also an issue raised by the court and decided without the benefit of adversary advocacy.

Ordinarily, when there is a division of authority and the majority of the court elects to follow a majority rule or the weight of authority, I feel that I should accept that position. In this case, I cannot accept the requirement that there must be clear and convincing evidence to show that the consent of a parent to an adoption may be dispensed with in considering a petition for the adoption of his child, although I can readily accept that rule as applicable where the consent is rendered unnecessary because there has been an abandonment. The very word "abandonment" requires such a construction. It has been defined to mean:

> "To relinquish or give up with the intent of never again resuming or claiming one's rights or interests in; to give up absolutely; to forsake entirely; to renounce utterly; to relinquish all connection with or concern in; to desert, as a person to whom one is bound by a special relation of allegiance or fidelity; to quit; to forsake."

See, *Walthall* v. *Hime,* 236 Ark. 689, 368 S.W. 2d 77 (1963); *Woodson* v. *Lee,* 221 Ark. 517, 254 S.W. 2d 326. See also, *Hyde, Ex'rs.* v. *Hyde,* 240 Ark. 463, 400 S.W. 2d 288. Both *Walthall* and *Woodson* were adoption cases, based upon our adoption statute then in force. See Ark. Stat. Ann. § 56-106 (Repl. 1971). We have never quite reached the point of requiring proof of abandonment by a parent by clear and convincing evidence. In *Woodson,* we quoted from a California case

[*In re Cordy,*[1] 169 Cal. 150, 146 P. 532 (1940)], which also involved an abandonment statute similar to our statute then in effect. The effect of the holding by the California court was that every *intendment* should be in favor of the non-consenting parent in an adversary proceeding where absolute severance of the natural relation of parent and child is sought without the consent, and over the protest, of the parent, because the inclination of the courts is in favor of maintaining the natural relation. In treating "intendments" in pleadings, it has been said:

> *** The meaning of intendment is that, allowing an averment to be true, but at the same time a case may be supposed consistent with it which would render the averment inoperative as a full defense, such case shall be presumed, unless specifically excluded by particular averments. ***

Detroit, L. & N. R. Co. v. *McCammon,* 108 Mich. 368, 66 N.W. 471 (1896).

Intendment has also been given definitions such as: inclination, disposition, meaning, signification, intention, design, purpose, significance; the true or correct meaning of something. Webster's New International Dictionary, 2d Edition; Webster's Third New International Dictionary; The Random House Dictionary of the English Language. Intendment of law has been defined as: the true meaning, the correct understanding, or intention of the law; a presumption or inference made by the courts. Bouvier's Law Dictionary (Rawle's 3rd Revision). Thus, the effect of *Woodson* would be no greater than the creation of a presumption favoring the parent or the requirement that all inferences deducible from the evidence be drawn favorably to the parent. This would do no more than require that the petitioner for adoption assume the burden of proof and that the court draw inferences favorable to the parent, much as the Workmen's Compensation Commission does in favor of a claimant.

[1]The rule of strict construction of the California adoption statute stated in *Cordy* was disapproved because it was inconsistent with the rationale of other decisions and because the court had declared that the purpose of later statutes was the promotion of the welfare of children, bereft of the home and care of their real parents. *In re Barnett's Adoption,* 54 Cal. 2d 370, 354 P. 218, 6 Cal. Rptr. 562 (1960).

On the other hand, we have recognized that it is widely held that clear, unequivocal and decisive evidence is required to establish abandonment of property. *Hendrix* v. *Hendrix,* 256 Ark. 289, 506 S.W. 2d 848.[2] So, insofar as our statute still requires abandonment, I could readily accept the requirement of clear and convincing evidence under our previous statute, and on an allegation of abandonment under the present one, even though neither case cited by the majority really supports its position. The court neither said nor held that a petitioner for adoption must show that a parent's consent is not necessary by clear and convincing evidence in *In re Adoption of Porras,* 13 A.D. 2d 239, 215 N.Y.S. 2d 778 (1961). All the court said was that the burden placed upon the petitioner to establish abandonment by the natural parent was a heavy one. *In re Cozza,* 163 Cal. 514, 126 P. 161 (1912), from which the majority quotes, is a case in which, unlike this one, abandonment was the principal ground relied upon for avoiding the necessity of parental consent. The California court said that it would be a waste of time to point out that the evidence did not show desertion and that it was so clearly shown that there was no abandonment that the matter ought not to be open for discussion. Thus, the portion of that opinion quoted by the majority, if not dictum, affords poor support for requiring that significant failure to communicate be shown by clear and convincing evidence.

A drastic change was made when the Revised Uniform Adoption Act [Ark. Stat. Ann. §§ 56-201 — 56-221 (Supp. 1977)] went into effect on July 5, 1977. See § 22, Act 135 of 1977. In the new act, the General Assembly added a ground for dispensing with the requirement of consent, although the provision as to abandonment was retained. This proceeding, however, does not involve Ark. Stat. Ann. § 56-207(a)(1), under which consent of a parent who has abandoned a child is not required. A much less stringent standard for dispensing with consent was added to our adoption law by Ark. Stat. Ann. § 56-207(a)(2). Under that subsection, consent of a parent of a child in the custody of another is not required if the parent, for a period of at least one year, has failed

[2]It should be noted, however, that in *Hendrix,* we merely held that we could not say that the chancellor's holding that there had been no abandonment of the real property involved was clearly against the preponderance of the evidence.

significantly without justifiable cause, either to communicate with the child or to provide for its care and support as required by law or judicial decree. It seems to me that the addition of this ground was a recognition of the fact that, while parental rights are important, they are not more important, or to be given more emphasis, than the rights of children.

The Commissioners' note to the applicable section of the Revised Uniform Adoption Act certainly suggests that there was an intention to impose a less stringent standard than would be required to show abandonment. It is recognized in other jurisdictions that non-support and desertion are less drastic breaches of parental obligations than abandonment. *Stalder* v. *Stone,* 412 Ill. 488, 107 N.E. 2d 696, 35 ALR 2d 653 (1952); *Smith* v. *Smith,*[3] 67 Idaho 349, 180 P. 2d 853 (1947); *Lout* v. *Whitehead,* 415 S.W. 2d 403 (1967). Under statutes similar to Ark. Stat. Ann. § 56-207 (a) (2) relating to the parent's failure to support the child, there is quite respectable authority that the burden of the petitioner is met by proof by a preponderance of the evidence. *Khafaji* v. *Meitzen,* 429 S.W. 2d 174 (Tex. Civ. App., 1968); *Jordan* v. *Hancock,* 508 S.W. 2d 878 (Tex. Civ. App., 1974); *In re Adoption of Wright,* 15 Ohio Misc. 354, 240 N.E. 2d 923 (1968).

Requiring a greater quantum of proof than a preponderance of the evidence for showing that a parent has failed *significantly* and *without justifiable cause* to either communicate with his child or to provide for its care and support as a substitute for that parent's consent does emphasize parental rights and deemphasize the child's rights. The parent-child relationship involves reciprocal rights and obligations. They are not reciprocal when the rights of a parent are elevated above both his own obligations and his child's rights.

Many other jurisdictions hold that the rights of the parent must yield to the rights and interests of others in view of the requirement that the welfare and best interests of the minor should at all times be controlling in adoption proceedings. *Hamilton* v. *Rose,* 99 So. 2d 234 (Fla. 1957); *Stearns* v. *Allen,* 183 Mass. 404, 67 N.E. 349 (1903). It

[3]In *Smith,* it was pointed out that an adjudication of abandonment cannot be based upon non-support. And, similarly, neglect is somewhat short of wilful neglect. *In re E.C.N.,* 517 S.W. 2d 709 (Mo. App., 1974).

is widely held that the welfare and best interests of the minor child are the dominant, primary and paramount consideration and the rights and wishes and feeling of the natural parents and the petitioners for adoption are secondary, subordinate and subservient thereto. *In re Adoption of Morrison,* 260 Wisc. 50, 49 N.W. 2d 759 (1951); *In re Neusche,* 398 S.W. 2d 453 (Mo. App., 1965); *Palmisano* v. *Baltimore County Welfare Board,* 249 Md. 94, 238 A. 2d 251 (1968); *Rhodes* v. *Shirley,* 234 Ind. 587, 129 N.E. 2d 60 (1955); *Galloway* v. *Galloway,* 249 S.C. 157, 153 S.E. 2d 326 (1967). In elaborating upon the duty of the courts, even appellate courts, to protect the rights of minor children, the South Carolina Court said:

> It has been broadly stated that under adoption proceedings there are four interested parties: (1) The minor child; (2) the parents or those standing in place of the parents; (3) the party seeking to adopt; and (4) the state. Undoubtedly, the person standing highest in interest is the child, and when adopted its status for life is entirely changed.

The Massachusetts Supreme Court has said that the interest of natural parents, important as it is, must yield when it is in conflict with the best interest of the child. *In re Adoption of a Minor,* 343 Mass. 292, 178 N.E. 2d 264 (1961).

When the new statute provided a more liberal basis for dispensing with parental consent, the majority rule, the weight of authority and our previous holdings on the question of abandonment became much less significant. We should look to the decisions of those states which have adopted the uniform act.

In North Dakota, a state which has adopted the uniform act, the Supreme Court, speaking of parental rights in *Kottsick* v. *Carlson,* 241 N.W. 2d 842 (N.D., 1976)), stated:

> *** The relationship of parent and child consisting of a bundle of essential human rights necessary for the preservation of society must be carefully balanced and jealously guarded.

The Supreme Court of Montana (where the original uniform act was substantially adopted) considered parental

obligations in *Conley* v. *Walden*, 166 Mont. 369, 533 P. 2d 955 (1975) and reached the following conclusion:

> The general obligations of parenthood include these minimum standards: 1) Express love and affection for the child. 2) Express personal concern over the health, education and general welfare of the child. 3) The duty to supply the necessary food, clothing and medical care. 4) The duty to provide an adequate home. 5) A duty to give social and religious guidance. ***

We have also recognized specific parental duties and obligations which are indicative of a correlative right of the minor child. The parent has a legal and moral duty to support and educate his child and to provide the necessities of life to it and to give it those advantages which are reasonable, considering the parent's financial condition and position in society. *Bostic* v. *Bostic,* 229 Ark. 127, 313 S.W. 2d 553; *Kuespert* v. *Roland,* 222 Ark. 153; 257 S.W. 2d 562; *Brown* v. *Brown,* 233 Ark. 422, 345 S.W. 2d 27; *Central Manufacturers' Mut. Ins. Co.,* v. *Friedman,* 213 Ark. 9; 209 S.W. 2d 102, 1 ALR 2d 557; *McDaniel* v. *Brandon & Baugh,* 168 Ark. 1063, 272 S.W. 670; *Bockman* v. *Bockman,* 202 Ark. 585, 151 S.W. 2d 99; *Alcorn* v. *Alcorn,* 183 Ark. 342, 35 S.W. 2d 1027; *Aaron* v. *Aaron,* 228 Ark. 27, 305 S.W. 2d 550; *Sain* v. *Smith,* 254 Ark. 720, 495 S.W. 2d 865. The courts will zealously enforce these duties. *Jordan* v. *Wright,* 45 Ark. 237; *Waller* v. *Waller,* 220 Ark. 19, 245 S.W. 2d 814. They are derived from principles of natural law and are owed both to the child and to the public. *Jordan* v. *Wright,* supra; *Johnson* v. *Mitchell,* 164 Ark. 1, 260 S.W. 710.

In Oklahoma, where the original uniform act was adopted in 1957, the primary inquiry in adoption is whether it will promote the best interest of the child. *In re Adoption of Greer,* 463 P. 2d 677 (Okla. 1970). In Montana, the best interests of the child are of utmost concern in adoption cases. *In re Adoption of Biery,* 164 Mont. 353, 522 P. 2d 1377 (1974).

It is important that the "best interests of the child" in adoption cases take on a meaning different from that accorded it as a term of art in granting custody in a divorce action. In an adoption proceeding under the uniform act, the term includes among other things, the "total relationship between

child and parent pertaining to, and involving heterogeneous values, rights, duties and concepts." *Kottsick* v. *Carlson,* 241 N.W. 2d 842 (N.D. 1976). The North Dakota court indicated that the grounds for termination of parental rights "must rest upon the attitude, conduct, ability and such other matters relating to the parents' duties, responsibilities and care for the child which may be, and frequently are, collectively referred to as 'fitness.' " The best interest of the child does not require that it be placed in the wealthiest home, but it should be in the home which, all things considered, is available and will promote the welfare of the particular child. *In re Neusche,* 398 S.W. 2d 453 (Mo. App. 1965). The matter has been put in appropriate perspective in Florida, where in *Jones* v. *Allen,* 277 So. 2d 599 (Fla. App., 1973), the court said:

> We hasten to add, however, that the mere fact that strangers might make better parents or that they might be in a better financial position than the natural parents is not in and of itself sufficient even where it is manifestly clear that the child might be better off in the proposed new environment. Were these the only tests to be employed it would be quite possible for absolute strangers to arbitrarily choose any child of any parents poorer and/or less moral than themselves and, simply by following the procedures in the adoption statute, walk away with the child.
>
> Of course, circuit judges are not likely to let this happen absent an additional showing that the natural parents have failed to carry out their parental duties to the child in some substantial way and have neglected or shown disinterest in the welfare of the child. This is plainly as it should be as we perceive the law.

If the parents' duties and obligations are so important and so zealously guarded by the courts, why should it be necessary to require that default by having "failed substantially" be proved by more than a preponderance of the evidence? On appeal, determination of the trial court in an adoption proceeding as to what is in the best interest of the child will stand where there has been no abuse of discretion. *In re Neusche,* supra. In Arkansas, in probate court procedures, the scope of review and all other matters relating to appellate

review are controlled by the law and rules applicable to appeals in equity cases. Ark. Stat. Ann. § 62-2016 (g). A Missouri court has spoken on the significance of such a requirement in an adoption case, *In re E.C.N.*, 517 S.W. 2d 709, viz:

> In this case it is our duty to review the record, as in actions of equitable nature, upon the law and the evidence, and reach our own conclusions, giving due deference to the trial court on questions of credibility. Unless the judgment is clearly erroneous and in conflict with the clear preponderance of the evidence, it should not be lightly disturbed.

Even in Oklahoma, where the statute requires a *wilful* failure or refusal to support, the supreme court has held that it will not reverse the findings of the trial court applying the rule of preponderance of the evidence, unless they appear, after examination of the record to be clearly against the weight of the evidence. *DeGolyer* v. *Chesney,* 527 P. 2d 844 (Okla. 1974); *Wade* v. *Mantooth,* 417 P. 2d 313 (Okla. 1966); *Davis* v. *Neely,* 387 P. 2d 494 (Okla. 1963), cert. den. 379 U.S. 2, 85 S. Ct. 31, 13 L. Ed. 2d 21 (1964).

I find no sound basis for a "clear and convincing" evidence rule and no reason why the typical de novo review in equity cases is not adequate for protection of the rights of both parent and child.

I am authorized to state that the Chief Justice joins in this opinion.

Nellie PALMER, d/b/a PALMER'S BOUTIQUE *v.* ARKANSAS EMPLOYMENT SECURITY DIVISION

78-318 580 S.W. 2d 683

Opinion delivered April 23, 1979
(Division II)
[Rehearing denied June 4, 1979.]

Hoofman & Bingham, P.A., for appellant.

Herrn Northcutt, for appellee.

FRANK HOLT, Justice. Appellee's Board of Review determined that appellant was liable for contributions under the State Employment Security Law. The trial court affirmed. Appellant first asserts that the court erred in sustaining the Board's ruling inasmuch as there was no evidence to support

a finding that appellant paid wages, for services performed, to individual beauty operators. We must agree.

The facts are undisputed. Appellant leases the property in which Palmer's Boutique is located. She owns all the beauty shop equipment and pays the janitorial and utility bills. She is not a beautician and has no cosmetology license. The license for the establishment, issued by the State Board of Cosmetology, is in her name. Several individual beauty operators lease a designated space from appellant for which each operator pays appellant $36 per week. Each lease may be terminated by either appellant or the operator by giving thirty days' written notice. It provides that the business is to be operated under the name "Palmer's Boutique." Each operator has an individual cosmetology license. Appellant pays $25 per year local occupation tax and a $5 per year levy for each chair maintained. She is reimbursed for the $5 fee by each operator. Appellant withholds no income tax nor pays any tax for these individual operators. She has no knowledge of what each individual operator's earnings are. There is only one phone, and it is listed in the name of the Boutique. Appellant does not take the operator's calls nor make appointments. She is seldom on the premises except to collect her rent. Each operator works whenever she pleases and is under no obligation to report to appellant. Each operator sets her own fee scale, buys her own supplies and insurance and receives payment for her services directly from her customers.

Ark. Stat. Ann. § 81-1103 (i) (5) (Repl. 1976) provides:

> Service performed by an individual for wages shall be deemed to be employment subject to this Act irrespective of whether the common-law relationship of master and servant exists, unless and until it is shown to the satisfaction of the commissioner that—
>
> (a) such individual has been and will continue to be free from control and direction in connection with the performance of such service, both under his contract for the performance of service and in fact; and
>
> (b) such service is performed either outside the usual course of the business for which the service is performed

or is performed outside of all the places of business of the enterprise for which the service is performed; and

(c) such individual is customarily engaged in an independently established trade, occupation, profession, or business of the same nature as that involved in the service performed.

In *McCain* v. *Crossett Lumber Co.,* 206 Ark. 51, 174 S.W. 2d 114 (1943), we held that paragraphs (a) through (c) have no application "except in cases where the three precedent conditions are first found to exist, to-wit: (1) that services were performed; (2) by an individual; (3) for wages." § 81-1103 (n) defines wages: " 'Wages' means all remuneration paid for personal services including commissions and bonuses and cash value of all remuneration paid, in any medium other than cash." Thus, it is true, as argued by the appellee, that remuneration can be paid or received in different forms for services performed. In making the determination if remuneration is paid, this Act must be construed strictly against the State with any doubts being resolved in favor of tha taxpayer. *McCain* v. *Crossett Lumber Co., supra;* and *Hervey* v. *Const. Helicopters,* 252 Ark. 728, 480 S.W. 2d 577 (1973).

Here, we are of the view that the facts are insufficient to support a finding that the beauty operators, who paid a fixed rent according to their lease agreement, "performed services" for which "wages" were paid to them by appellant within the meaning of the Act.

It becomes unnecessary to discuss appellant's contention that even if "wages" were paid, the appellant is exempt from the Act inasmuch as she has met the three requirements, (a) through (c), *supra.*

Reversed and dismissed.

We agree: HARRIS, C.J., and FOGLEMAN and HICKMAN, JJ.

Dale Lawrence BENEDICT et ux
v. ARBOR ACRES FARM, INC.

78-332 579 S.W. 2d 605

Opinion delivered April 23, 1979
(Division II)

Rick A. Beye, for appellants.

Crouch, Blair, Cypert & Waters, for appellee.

FRANK HOLT, Justice. Appellee's deed to the appellants allegedly failed to include a complete legal description of the land (54 acres) purchased, omitting 7.995 acres. Appellee refused to deed the asserted omitted acreage to appellants. When appellants defaulted on their first mortgage payments, held by American Savings & Loan, it sued to foreclose on June 24, 1977, naming both appellants and appellee, the second mortgagee, as defendants. On August 23, 1977, appellee crossclaimed against appellants for default of payments on their purchase money second mortgage. Appellants answered on August 31, 1977. On November 1, 1977, seven days before the trial date, appellants moved for a continuance and crossclaimed against appellee alleging that appellee fraudulently misrepresented the acreage being sold and sought damages. On November 3, 1977, appellants' motion for a continuance was granted, the trial was reset for November 28, 1977, and appellants' cross-claim was dismissed without prejudice by the court, acting *sua sponte*. Upon trial, foreclosure was decreed by the chancellor in favor of American Savings & Loan and the appellee. Appellee then purchased the property at a Commissioner's sale. Thereafter, appellants instituted the present action to recover damages on the same grounds which they had alleged in their dismissed crosscomplaint. Appellee answered, sought the return of the matter to chancery to reform the foreclosure decree and moved for a summary judgment, arguing that appellants' claim was barred by *res judicata* in that they had failed to comply with our compulsory counterclaim statute, Ark. Stat. Ann. § 27-1121 Fourth (Repl. 1962), in the prior foreclosure suit. The motion for summary judgment was granted. Hence, this appeal. Appellants assert that the court erred in finding that they failed to comply with the compulsory counterclaim requirements of that statute and in ruling their cause was barred by *res judicata*.

Appellants, conceding that appellee did proceed in the

foreclosure proceeding to the extent necessary to invoke the application of § 27-1121 Fourth, argue that they complied with the statute by filing their pleading on the cross-complaint. They assert that it was within the chancellor's discretion to dismiss their cross-complaint without prejudice, which would permit them to refile their present claim for damages at a later date. Appellee responds that here it filed its motion for summary judgment accompanied by affidavit, which stated that the parties in the preceding case were the same parties as were present before the court below and that the subject matter of that suit was the foreclosure of property which appellants had purchased from appellee in a transaction which resulted in this suit. Appellee argues that, since appellants did not file an affidavit controverting its affidavit, these uncontroverted facts must be taken as true, therefore leaving no question that both parties and the subject matter of the two suits were the same so that *res judicata* precludes a second adjudication on the merits. Also appellee asserts that appellants placed themselves in the position of forcing the chancellor to dismiss their crosscomplaint by waiting until 7 days before the trial date to file their action and that, being aware of the doctrine of *res judicata,* it was incumbent upon appellants to question the ruling of the trial court by appeal in that case. It also contends that a mandatory counterclaim, as here, cannot be dismissed without prejudice; i.e., the dismissal is with prejudice by the very language of § 27-1121 Fourth.

We agree with appellants' contention that § 27-1121 Fourth was complied with by a timely filing of their cross-claim. All the statute requires, by its clear language, is that a defendant "set out in his answer" such a claim, and we have held that when, as here, the original answer was timely filed, a party may amend his answer, within a reasonable time, to include a cross-complaint. *Huffman* v. *City of Hot Springs,* 237 Ark. 756, 375 S.W. 2d 795 (1964). Here we cannot agree with appellee's contention that the statute, by its very language, prohibits dismissal of a cross-claim without prejudice. Neither do we agree with any of appellee's other arguments. We find nothing in the statute to indicate that the legislature intended to alter the general rule allowing the court discretion in dismissal of an action without prejudice. See *May* v.

Exxon Corp, 256 Ark. 865, 512 S.W. 2d 11 (1974); and 27 C.J.S. Dismissal and Nonsuit § 73.

To bar a subsequent action, a prior judgment must have been made upon the merits of the case. *Ogden* v. *Pulaski County,* 189 Ark. 341, 71 S.W. 2d 1052 (1934). Generally, a dismissal without prejudice will not be a bar to a subsequent action on the same cause. *Turner* v. *Citizens' Bank of Hickory Ridge,* 177 Ark. 586, 9 S.W. 2d 23 (1928); *Forschler* v. *Cash,* 128 Ark. 492, 194 S.W. 1029 (1917). This is because a dismissal without prejudice is not an adjudication on the merits. See *Forschler* v. *Cash, supra;* and *Hallum* v. *Dickinson,* 47 Ark. 120, 14 S.W. 77 (1886). The law of *res judicata* provides that a prior decree bars a subsequent suit when the subsequent cause involves the same subject matters as that determined or which could have been determined in the former suit between the same parties; the bar extends to those questions of law and fact which "might [well] have been but were not presented." *Turner* v. *State,* 248 Ark. 367, 452 S.W. 2d 317 (1970); and *Olmstead* v. *Rosedale Bldg. & Supply,* 229 Ark. 61, 313 S.W. 2d 235 (1958).

Appellee relies upon *Shrieves* v. *Yarbrough,* 220 Ark. 256, 247 S.W. 2d 193 (1952), to support its contention that appellants are barred from bringing the present action. There we held that a subsequent action on the same cause was barred when the appellant had asserted the cause as a counterclaim in a previous suit and then took a voluntary non-suit on the counterclaim. Here appellants did not take a voluntary non-suit. To the contrary, the court, exercising its discretion and acting *sua sponte,* dismissed their claim without prejudice. As a result, there was no opportunity for the issues, the shortage of acreage and resulting damages, raised by the appellants in their cross-claim to be litigated in the previous action.

It was never contended that the court abused its discretion in dismissing appellants' cross-claim without prejudice. In the circumstances, we hold that appellants are not barred from asserting their cause in the present suit, and, therefore, the court erred in finding appellants failed to comply with the compulsory counterclaim requirements of § 27-1121 and in

granting appellee's motion for summary judgment on the ground of *res judicata*.

Reversed and remanded.

We agree: HARRIS, C.J., and FOGLEMAN and PURTLE, JJ.

ARKANSAS STATE HIGHWAY COMMISSION
v. Kenneth WARD et ux

78-309 579 S.W. 2d 603

Opinion delivered April 23, 1979
(In Banc)

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

Jim Burnett, for appellees.

DARRELL HICKMAN, Justice. The Arkansas State Highway Commission appeals this condemnation case alleging only one error: The court erred in not striking the testimony of the appellees' expert witness. We find no error and affirm the judgment.

The appellant sought condemnation in 1975 of .97 acres owned by the appellees to be used in construction of a bypass of the city of Clinton.

The case was tried to the jury on the issue of damages and the appellees called only one expert witness on this issue. He gave an opinion that the damages to the appellees were some $14,744.00. The expert witness for the Highway Commission testified that the damages were $550.00. The jury returned a verdict in favor of the appellees in the sum of $5,-500.00.

The appellees' expert witness sought to use five comparable sales as a basis of his opinion testimony. Three of those comparable sales were stricken by the trial judge as being objectionable. The other two were permitted to be used. One was a 1966 sale to Petit Jean Electric Cooperative involving .66 acres in downtown Clinton and the other was .52 acres sold in 1976 to the Heber Springs Savings and Loan Association. Both were located near appellees' land.

The appellant argues that the appellees' expert witness' testimony should have been stricken because one sale was too remote in time, the comparable sales were lots rather than tracts of land, the expert witness conceded the property was

enhanced by the construction and one of the sales was to an authority empowered to take property by the law of eminent domain.

We have held that there is no hard and fast rule as to the time beyond which a sale may be considered comparable and remoteness goes to the weight rather than to the admissibility of such testimony. *Arkansas State Hwy. Comm'n* v. *NWA Realty,* 262 Ark. 440, 557 S.W. 2d 620 (1977). The question of similarity or dissimilarity is basically a question for the trial judge and we find no abuse of that discretion in this case. See *Arkansas State Hwy. Comm'n* v. *NWA Realty, supra.* The appellant, during cross-examination of the expert witness, after considerable questioning, was able to get the witness to concede that "possibly" or "probably" all the land in the area — the witness said within 10 or 20 miles of the construction — was affected to some degree by the construction. Such an admission falls far short of evidence that the property of the appellees was, in fact, enhanced by the construction rather than damaged. See *Lazenby* v. *Ark. State Highway Commission,* 231 Ark. 601, 331 S.W. 2d 705 (1960).

One of the comparable sales was to Petit Jean Electric Cooperative, which we assume has the authority and power to condemn property. In the light of our recent decision in the case of *Ark. State Hwy. Comm'n* v. *First Pyramid Life Ins. Co. of America, et al,* 265 Ark. 417, 579 S.W. 2d 587 (1979), the trial court should have stricken this testimony unless the expert witness could have demonstrated whether the sale was negotiated, or was consummated because of Petit Jean Electric Cooperative's power to condemn property.

However, the issue to us on appeal, as it quite often is in this type of case, is whether the entire testimony of the expert should have been stricken. We have said many times that such a motion should be overruled, as it was, if there is any reasonable basis for the expert's testimony. *Ark. State Hwy. Comm'n* v. *Barnes,* 263 Ark. 567, 566 S.W. 2d 148 (1978); *Ark. State Hwy. Comm'n* v. *Russell,* 240 Ark. 21, 398 S.W. 2d 201 (1966). Since that is the only issue to us on appeal, and since there were other bases for the expert witness' testimony, we

find no prejudicial error requiring us to reverse the judgment of the trial court.

Affirmed.

BYRD, J., dissents.

K. A. KELLEY et al *v.*
Stanley REED, Executor, et al

78-324 580 S.W. 2d 682

Opinion delivered April 23, 1979
(Division I)
[Rehearing denied June 4, 1979.]

Allen & McSpadden and *Keith Rutledge,* by: *Tom Allen,* for appellants.

Murphy, Blair, Post & Stroud, by: *Robert D. Stroud,* for appellees.

DARRELL HICKMAN, Justice. Beulah Kelley of Batesville died in January, 1976. Her will, executed in August, 1954, was admitted to probate in the Independence County Probate Court. The Executor appointed was Stanley Reed, Chairman of the Administrative Board, First United Methodist Church of Batesville. The appellants, K. A. Kelley and Monnie Wilcox, brother and sister of Beulah Kelley, contested the will.

In the first hearing on this matter, the probate judge granted the appellees' demurrer to the evidence and dismissed the appellants' contest at the conclusion of their evidence. We decided, in an unpublished opinion, that there was sufficient evidence of a lack of testamentary capacity to require that the demurrer be overruled. On remand, the matter was reheard in its entirety. Testamentary capacity is not an issue on this second appeal. The main issue at the trial, and presented to us now, is whether an insane delusion from which Beulah Kelley suffered invalidated the will. The probate judge found as a fact that Beulah Kelley was a monomanic, possessing a delusion concerning her family. However, he found that there was no evidence that the 1954 will was a result or a product of that delusion.

The will of Beulah Kelley left her home to her mother for life and the remainder of her property, as well as the home on the death of her mother, to a trust ". . . to give aid to crippled persons, who are in need of help because of their infirmities . . . . " The will was to be administered by the Board of Stewards of the First Methodist Church of Batesville.

Both parties to this litigation presented evidence of Beulah Kelley's state of mind. Two witnesses for the appellants, both physicians, testified that in their opinion Beulah Kelley was paranoid and suffered from an insane delusion that she was mistreated because she was crippled. Ms. Kelley was confined to a wheel chair because of polio. Also, the appellants offered testimony from other witnesses that Ms. Kelley suffered from an insane delusion regarding her family. Her family consisted of the appellants and another sister who is not a party to this appeal. She was not survived by a husband or any children.

The appellees offered testimony of several witnesses that Beulah Kelley suffered from no mental deficiency as claimed by the witnesses for the appellants.

A good deal of the evidence regarding her delusion centered around the fact that Ms. Kelley thought that her family had worked against her in her campaign for reelection to the office of County Treasurer. She was defeated after serving several terms. Her defeat was some years after the will was executed in 1954.

The probate judge found that the delusion possessed by the decedent ". . . is not clearly shown to have influenced the testator in making the provisions of the will." The appellants argue that since it was proved that she suffered from a delusion regarding her family, and since the will did not provide for her family, then it must be set aside as a matter of law. The probate judge was correct. In two cases we have clearly said that in order to invalidate a will because of an insane delusion, it must first be proved that the delusion exists and, second, that the will is a product of the delusion. *Taylor* v. *McClintock,* 87 Ark. 243, 112 S.W. 405 (1908); *Dumas* v. *Dumas, et al,* 261 Ark. 178, 547 S.W. 2d 417 (1977). To agree with the appellants would be to hold that any will otherwise valid could be set aside simply because a relative was left out of a will. The probate judge found, as a matter of fact, that the appellants had not proved the will was a product of that delusion and we cannot say that finding is clearly against the preponderance of the evidence. *Dumas* v. *Dumas, et al, supra.*

The appellants raise three arguments but all of them relate to the insane delusion, the weight of the evidence regarding that issue and the findings of the probate judge. The probate judge correctly followed the law and we cannot say any of his findings are clearly against the preponderance of the evidence.

Affirmed.

We agree. HARRIS, C.J., and GEORGE ROSE SMITH and BYRD, JJ.

ARKANSAS STATE HIGHWAY COMMISSION *v.* PULASKI INVESTMENT COMPANY et al

78-325 580 S.W. 2d 679

Opinion delivered April 23, 1979
(Division I)
[Rehearing denied June 4, 1979.]

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

Friday, Eldredge & Clark, by: *George Pike Jr.,* for appellees.

DARRELL HICKMAN, Justice. The Arkansas State Highway Commission appeals a condemnation case from the Pulaski County Circuit Court in which the jury awarded the appellee, Pulaski Investment Company, et al, $234,400.00 for the taking of 32.92 acres to be used in the construction of the East Belt Freeway through Pulaski County.

The Commission alleges three errors on appeal, two of which are without merit. These two relate to the use of a sale by the appellees' expert witnesses, C. V. Barnes and James Larrison, in arriving at a damage figure. The particular sale occurred about 14 months after this condemnation case was commenced. The Little Rock Port Authority was the seller, Reynolds Metals Company the buyer; the price was $18,750 per acre. Both experts reduced the value of the land, discounting any enhancement to the property that might result from the construction of the freeway. Barnes reduced it to $11,700 per acre; Larrison to $12,000 per acre. Barnes said he considered it a comparable sale that could be used as both a before and an after sale; Larrison used it as an after sale. The only objection at the trial was that the sale was, in fact, an after sale enhanced by the proposed construction and, therefore, the experts' opinions of before value were without any fair or reasonable basis.

The appellant argues on appeal that all of the before value testimony of these witnesses should be stricken because of the improper use of this sale. We have permitted expert witnesses to make adjustments or to explain the difference between similar tracts. *Ark. State Hwy. Comm'n* v. *Sargent,* 241 Ark. 783, 410 S.W. 2d 381 (1967). According to the experts they reduced the value of the property to preclude any possibility of enhancement.

The appellant's argument is also without merit because it is argued that the entire before value testimony of the experts should be stricken on the basis that one sale was improperly considered. We have held many times that such a motion is improper where there is any basis for such an opin-

ion. *Ark. State Hwy. Comm'n* v. *Barnes,* 263 Ark. 567, 566 S.W. 2d 148 (1978). The record shows that Barnes and Larrison relied on other sales and additional information; therefore, we find that their opinions did, in fact, have some fair and reasonable basis.

The third point has merit: The appellant was improperly restricted in its cross-examination of the witness Barnes. The appellant tried to show that Barnes had in other similar cases refused to recognize the principle of enhancement, i.e., the value of a landowner's remaining property adjacent to a highway is increased as a result of the highway's construction.

It was the appellant's theory that appellees' remaining property, about 40 acres which will lie in a quadrant of an interchange after construction of the freeway, would be enhanced and appellees' damages thus reduced. The Commission's attorney attempted to ask Barnes about his testimony in four previous condemnation cases where part of an owner's land was taken leaving the remainder of the property adjacent to a quadrant of the interchange after construction. The trial court prohibited any such examination. That was error. In a similar case, ironically involving this same witness, we said:

> In view of the necessity for a new trial two other points should be mentioned. First, the court was unduly strict in limiting the highway department's cross-examination of the witness Barnes. The great value of the right of cross-examination has been emphasized so frequently that we need not cite the cases. Counsel sought to show, by interrogating Barnes, that in other condemnation cases he had testified that the taking had not enhanced the value of the landowner's remaining land, which was thereafter promptly sold at prices in excess of the valuation given by the witness. Of course, the trial judge has much discretion in controlling cross-examination, so that the inquiry does not go too far afield. Even so, if counsel could bring out by Barnes' own admissions that his earlier testimony had proved to be wrong in a number of instances, his credibility might well have been seriously impaired. The effort should have been permitted.

Ark. State Hwy. Comm'n v. *Lewis,* 258 Ark. 836, 529 S.W. 2d 142 (1975).

The Commission's attorney properly proffered Barnes' testimony in chambers by asking him questions and soliciting answers. While Barnes did not acknowledge that he was aware of enhancement in such cases, that is, that the landowner later received a larger sum of money for the adjacent property than Barnes estimated its worth, the questions that were asked of Barnes were proper and his answers were admissible. His knowledge, or lack of knowledge, and his record of accuracy regarding the value of property would go to the credibility to be given his testimony as an expert witness. Ark. Stat. Ann. § 28-1001, Rules 607 and 611 (Supp. 1977). Of course, the Commission may well be bound by his answers to his knowledge of afterfacts; but the questions and answers, themselves, are admissible.

We have emphasized before that wide latitude must be afforded in cross-examination. In the case of *Arkansas State Hwy. Comm'n* v. *Dean,* 247 Ark. 717, 447 S.W. 2d 334 (1966), we said:

> The proper cross-examination of a witness is the most effective attack that can be made upon his credibility and the best means of diminishing the weight which might be accorded his testimony. A wide latitude is permitted in cross-examination as to questions tending to impeach the credibility of a witness or in eliciting matter for consideration of the jury in weighing the testimony . . . Where the testimony of a witness is opinion evidence, it is essential that opportunity for thorough cross-examination be accorded. . . .Courts should be especially liberal in allowing full and complete examination of an expert witness. . . .

We find it was prejudicial error to limit the appellant in its cross-examination of Barnes and, therefore, reverse the judgment and remand the cause to the trial court for a new trial.

Reversed and remanded.

We agree: HARRIS, C.J., and GEORGE ROSE SMITH and BYRD, JJ.

Ivan QUATTLEBAUM et al *v.*
W. L. "Bill" DAVIS, as County
Judge et al

79-61 579 S.W. 2d 599

Opinion delivered April 23, 1979
(Division I)

Lessenberry & Carpenter, for appellants.

Robert Edwards, Pros. Atty., for appellees.

JOHN I. PURTLE, Justice. On September 12, 1978, the White County Equalization Board contracted with the Miller-Edmiaston Appraisal Company for appraisal of the property in White County. September 29, 1978, the White County Quorum Court approved Ordinance No. 50 authorizing payment of the fees charged by the contractor for the appraisal of the property. On December 27, 1978, the appellants, representing a large number of taxpayers, filed a referendum petition. They sought to have Ordinance No. 50 referred to the voters of White County for approval or disapproval. The county court refused to call a special election for the reason, among others, that the petition did not specifically ask for a special election. A mandamus action was then filed in the circuit court against the county judge and election commission seeking to have a special election held.

On February 2, 1979, the Petition for Writ of Mandamus was presented to the circuit court. The court dismissed the county election commissioners as not being proper parties to the action. The court further refused to grant the writ as to the county judge for the following reasons: (a) The petition did not request a special election; (b) the failure to request a special election vested jurisdiction with the county court to determine the necessity for calling a special election; and, (c) the county court acted within its discretion in determining that there was no need for a special election.

ON APPEAL APPELLANTS CONTEND THAT THE TRIAL COURT ERRED IN REFUSING TO GRANT THE MANDAMUS ORDERING THE SPECIAL ELECTION ON ORDINANCE NO. 50.

Amendment 7 to the Constitution for the State of Arkansas provides that the people may refer an ordinance to the people for an election upon obtaining the signatures of 15% of the votes cast in the last election for circuit clerk in the county where the election is sought to be held. It provides that a petition for referendum may be filed from 30 to 90 days after the passage of the ordinance. Amendment 7 specifically states

that a special election may be requested upon the timely filing of the requisite number of signatures with the county election board.

Ark. Stat. Ann. § 84-706 (Repl. 1960) reads as follows:

. . .

> Each year the board shall, beginning the first day of August, and if deemed necessary, through the first day of September, but not thereafter except when convened in special session, which meeting in special session shall not last beyond the first day of October, except in those counties wherein the assessed value of real and personal property has been found by the assessment coordination department to be below the percentum of true or fair market value as required by law such special session may continue until, but not later than, the third Monday in November of each year, exercise its functions as a board of equalization to equalize the assessed value of all acreage lands, city and town lots, other real property and personal property subject to local assessment, regardless of the year in which such property was last assessed by the local assessor.

. . .

Ark. Stat. Ann. § 84-717 (Repl. 1960) provides as follows:

> The Equalization Board of any county, on petition of the County Judge, or on its own motion, shall, at any time after adjournment of its regular meeting and before the first Monday in October next following such adjournment, convene in special session for the purpose (1) of completing its work of equalization of property assessments or (2) for the purpose of reviewing or extending its work of equalization of property assessments; and, for that purpose, said board shall be vested and charged with all the powers and duties with which such board is vested and charged when meeting in regular session and, in addition, said board shall be empowered to employ qualified appraisers, abstractors

> or other persons needed, to appraise properties which the board may need in the discharge of its duties.
>
> The petition of said Equalization Board shall specify the date on which the board shall convene and such board may thereafter exercise its functions but not later than the third Monday in November next following.

Ark. Stat. Ann. § 84-718 (Repl. 1960) allows appeals to be taken from the action of the board of equalization within 10 days of notice, by the taxpayer, and further provides that it shall be held not later than 45 days prior to the date on which the tax books for the year are required to be delivered to the county clerk.

Ark. Stat. Ann. § 84-719 (Repl. 1960) reads as follows:

> The expense of any special session of the County Equalization Board, including the expense for employment of appraisers, abstractors and other persons needed, shall be allowed and paid from the general fund of the county. Provided, however, that the general fund of the county shall be reimbursed by transfer to it from the funds of the respective taxing units of the county, and the amount to be contributed by each such taxing unit shall be in the proportion that the total of such ad valorem taxes collected for the benefit of each such taxing unit bears to the total of such ad valorem taxes collected for the benefit of all such taxing units during collection period next following such special session.

Ark. Stat. Ann. § 84-721 (Repl. 1960) allows special sessions by the board of equalization and authorizes the board to employ appraisers and others as needed to appraise the property.

Ark. Stat. Ann. § 84-722 (Repl. 1960) provides expenses incurred by the county equalization board, including the expenses for appraisers, shall be allowed and paid from the general fund of the county. The statute allows the county fund to be reimbursed by the respective taxing units within the county in proportion to the benefits derived.

Ark. Stat. Ann. § 17-4011 (Supp. 1977) makes provisions for initiative and referendum elections on matters concerning county government. This statute complies with the general provisions of Amendment 7 to the Constitution of the State of Arkansas. § 13 (b) of Ark. Stat. Ann. § 17-4011 (Supp. 1977), Act 1977, Number 742, provides that a referendum petition may be submitted to the electors during a general election, or it may be referred to the electors at a special election called for the expressed purpose proposed by the petition. The statute then provides that the county court and the quorum court have the discretionary powers to call special elections on county ordinances in the event the voters themselves do not see fit to do so.

The appellants candidly admit that their petition did not request a special election, thus they fail to abide by the plain and unambiguous wording of the constitution and laws. We recognize that due to the time element involved that appellants really had in mind calling for a special referendum. However, we are not authorized to change the petition for them. Also, we agree that a liberal construction should be applied to the amendment and laws above-stated. In doing so, however, the courts are not authorized to completely ignore the plain words of the statutes as enacted by the General Assembly.

The powers granted to the county equalization board under Ark. Stat. Ann. § 84-706, et seq, plainly gave the board the right to employ appraisers and further states payment *shall* be from the county general fund, which shall be reimbursed by the respective taxing units. We do not have the contract before us. It has not been made a part of the record, nor abstracted, and we are therefore unable to treat it as other than a valid contract. In that case, it appears the General Assembly has mandated payment from the county funds and neither the quorum court nor the county court would have any discretion in whether the expenses should be paid.

When mandated by the General Assembly, no appropriation by the county is necessary. *Green* v. *Shell,* 239 Ark. 1161, 397 S.W. 2d 363 (1965). As we view Ark. Stat. Ann. §

84-719 the expense of the appraisers in this case must be paid by the county and regardless of the results of a referendum this would be true.

We recognize the natural conflict which has arisen in this matter. On the one hand, the people of White County are faced with the loss of state turn-back funds because the assessment of property in the county has been determined by an agency of the state to be inadequate to meet the requirements of the law. On the other hand, the electors are faced with the possibility of increased taxes at a time when the cost of living is ever increasing. The appellants have taken the course believed to be the least detrimental to them in the long run. However, the county judge and the quorum court and, no doubt, the board of equalization have made decisions which they believe are in the best interest of the people of White County. Therefore, the matter has been brought to a head in this proceeding. It is our duty to resolve this situation in accordance with the law and precedent as we understand them to be.

There seems to be no question but that the petition was timely filed and contained the requisite number of signatures and otherwise met all of the requirements except the request for a special election. Appellants rely on *Lewis* v. *Conlee, Mayor,* 258 Ark. 715, 529 S.W. 2d 132 (1975), as authority for requiring a local government to conduct a special election when the prerequisites for a referendum are met by the voters. We do not agree that this case stands for the proposition that any time the requisite number of signatures are obtained, in a timely manner, a measure must be referred to a special election. In *Conlee* the city had enacted an ordinance stating that a special election on a referred matter would be held at a period not less than 10 days after filing of the petitions. When the city government attempted to postpone the election for a period of almost two years, we held it was an abuse of their discretion and required a special election to be held. Since the ordinance in *Conlee* set no upper time limit on the holding of the special referendum, we held that to postpone such election for 21 months was a violation of Amendment 7.

We agree with the trial court that the matter of calling a special election, if not exercised by the electors, rests in the discretion of the county court and/or the quorum court, either of which may determine the necessity of calling a special election. The reasons set forth in the testimony of the county judge clearly establish the court was acting within its discretion in refusing to call a special election on his own volition. The same reasons would apply to the quorum court. Appellants also rely on *Kirkwood* v. *Carter, County Judge,* 252 Ark. 1124, 482 S.W. 2d 608 (1972), as grounds to support their request for the special election. In *Kirkwood* the electors of Faulkner County had dictated that the county purchase electronic voting machines for all precincts in the county where as many as 300 votes were cast. Although the suit in *Kirkwood* was in the nature of a Petition for Writ of Mandamus against the county judge and county board of election commissioners, it was not for the purpose of compelling them to hold an election. Rather it was for the purpose of requiring them to abide by the results of an election already held. *Cochran, Mayor* v. *Black,* 240 Ark. 393, 400 S.W. 2d 280 (1966), involved an initiated ordinance rather than a referendum. The court in *Cochran* attempted to continue the election until a date beyond the general election. Again, we do not feel that this initiated act is in point with the attempted referendum. Indeed, Amendment 7 to the Constitution required such elections to be held in the next general election and it was not within the power of the court to extend it beyond that time. In the case of *City of North Little Rock* v. *Gorman,* 264 Ark. 150, 568 S.W. 2d 481 (1978), we considered two cases involving the city ordinances of North Little Rock. One case was filed in chancery court and the other in circuit court. We had no trouble in determining that the chancery court did not have jurisdiction in this matter. *Nethercutt* v. *Pulaski County School District,* 248 Ark. 143, 450 S.W. 2d 777 (1970). The second case dealt with whether or not the subject matter of the ordinance sought to be referred was a matter subject to referendum action. Therefore, the matter of a special election as such was not before the court.

Although we agree that the provisions of Amendment 7 and Acts of 1977, No. 742, should be construed liberally, we feel this contract is controlled by the specific provisions of Ark. Stat. Ann. §§ 84-706 — 717 — 719. Therefore, since the

General Assembly has authorized this action by the board of equalization and mandated payment from the general fund of the county, a special election would not have any effect on the contract here in question. For these reasons, we agree that in this particular case a special election should have been specifically requested even though if successful it would not have changed the effect of the contract made by the board of equalization.

Affirmed.

We agree. HARRIS, C.J., and GEORGE ROSE SMITH and BYRD, JJ.

Willie Earl BELL *v.* STATE of Arkansas

CR 78-69 579 S.W. 2d 586

April 23, 1979

[redacted]

Willie Earl Bell, pro se.

Steve Clark, Atty. Gen., for appellee.

PER CURIAM

Petitioner was convicted of burglary and theft of property and sentenced to 12 years and three years, respectively. We affirmed, *Bell* v. *State,* not designated for publication (November 6, 1978). Petitioner now seeks permission to proceed in circuit court under Criminal Procedure Rule 37 for postconviction relief and sets forth two grounds for relief challenging the composition and empanelling of the jury. His appeal was filed on May 15, 1978, and on September 12, 1978, his attorney filed a motion for permission to proceed under Criminal Procedure Rule 37, which was denied on October 2, 1978, as being premature. Petitioner's present petition is identical to the petition filed by his attorney and the allegations are discussed below.

Let it be stated at the outset that the composition of the jury was not challenged in the trial court and voir dire of the jury is not included in the record. In order for a petitioner to claim postconviction relief regarding the deprivation of a constitutional right when the issue was not raised in the trial court, the burden is on petitioner to show why the issue was not raised and the prejudice that resulted. *Wainwright* v. *Sykes,* 433 U.S. 72 (1977). This petitioner has failed to do.

However, regarding petitioner's allegations, he first alleges:

> A. The jury did not represent a cross-section of the community from which it was chosen in that its racial representation was considerably disproportionate to the racial composition of the population area thereby violating the defendant's Sixth Amendment right to a fair and impartial jury;

There is no requirement that juries must reflect various distinctive groups in the community, but the jury panel from which the jury is drawn must not systematically exclude the distinctive groups. *Taylor* v. *Louisiana,* 419 U.S. 522 (1975). Petitioner may not challenge the make-up of the jury merely because a certain number of members of his race were not on the jury, if, in fact, they were not. He must prove his race was systematically excluded. *Apodaca* v. *Oregon,* 406 U.S. 404 (1972).

Secondly, he alleges:

> B. The jury was not impanelled in accordance with the applicable statutory provisions of the law of the State of Arkansas and of the United States.

Petitioner's conclusory allegation provides this Court with no facts upon which we could grant relief. He fails to allege by what method the jury was empaneled or by what procedure it should have been empaneled. He even fails to provide the statutory provisions under which he is claiming relief.

Accordingly, petitioner's pro se petition for permission to proceed under Criminal Procedure Rule 37 for postconviction relief is hereby denied.

Petition denied.

SUPERIOR FEDERAL SAVINGS & LOAN ASSOCIATION et al *v.* Louise SHELBY

78-297 580 S.W. 2d 201

Opinion delivered April 30, 1979
(In Banc)

Shaw & Ledbetter, for appellants.

Rex M. Terry, for appellee.

GEORGE ROSE SMITH, Justice. This is a claim filed by the appellee for additional compensation under the workers' compensation law. The employer and its insurance carrier resisted the claim on the ground that it was not filed within one year after the last payment of compensation and was therefore barred by limitations. Ark. Stat. Ann. § 81-1318 (b) (Repl. 1976). The Commission rejected the plea of limitations, finding that compensation had been furnished by the carrier to the claimant, in the form of medical treatments, within less than a year before the claim was filed. We find no substantial evidence to support that conclusion and therefore

reverse the circuit court's judgment affirming the award and dismiss the claim.

The facts are not in dispute. Mrs. Shelby suffered a back injury in the course of her employment on February 14, 1975. She lost no time from work, but she was treated from time to time by Dr. Seubold, a chiropractor of her own choosing. On July 31, 1975, Dr. Seubold submitted a bill for $204, which was accompanied by a final report that the patient was asymptomatic and no longer under the doctor's care. The carrier paid that bill on August 25, 1975.

Dr. Seubold, also on August 25, realized that he had made a mistake in considering the case to be closed and directed his secretary to telephone the insurance carrier to keep the file open. In response to that call the carrier, on August 26, sent a printed questionnaire to Dr. Seubold, requesting a final report and asking for specific information, including this question: "Is the employee still under your treatment? Yes ____ No ____."

Dr. Seubold ignored the questionnaire and in fact did not communicate with the carrier for over 17 months. He did, however, continue to treat Mrs. Shelby. He sent his monthly bills to her and, when she expressed concern about their not having been paid, assured her that the insurance company would pay them. Finally, on February 8, 1977, Dr. Seubold submitted a bill for $405 to the carrier, for medical services consisting primarily of 42 spinal manipulations effected between July 28, 1975, and January 17, 1977. The Commission expressly found that Dr. Seubold was in error in waiting until February of 1977 to send his bill to the insurer, and the doctor testified himself that he had been at fault.

The actual claim now in issue was not filed with the Commission until July 7, 1977. The Commission, in holding that the statute of limitations had not run, relied upon the carrier's request, made on August 25, 1975, that Dr. Seubold file a final report. The Commission went on to say: "The requested final report was never filed, clearly indicating to all concerned that the claimant was still being treated by Dr. Seubold. Yet, the carrier, acting on the previously retracted 'final report,' purportedly 'closed the file' and now takes the

position that they were unaware of continuing medical treatment at the hands of Dr. Seubold." There is actually no testimony whatever that the carrier knew that Dr. Seubold was continuing to treat the claimant after the secretary's telephone call on August 25, 1975. The carrier simply had no information one way or the other.

The Commission's reasoning, which puts the burden on the carrier to find out whether medical treatments are continuing, misconceives the nature of a statute of limitations. The burden is, rather, on the claimant to act within the time allowed. What we said in a similar situation in *Phillips* v. *Bray,* 234 Ark. 190, 351 S.W. 2d 147 (1961), is pertinent:

> No one can reasonably contend that a doctor could, by carelessness or connivance, keep the case in suspense for an unlimited time by merely failing to present his bill to the Commission. It seems perfectly obvious that the primary purpose of the one year statute of limitations is to give the claimant that much extra time to decide whether he has been fully compensated for his injury, and not for the purpose of paying belated medical bills.

The one-year statute governing claims for additional compensation runs from the last "payment of compensation," which we have held to mean the *furnishing* of medical services. *Heflin* v. *Pepsi Cola Bottling Co.,* 244 Ark. 195, 424 S.W. 2d 365 (1968). Thus the Commission's reasoning asserts that in this case the carrier was actually furnishing medical services to the claimant, even though the carrier had merely inquired whether the employee was still under treatment and had no actual knowledge that any medical services were being provided. As we said in *Phillips* v. *Bray, supra,* such an interpretation amounts to a nullification of the one-year statute of limitations. We conclude that the statute was permitted to run in the case at bar, not as a result of any action on the part of the carrier but solely as a result of the failure of the claimant or her doctor to file a claim within the time allowed.

Reversed and dismissed.

HICKMAN, J., concurs.

PURTLE, J., dissents.

DARRELL HICKMAN, Justice, concurring. I agree with the majority decision. However, it is my opinion that the claimant was blameless. She inquired of her doctor about the bills, expressing concern. According to her testimony, the doctor told her not to worry, that the bills would be paid by the Workers' Compensation insurance.

The doctor admitted that he was at fault in sending to the appellant the final report; he failed to cause intermediate reports to be filed with the appellant; he failed for almost a year to return the form to the appellant that would have clarified his error. The charges were permitted to accumulate to almost double the amount of the first bill before the company was notified of the continuing services.

Since the claimant was blameless, as well as the appellant, that leaves the doctor as solely responsible for the error — an error which should not work to the financial prejudice of the claimant. I presume that will be the case, but I feel strongly enough about the matter to emphasize the question of fault for the benefit of all concerned.

JOHN I. PURTLE, Justice, dissenting. I disagree with the majority because of my interpretation of the facts. I agree that appellants have accurately stated the law as has the majority of this Court. I think the Commission properly applied the facts to the law when it held the carrier was on notice that appellant was still being treated for the admitted compensable injury.

The majority fail to point out that after the appellant received notice that appellee was still being treated and sent the request for additional information their file was improperly closed and thereafter there was nothing in their office to show the appellee was still being treated.

If Dr. Seubold was negligent in not forwarding interim reports it is certainly negligence on the part of appellant to fail to follow up. Simply because the carrier and the doctor failed to do their duties it is unfair to cause appellee to suffer the consequence of their combined negligence. It is normal

for an injured employee to assume the matter is being properly handled when she reports the injury and obtains medical services which are paid by the carrier. The average worker is unaware that a formal claim must be filed in order to preserve her rights when she has been informed the case has been accepted as compensable and payments have been made on her behalf.

Perhaps there is something missing in our law if a claim may be legally denied because a formal claim was not filed on a particular date. Maybe the filing of notice and having it accepted or denied should be treated as sufficient notice of the claim. Whether this is a good idea is not up to this Court to decide. There is no such provision under the present law.

I believe the facts in this particular case fit the decision in *Reynolds Metals Company* v. *Brumley,* 226 Ark. 388, 290 S.W. 2d 211 (1956). We therein stated:

> "This holding follows the general rule that where an employer or his insurance carrier has furnished an injured employee medical and hospital services, this constitutes the payment of compensation or a waiver which suspends the running of the time for filing a claim for compensation."

It is not in keeping with the intent of the Worker's Compensation Act, nor in the public interest, to allow an employer to accept a claim and pay benefits for medical services furnished to an injured employee and then close the file and do nothing until the statute runs and then deny the balance of the claim. Under the majority opinion, a carrier could receive medical bills and reports and file them away, or destroy them, and then rely on the statute of limitation to defeat a just and fair claim.

I would hold that appellant had tolled the statute by accepting the claim and then closing it without even so much as a telephone call to the doctor who they knew was treating the injured employee. The last communication the appellant had with Dr. Seubold was that the appellee was still receiving treatment. They should have known there was at least an outstanding bill. In fact, they did receive another bill before the

statute ran but did not pay it. The appellant suddenly became aware of everything as soon as limitations had expired.

I see no need to furnish additional citations in support of my position in view of the majority opinion.

Leroy BURRIS *v.* STATE of Arkansas

CR 79-17 580 S.W. 2d 204

Opinion delivered April 30, 1979
(Division I)

Albert R. Hanna, for appellant.

Steve Clark, Atty. Gen., by: *Catherine Anderson,* Asst. Atty. Gen., for appellee.

GEORGE ROSE SMITH, Justice. The appellant, Leroy Burris, was convicted of rape and sentenced to 20 years' confinement. He contends that the trial court should not have permitted each of two witnesses to testify that the prosecutrix, within a few minutes after the occurrence, stated that she had been raped by Burris. We hold that both statements were admissible.

The prosecutrix testified that, in the absence of her husband, Burris forced her into her apartment and raped her. When she managed to escape she ran, nearly naked, to a neighbor's house and called the police. Officer Worth answered the call and testified that when he reached the house the prosecutrix was "very hysterical. She was crying, wringing her hands." It took the officer a few minutes to get her calmed down to where he could get any information from her. She then said that she had been raped by Leroy Burris.

The prosecutrix also called her brother within 15 or 20 minutes after the occurrence. He testified that she sounded really hysterical, that she was "all shook up" and was crying. At first she wouldn't say what had happened, but she finally said that she had been raped by Leroy. The witness went to his sister's apartment and saw her within five minutes after the call. Officer Worth was there, and she was still hysterical and crying.

The statements were admissible as being part of what was formerly referred to as the res gestae. The matter is now covered by Rule 803 (2) of the Uniform Rules of Evidence, Ark. Stat. Ann. § 28-1001 (Supp. 1977), which provides:

> The following are not excluded by the hearsay rule, even though the declarant is available as a witness:
>
> * * * * *
>
> (2) Excited utterance. A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.

The trial judge was unquestionably justified in concluding from the testimony that the prosecutrix's experience had been a "startling event" and that she was still under the stress of excitement caused by it when she made the two statements. They were therefore admissible under the quoted Rule.

Affirmed.

We agree. HARRIS, C.J., and BYRD and HICKMAN, JJ.

George B. THWEATT et al *v.* J. E. HALMES and Pauline HALMES

78-172 580 S.W. 2d 685

Opinion delivered April 30, 1979
(In Banc)
[Rehearing denied June 4, 1979.]

Friday, Eldredge & Clark, by: *William L. Terry,* for appellants.

A. Jack King, for appellees.

CONLEY BYRD, Justice. The trial court found that appellees J. R. and Pauline Halmes and those through whom they claimed title had acquired by adverse possession an undivided one-half interest in and to all the coal in and under the "back forty" or "south forty" originally conveyed to Charles Thweatt on June 3, 1927. For reversal appellants, who claim title as heirs or devisees of Charles Thweatt and Frank H. Dodge, contend the chancellor erred in holding that the actions of Joe Halmes, grandfather of appellee J. E. Halmes, were sufficient under the law to establish all required elements of adverse possession, especially when viewed in light of the rules pertaining to tenants in common.

The parties stipulated that the area involved — *i.e.* SW NE 22, T 10 N, R 26 W — consisted of forty acres and was also known as the "back forty" or "south forty" of the Joe Halmes farm.

Alic Nichols testified that he was familiar with the Joe Halmes' south forty. Coal mining commenced in 1920 or thereabouts and lasted until about 1950. The mined coal went mostly to Mulberry and Missouri. It was common

knowledge in the community that Joe Halmes delivered coal for use of the people in the community and elsewhere.

J. E. Halmes testified that there was a continuous mining operation carried on from the early 30's until the 50's. The last mining was done in 1952 or 1953. His grandfather, Joe Halmes, was the only person who benefited or profited from an ownership in the coal under the land during that period. The mining operation would produce so much coal and then wait until the coal market started moving before the mining operation would start up again. It was common knowledge that his grandfather was mining and had coal for sale. His grandfather advertised "coal for sale" in the paper and maintained a big sign on the place with an arrow that said "Coal for Sale." His father and Robert McElroy leased the land in 1936 or 1937 and mined continuously until Mr. McElroy died in 1940 or 1941. After that operation stopped people would come in and lease a small area, on which two or three men would work. After he got out of military service in 1946, he, his brother, and their father bought an electric coal digging machine and mined for two years. After they closed down, some other people leased the mine and worked it by hand until the early 50's. This mining operation all took place on the "back forty" or "south forty" of the Joe Halmes place. He estimated there were 15 shafts sunk on this particular 40. He states that the coal mining was as continuous as it could be because of the market. If the market was there, the mining was carried on every day or every month. Most of the miners were farmers. They would grow what they could and spend all of their other time digging this coal. If there was a market for coal, the miners would let their crops go, but most of the time there was not that much market for coal in the hot summertime and it was fall before people really started hauling coal. Generally, one would find more mining activity after the miners were able to lay by their crops.

J. E. Hardcastle testified that he helped sink some of the shafts on the "back forty." This occurred from 1928 to about 1939 or 1940. He estimated there were five or six shafts located upon this particular forty besides the slopes. "The slopes would just go back in the ground about 20 feet till you get to the coal. A lot of us fellows farmed and when we got our crops laid by we would go back to mining, but there were a

lot of guys out there that didn't do anything but mining. There was a sign out there pointing to the coal. We built a road out there in the 30's to haul that coal out on. This one forty was the only place we worked. The rest of the area was too deep to mine."

Theo Dunford testified that he knew Joe Halmes carried on a mining operation out there for 20 or 25 years. "It was fairly common knowledge that Mr. Halmes was in the coal business. The coal was distributed to Ozark, Mulberry, Missouri and all around." On cross-examination he testified that he recalled it as the other witnesses had — *i.e.* they would work when there was a market for coal. "Hardly ever did they work the whole year around. There was some out there that worked the whole year around. Most of them just worked after their crops were laid by. It was not possible that a whole year would go by without any mining activity at all."

Appellant George Thweatt testified that he found the deed to his father in his father's papers after his father's death in 1962. The mineral deed to the coal had never been separately assessed and he had never paid any taxes on the land. There were letters among his father's papers showing that there were a few individual miners operating on the property in 1938.

For reversal appellants rely upon *Claybrooke* v. *Barnes,* 180 Ark. 678, 22 S.W. 2d 390 (1929). There, in reversing a trial court's finding of adverse possession covering a 160 acre tract, we stated:

> ". . . Evidence for appellee tended to show that some mining had been done on the land for each year since 1911, but nearly all of the mining had been done on a single 40-acre tract of land. All of the mining was surface mining, and no mines were opened up and mining machinery installed on the land. There was no occupancy of any of the land continuously for a period of seven years. The most that was shown was that, every three or four months, some of the appellees would work surface mines on the land. They all did so under leases from W. E. Barnes in his lifetime and from Mrs. Laura Barnes after his death. It is not possible, however, to take out

> any definite part of the land which was so mined, and the evidence does not show any continuous operation of mines for the period of seven years. At best it was only a fitful and desultory occupancy for mining purposes, and was not continued for the necessary length of time to give title by adverse possession for the statutory period of seven years."

On the contrary, the record here shows that there was a continuous occupancy of the "south forty" or "back forty" for mining purposes. Some 15 shafts were sunk in addition to the mining of the slopes. A sign was maintained with an arrow showing "Coal for Sale." Advertisements of "Coal for Sale" were run in newspapers. A road was constructed to haul the coal to market. The parties stipulated that the only area on which appellees claimed adverse possession was the area known as the "back forty" or "south forty" of the Joe Halmes' farm. All of the witnesses described the area worked as the "back forty" or "south forty." Furthermore, the letters in the files show that Charles Thweatt had knowledge of such coal mining operation as early as 1938. Consequently, we cannot say that the trial court's finding of adverse possession is contrary to a preponderance of the evidence.

Affirmed.

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

DARRELL HICKMAN, Justice. With all due respect, the majority has, in my judgment, failed to apply the law to this case.

The appellants are owners of one-half of the mineral interests in this land by virtue of a deed that dates back to 1927. The original owners of the interest, kinsmen of these parties, are now deceased.

This property interest was held by the parties and their predecessors as tenants in common. The coal has not been mined for 25 years. Before that, there was a small mining operation. There is not one item of evidence in this record of any single act that could be used to argue that the appellants

or their predecessors in title had notice of adverse possession as required by law.

In the case of *McGuire* v. *Wallis,* 231 Ark. 506, 330 S.W. 2d 714 (1960), we dealt with a similar case where possession, as well as other facts, was used as a justification to claim title adversely. In *McGuire,* the cotenant was in charge of a farm, managing it for his own benefit, paying taxes and paying the installment payments upon a mortgage debt. We found these facts insufficient to support a claim of adverse possession against a cotenant. We said:

> . . . *in order for that possession to be adverse it was incumbent upon Clovis to bring home to his cotenants knowledge of his hostile claim, either directly or by acts so notorious and unequivocal that notice must be presumed. Smith* v. *Kapler, supra.* Upon this point Clovis's proof is fatally deficient. It is fair to say that his own testimony, when carefully read in its entirety, discloses that he never asserted a claim of exclusive ownership to a single one of his interested uncles, aunts, or cousins. His testimony implies that these relatives should have deduced from his occupancy that his position was hostile, but the law is otherwise.
>
> Nor do we find in the record proof of any acts so notoriously and unequivocally hostile as to charge the appellants with knowledge of Clovis's adverse claim. Counsel list an imposing array of facts that are said to satisfy the appellee's burden of proof, but for the most part the various acts relied upon are merely subordinate aspects of conduct which, taken altogether, amounts simply to possession of the property. . . . [Emphasis added.]

The appellees argue that they had exclusive possession of the property and did not share the benefits from the coal. But, aside from these facts and the passage of time, they have nothing more. There was no severance of the mineral interests so that the taxes could be paid separately. The first notice of an adverse claim was when this lawsuit was filed by the appellees.

We have traditionally required a higher degree of proof

when one cotenant seeks title by adverse possession against another cotenant. In the case of *Bowlin* v. *Keifer,* 246 Ark. 693, 440 S.W. 2d 232 (1969), we emphasized the principles of law that apply to such a case.

> . . . In order for possession of a tenant in common to be adverse to that of his cotenants, knowledge of the adverse claim must be brought home to them directly or by such notorious acts of unequivocal character that notice may be presumed. *Griffin* v. *Solomon,* 235 Ark. 909, 362 S.W. 2d 707. Stronger evidence is required when a family relationship exists than in other cases. *McGuire* v. *Wallis,* 231 Ark. 506, 330 S.W. 2d 714; *Ueltzen* v. *Roe,* 242 Ark. 17, 411 S.W. 2d 894. The burden of proof was upon appellee. *Smith* v. *Kappler,* 220 Ark. 10, 245 S.W. 2d 809. . . .

The appellees have failed to demonstrate any hostile act or acts that could place the appellants or their predecessors in title on notice that their claim, evidenced by deed of record, was being taken from them without compensation by virtue of the right called adverse possession.

It was never intended that the law of adverse possession be used to give someone something that is unjustified. The law of adverse possession is intended to be a tool to solve title disputes, cure legal defects and settle boundary line disputes. It has been used by the appellees in this case to take something that does not belong to them rightfully or legally. With all due respect to the majority, I submit that the law was misinterpreted by the trial judge, not applied by the majority, and I would reverse and dismiss the decree of the chancellor.

I am authorized to state that HARRIS, C.J., and FOGLEMAN, J., join in this dissent.

Johnnie Eugene COCKMAN *v.* WELDER'S SUPPLY COMPANY and HOME INSURANCE COMPANY

78-326 580 S.W. 2d 455

Opinion delivered April 30, 1979
(In Banc)

[Rehearing denied May 29, 1979.]

Pearce & Robinson and *Richard L. Mattison,* for appellant.

Lowe & Hamlin, and *Tom Forest Lovett,* P.A., for appellees.

FRANK HOLT, Justice. Appellant, injured when a grinding disc he was using disintegrated or exploded, brought suit

to recover damages for strict liability, breach of warranty, and negligence against appellee Welder's, a retail distributor of grinding discs, and Gulf States Abrasive Manufacturing Co., the manufacturer. Home Insurance Company, the workmen's compensation carrier for appellant's employer, Benton Crawler Works, intervened. The suit against Gulf States was settled and dismissed prior to trial by agreement of the parties. At the conclusion of appellant's case, appellee Welder's motion for a directed verdict was granted. Appellant asserts the court erred. We hold the court was correct.

In the determination of a court's correctness in directing a verdict, we take the evidence and all reasonable inferences most favorable to the party against whom the verdict was directed and, if there is any substantial evidence tending to establish an issue in favor of that party, it is error to take the case from the jury. *Daniels* v. *Chicago, R.I. & Pac. R.R.,* 256 Ark. 874, 511 S.W. 2d 175 (1974); and *Barrentine* v. *The Henry Wrape Co.,* 120 Ark. 206, 179 S.W. 328 (1915).

Appellant states that, since the proof necessary to impose liability on the theory of strict liability or implied warranty of merchantability is essentially the same, he will discuss his evidence in terms of strict liability although his evidence also demonstrates the appellee's liability for breach of warranty. He argues that he met his burden of proof of presenting a factual issue as to strict liability by demonstrating a defect in a product through circumstantial evidence, citing *Higgins* v. *General Motors Corp.,* 250 Ark. 551, 465 S.W. 2d 898 (1971). There, although we did not judicially recognize the theory of strict liability in tort, in discussing a party's burden when suing for damages under that theory, we said:

> In the absence of direct proof that the product is defective because of a manufacturing flaw or inadequate design, plaintiff must negate the other possible causes of failure of the product for which the defendant would not be responsible in order to raise a reasonable inference that the dangerous condition existed while the product was still in the control of the defendant.

Subsequently, our legislature recognized strict liability by enacting Ark. Stat. Ann. § 85-2-318.2 (Supp. 1977), which provides:

> A supplier of a product is subject to liability in damages for harm to a person or to property if:
> (a) the supplier is engaged in the business of manufacturing, assembling, selling, leasing or otherwise distributing such product;
> (b) the product was supplied by him in a defective condition which rendered it unreasonably dangerous; and
> (c) the defective condition was a proximate cause of the harm to person or to property.

Appellant argues that he had adduced sufficient evidence to show that the grinding disc was supplied by the appellee distributor in a defective condition which rendered it unreasonably dangerous, and its defective condition was the proximate cause of his injuries.

Appellee Welder's is engaged in the business of selling and distributing grinding discs and other supplies. It supplied appellant's employer with this grinding disc in August, 1973. From the time of appellant's employer's receipt of the disc, 10 months previously, to the date of appellant's injury, the disc was stored, hanging on a nail, in an area of the shop in which there were no activities which would disturb the disc. According to the shop foreman, who was present every day, the disc had not been disturbed although the area was open to the public. The foreman had properly attached the disc to the grinding machine the night before appellant's use and resulting accident. It had not been used previously. Normally, it would last through several days of continuous use before wearing out. Appellant was using the disc properly and had, at the time of his injury, been using it for only 20 or 30 minutes when it unexpectedly exploded. According to appellant's expert witness, the disintegration was not caused by a malfunction of the grinding machine, and the machine was running smoothly at a speed less than that recommended as the maximum for the disc. He could find nothing that indicated a manufacturing defect. He felt that, sometime after its manufacture, a defect had been injected into the disc. Appellee's method of transporting the

discs, loose in its truck, was not a proper or desirable way to transport the discs. All safety guidelines concerning the handling of abrasives, including grinding discs, were designed to prevent them from receiving any sort of shock by bouncing around or into one another. The disc would be subject to damage if struck an impact blow. When the witness was presented with a hypothetical question containing assumptions of the recited evidence, which included that the disc was transported loose in the trailer of a truck when delivered by appellee, the disc had been stored undisturbed for 10 months after purchase from appellee by appellant's employer, and it was mounted and used properly, it would be his opinion that the disc was defective when sold and delivered by appellee Welder's to appellant's employer.

On cross-examination as to the basis of his opinion, this witness admitted that he had made a previous report to the insurance compensation carrier, the intervenor, that "[i]n summary, I find no conditions with either the air grinder or the grinding disc that would have caused this accident," based upon an examination of the disc fragment. This was still his conclusion at the time he testified at trial; he was not able to tell the jury "with any real certainty that it was defective when it was delivered [by appellee] on August 9 or 8"; it was beyond his ability to make a determination as to why the disc exploded; it was also beyond his ability to determine that the disc was defective when it was delivered by appellee to appellant's employer; since the disc fragmentized, a defect occurred at some point in time; however, it was beyond his ability to determine when the defective condition was injected; he had no information whereby he could "with reasonable certainty" form an opinion that the disc was not properly manufactured or at the time of delivery to appellee and by appellee to appellant's employer "it had a defect or did not have a defect;" and finally, he could not "arrive at a conclusion to any reasonable degree of certainty whether it [the disc] was defective or not."

In *Ark. State Highway Comm'n.* v. *Byars,* 221 Ark. 845, 256 S.W. 2d 738 (1953), we said:

> Whether there is substantial evidence to support a verdict is not a question of fact, but one of law. Because a

> witness testifies as to a conclusion on his part does not necessarily mean that the evidence given by him is substantial, when he has not given a satisfactory explanation of how he arrived at the conclusion.

There we reiterated that "to support a verdict the evidence must be of a convincing nature, imparting qualities of reasonable certainty." See also *Sadler* v. *Scott,* 203 Ark. 648, 158 S.W. 2d 40 (1942); and *St. Louis Southwestern Ry. Co.* v. *Braswell,* 198 Ark. 143, 127 S.W. 2d 637 (1939). In *Kapp* v. *Sullivan Chevrolet Company,* 234 Ark. 395, 353 S.W. 2d 5 (1962), we reiterated that "[c]onjecture and speculation, however plausible, cannot be permitted to supply the place of proof."

Appellant's burden of demonstrating a fact issue was dependent upon his expert's testimony. In summary that witness admitted there was nothing in his examination of the disc fragment which would lead him to a conclusion with any reasonable degree of certainty that the disc was defective when sold by the appellee to the appellant's employer. It was beyond his ability to say why the disc exploded. Viewing appellant's evidence most favorably, we cannot say that it negates all possibilities sufficiently to remove the asserted issue of liability from the realm of speculation and conjecture so as to entitle him to have the question presented to the jury.

Appellant next argues, with respect to negligence, that he adduced sufficient evidence on the issue of proximate causation. We have said that proximate cause must be proved, as a fact, by circumstantial or direct evidence, and not by speculation or conjecture. *Superior Forwarding Co.* v. *Garner,* 236 Ark. 340, 366 S.W. 2d 290 (1963). In an action for negligence, the evidence is sufficient to show proximate cause if the "facts proved are of such a nature and are so connected and related to each other that the conclusion therefrom may be fairly inferred." *St. Louis-San Fran. Ry. Co.* v. *Bishop,* 182 Ark. 763, 33 S.W. 2d 383 (1931); see also *Glidewell* v. *Arkhola Sand & Gravel Co.,* 212 Ark. 838, 208 S.W. 2d 4 (1948). Here, although there was evidence that the explosion of the disc caused appellant's injuries, there was no evidence from which it could be fairly inferred that any action by appellee Welder's was the proximate cause of the exploding disc and appellant's resulting injuries. Appellant's evidence as to

proximate cause is not sufficient to remove it from the realm of conjecture or speculation.

Affirmed.

BYRD and PURTLE, JJ., dissent.

JOHN I. PURTLE, Justice, dissenting. For the reasons stated in the majority opinion I must respectfully dissent. The work load has apparently overtaken my brothers on the Court because they have in this opinion seated themselves in the jury box instead of on the bench.

It amazes me that we stated in *Higgins* v. *General Motors Corp.*, 250 Ark. 551, 465 S.W. 2d 898 (1971) that if we had strict liability in a case like this we would approve it, then the General Assembly enacted Ark. Stat. Ann. § 85-2-318.2 (Supp. 1977) to cover the subject, and now we say we really didn't mean what we said in *Higgins*. The statute has been set out in the majority opinion and in the interest of brevity will not be repeated.

There is no dispute that appellee was the supplier of the product which proximately caused appellant's injury. Neither is it disputed that the supplier was engaged in selling this product nor that the defective condition was the proximate cause of the harm to appellant.

After setting out an almost perfect case against appellee, the majority then turn around and quote from a decision "to support a verdict the evidence must be of a convincing nature, importing qualities of reasonable certainty." This, I contend, is for the jury to decide.

I find no fault in the law as stated by my brothers but I strongly disagree with the results reached. All we know about the manufacturer is that the case was dismissed. There is not a speck in the record which speaks of a settlement having been reached. It should not make any difference in this case how the manufacturer got out of the case. Maybe appellant thought his proof against them was no more than conjecture or speculation and the best strategy was to go against a single defendant.

Appellant's expert found the grinder on which the disc was used not to be defective. The shop foreman testified that the disc had been properly stored and correctly attached to the grinder. Appellant's witnesses effectively negated any defect occurring after the disc was delivered by appellee. The expert testified, eseentially, as follows:

> I did examine the disc fragments that were brought me. Assuming that Johnnie Cockman on May 30, 1974, was injured at his place of employment when a grinding disc exploded; that the disc was a 9 inch by 1/4 inch type 27 grinder disc, type 27 which means depressed center wheel mounted on a portable grinding machine; that a previously unused disc was mounted even before the accident; that it had not been used; that it was first utilized for 20 to 30 minutes on the morning of the accident; that the disc was purchased August 9, 1973 from a truck operated by Welder's Supply; that the discs were carried loose on the trailer of the truck; that it was transported after it leaves Malvern to the Benton Crawler Works in Benton; that it was stored after purchase in a storage area of Benton Crawler Works and was not disturbed from the time of purchase until the day before the accident happened when it was mounted on the machine; that it was properly mounted and attached and was being used flat against the track of a crawler type dozer to remove or smooth down excess welding material; that it was not put into a bin; that the grinder did not over-rev as I have previously testified, it is my opinion that the disc was defective and was defective when sold by Welder's Supply Company.
>
> It is my opinion that if it was properly used and so forth and since there was no problem with the grinder, the only opinion I can derive is that the disc was defective. And that it was defective when delivered by Welder's Supply to Benton Crawler Works.

This testimony, when considered with his testimony that he could find no defect in the manufacturing process, clearly carries possible liability to the supplier and the purchaser.

The purchaser's witnesses at least made a case for the jury against appellee when they testified that the disc was not damaged while in custody of the purchaser. The testimony also pointed to the driver for the seller by showing he hauled the disc in a manner likely to cause a defect. Any type of major impact would probably inject a defect into the disc thereby rendering it likely to explode when placed into service or use.

My brothers misinterpret the expert's testimony when he testified that he could find no manufacturing defect and that he could find no defect in the grinder and further that he could not say with any "real certainty" that it was defective when delivered by appellee. Of course, he could not say it was defective when delivered. Only a fool would so testify to such under the circumstances. All he was saying was that he found no defect in the manufacture of the disc nor in the grinder. This left only two other probabilities: It was damaged by the seller or the purchaser. He had no knowledge of how it was handled by the parties except for the testimony offered by the witnesses. However, the purchaser's witnesses eliminated him by showing exactly how it was stored and handled before use.

I need not cite authority for the proposition that we are supposed to give the evidence its strongest probative force when reviewing a directed verdict. The expert's testimony, standing alone, created a jury question as to the seller and purchaser although the purchaser was not a named defendant because his liability was limited to worker's compensation benefits.

Appellant offered substantial evidence, whcch, if believed by the jury, would meet every element set out in Ark. Stat. Ann. § 85-2-318.2 regarding strict liability. Therefore, I ask whether or not we meant it when we stated in *Higgins*:

> In the absence of direct proof that the product is defective because of a manufacturing flaw or inadequate design, plaintiff must negate the other possible causes of failure of the product for which the defendant would not be responsible in order to raise a reasonable inference

that the dangerous condition existed while the product was still in the control of the defendant.

Apparently the majority still holds that even after enactment of the strict liability statute a plaintiff still may not recover on circumstantial evidence. I do not so interpret the law or the decisions made in the past.

For these reasons, and many more, I would reverse and remand with directions to allow the jury to decide the fact questions, assuming, at least, the same amount of circumstantial evidence is presented at the new trial.

I am authorized to state that BYRD, J., joins me in this dissent.

Michael Joe McGUIRE *v.* STATE of Arkansas

CR 79-7 580 S.W. 2d 198

Opinion delivered April 30, 1979

Niblock & Odom and *Ronald M. McCann,* for appellant.

Steve Clark, Atty. Gen., by:*Ray Hartenstein,* Asst. Atty. Gen., for appellee.

FRANK HOLT, Justice. Appellant was charged with capital felony murder, convicted by a jury, and sentenced to life imprisonment. He first asserts for reversal that the search of the automobile, in which he was riding and in which the guns were found, was illegal, and therefore, the guns, as evidence, should be suppressed. He argues that none of the exceptions justifying a search without a warrant was present. Appellee responds that the warrantless search was justified by a valid consent. We agree with the appellee.

Appellant and a Jim Davis, local residents, had been questioned by the police on March 25, 1978, about the shooting death two days earlier of Ronald P. Snodgrass. The victim's car was found at a local tavern. Appellant and Davis admitted they were at the tavern on the day of the alleged offense. Davis worked there. Davis told an officer his fingerprints might be found on the victim's car and that he possessed a .38 caliber pistol similar to the one used to kill Snodgrass. The two men became the focus of the police investigation concerning the murder. On March 26, Officers Tedford and Ward received orders to further question the two men. The officers began observing a local residence, recognized the two suspects as they and another individual exited the residence and left in a car. The officers followed the

car to a local shopping center parking lot where, instead of parking, they drove or circled around looking and acting nervous. The officers stopped the car intending to question Davis further. As Officer Ward walked toward the rear of the car, he observed appellant straighten and make some sort of movement. The officer looked in the rear window and noticed that appellant had his hand under a coat in the rear seat. Officer Tedford observed the handle of what appeared to be a weapon in the front seat occupied by Davis. Officer Tedford got appellant and Davis out of the car. Barnett, the driver, was asked if the officers could look in the back seat and he responded that they could. When Ward raised the coat in the rear seat where McGuire had been sitting, he discovered a .38 caliber pistol. Davis then told the officer that there was another gun in the front seat. It was found to be a .38 caliber pistol. Both guns were fully loaded. Appellant and Davis were put under arrest and transported to the police station where appellant was read his rights and interrogated. Appellant gave a statement indicating that he and Davis had been picked up by Snodgrass while hitchhiking and that appellant had driven the victim's car to the place where his body was later found. There Davis talked about shooting Snodgrass and taking his car. Appellant stayed near the car while Davis walked the man into the woods. Appellant heard one shot, after which Davis returned and told appellant to "get the hell out of here." Appellant and Davis burned the victim's billfold. In another statement, appellant said he told Davis to tie the man up rather than shoot him and that Davis had taken both guns.

Here Barnett, the driver of the car in which appellant and Davis were passengers, readily gave his consent to a search. According to him, he had nothing to hide. Appellant argues that under *Moore* v. *State,* 262 Ark. 27, 551 S.W. 2d 185 (1977), and *Bumpers* v. *North Carolina,* 391 U.S. 543 (1968), the search was unreasonable, based on the fact that Barnett was not informed that he did not have to consent to the search and gave his consent thinking that the car would be searched anyway since there were four officers present. We first note that there were only two officers present at the time Barnett gave his consent to search. Second, proof of knowledge of the right to refuse consent is not a necessary prerequisite to

demonstrating voluntary consent. *Enzor* v. *State,* 262 Ark. 545, 559 S.W. 2d 148 (1977).

The determination of whether consent was voluntary or coerced can be made only by analyzing all the circumstances of that consent. *Enzor* v. *State, supra;* and *King* v. *State,* 262 Ark. 342, 557 S.W. 2d 386 (1977). Here Barnett was clearly not coerced into giving his consent for the officers to search the car he was driving. We cannot say the finding of the trial court that the consent was valid is clearly erroneous. See *State* v. *Osborn,* 263 Ark. 554, 566 S.W. 2d 139 (1978).

Appellant next asserts that the officers did not have probable cause to arrest him, making the arrest and subsequent search and interrogation illegal. First, we note that the search of the automobile took place prior to appellant's arrest. Since we find that the court's ruling as to the validity of that search was not erroneous, the officers properly seized the two fully loaded guns. Ark. Stat. Ann. Vol. 4A, Rules of Crim. Proc., Rule 4.1 (a) (iii) (Repl. 1977) provides that an "officer may arrest a person without a warrant if the officer has reasonable cause to believe that such person has committed any violation of law in the officer's presence." Most courts agree that there is no difference in the terms "reasonable cause" and "probable cause." Commentary to Article IV, Ark. Rules of Crim. Proc.; *Williams* v. *State,* 258 Ark. 207, 523 S.W. 2d 377 (1975). We have said that "[t]he substance of all definitions of probable cause is a reasonable ground for belief of guilt." *Williams* v. *State, supra.* Probable cause exists where facts and circumstances within the officer's knowledge and of which he has reasonably trustworthy knowledge are sufficient in themselves to warrant a man of reasonable caution to conclude that an offense has been or is being committed. *Brinegar* v. *U.S.,* 338 U.S. 160 (1949). We reiterated in *Holmes* v. *State,* 262 Ark. 683, 561 S.W. 2d 56 (1978), that probable cause "need not be tantamount to that degree of proof sufficient to sustain a conviction." Its determination is based upon factual and practical considerations of reasonable and prudent men rather than on those of legal technicians. *Sanders* v. *State,* 259 Ark. 329, 532 S.W. 2d 752 (1976). There we also said that applicable standards allow honest, common sense judgments by officers in their determination of probable cause. Ark. Stat. Ann. § 41-3151 (Repl.

1977) makes it unlawful for a person to carry a weapon if he possesses a handgun in certain situations, including possession "in a vehicle occupied by him, . . . with a purpose to employ it as a weapon against another person." There is a presumption that a loaded pistol is placed in a car as a weapon. *Clark* v. *State,* 253 Ark. 454, 486 S.W. 2d 677 (1972); *Stephens* v. *City of Ft. Smith,* 227 Ark. 609, 300 S.W. 2d 14 (1957).

Here appellant and Davis were the prime suspects in the investigation of a murder which had taken place only a few days prior to their being stopped with the two fully loaded guns. In the totality of the circumstances, then, the officers, upon finding the guns, one possessed by appellant, had probable cause to arrest appellant for unlawfully carrying a weapon. The arrest being valid, we find no merit in appellant's contention that evidence obtained through the search and the later interrogatories was inadmissible because it was "fruit of the poisonous tree." The court properly denied appellant's motion to suppress.

Appellant contends that the court erred in refusing to allow him to call Davis, his codefendant, to the witness stand for purposes of identification and also in not allowing Davis to appear in the courtroom as a physical exhibit to the sheriff's testimony for purposes of identification. Appellant's and Davis' cases were severed for trial. Davis' counsel invoked the 5th Amendment and the court refused to compel him to testify. Appellant argues that this prejudiced him by depriving the jury of viewing Davis whose size was relevant to the issue of duress. Appellant says he was coerced into not reporting the crime because of threats by Davis. Appellant described Davis as being 6'5" and weighing 220 to 250 lbs. Appellant weighs 135 lbs. Ark. Stat. Ann. § 28-1001, Rule 401 (Supp. 1977), defines "relevant evidence" as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Here the evidence of duress did not bear on the issue of appellant's guilt or innocence of the offense charged but, rather, bore only upon why appellant had not reported the crime. There was no assertion made that appellant was coerced into committing the offense. Even if Davis' size was

relevant and admissible, appellant testified, without objection, as to Davis' size in comparison with himself. Therefore, Davis' absence as a witness was not prejudicial and at most harmless error. *Kimble* v. *State,* 246 Ark. 407, 438 S.W. 2d 705 (1969).

As required by Ark. Stat. Ann. § 43-2725 (Repl. 1977) and Rules of Crim. Proc., Rule 36.24, we have reviewed the entire record and find no errors prejudicial to appellant.

Affirmed.

We agree: HARRIS, C.J., and FOGLEMAN and HICKMAN, JJ.

PURTLE, J., concurs.

JOHN I. PURTLE, Justice, concurring. I concur with the results reached but object to part of the language in the majority opinion. The opinion apparently states it is unlawful to carry a handgun. The cases cited by the majority predate the Criminal Code, Acts of 1975, No. 280. In my opinion, Rule 4.1 does not authorize an arrest for carrying a handgun because it is not a violation of the law unless intent to use it as a weapon against a person is proven. There was no such proof as is required by Ark. Stat. Ann. § 41-3151 (Repl. 1977). Neither is it shown that the possession of the handguns was in violation of Ark. Stat. Ann. § 41-3111 (Repl. 1977).

Therefore, I fear the majority opinion might be used later to support the theory that possession of a handgun for a person's own protection is in violation of the law. Such interpretation is clearly erroneous. Furthermore, there is no need for this language because the consent to search has already been found.

Louis Art DODRILL *v.* ARKANSAS DEMOCRAT COMPANY et al

78-10 590 S.W. 2d 840

Substituted Opinion on Rehearing
delivered July 2, 1979
(In Banc)

[Rehearing denied September 10, 1979.]

[redacted]

Brown & Etter, by: *Richard Quiggle;* and *Louis A. Dodrill*, for appellant.

Wright, Lindsey & Jennings, for appellees.

P. H. HARDIN, Special Justice. This appeal is prosecuted from an order of the lower court sustaining a motion for summary judgment, which dismissed Appellant's complaint seeking damages for libel and invasion of privacy. The factual background giving rise to the litigation is necessary to a clear disposition of the issues on appeal.

On February 4, 1975, upon a complaint filed by the Supreme Court Committee on Professional Conduct, the Pulaski Circuit Court entered judgment suspending Louis Art Dodrill's license to practice law for a period of 12 months. The judgment conditioned the reinstatement of Dodrill's license thereafter only upon Dodrill's satisfactorily passing the regular examination for admission to the bar. No appeal from the judgment was taken by Dodrill, but he subsequently filed a petition in this court challenging the circuit court's power to condition the reinstatement of his license upon his taking and passing the regular bar examination for admission to the bar. We dismissed the petition holding that the circuit court acted within its jurisdiction. *See, In Re Dodrill,* 260 Ark. 223, 538 S.W. 2d 549 (1976).

Thereafter, Dodrill took the regular bar examination administered August 9-11, 1976. The Board of Bar Examiners met in regular session and on August 21, 1976, announced the names of applicants who had passed the examination. The Secretary of the Board of Bar Examiners, in keeping with a long standing practice, provided a list of the names of the applicants who had passed the examination to the major newspapers in the state, namely, the *Arkansas Democrat* and the *Arkansas Gazette*.

The Sunday, August 22, 1976, issue of the *Arkansas Democrat* included an article which, among other things, stated:

> SUSPENDED LR LAWYER FAILS BAR EXAMINATION
>
> Louis Arthur Dodrill, a Little Rock lawyer whose license was suspended for a year on Feb. 4, 1975, for unethical conduct in his dealings with four clients, failed to pass the August examination of the State Board of Bar Examiners.

Following the above publication, Dodrill filed a petition for writ of mandamus in the Pulaski Circuit Court seeking an order directing the State Board of Bar Examiners to report his scores on the August, 1976, examination. The Board of Bar Examiners filed a motion to dismiss and on October 27, 1976, the *Arkansas Democrat,* in an article headlined "EXAM BOARD LAWYER ASKS SUIT DISMISSAL", recounted the efforts by the Board of Bar Examiners to have the suit dismissed, and a brief history of the controversy, including that Dodrill's name had not been published along with the list of successful examinees.[1]

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[1]The October 27, 1976 article stated:

> Robert L. Rogers II, a lawyer for the state Board of Law Examiners, has filed a motion in Pulaski Circuit Court asking Circuit Judge Tom F. Digby to dismiss a lawsuit filed by a suspended lawyer who wants to know his score on the Aug. 9 state bar examination.
>
> Louis Art Dodrill of 3000 Maryland Avenue filed the suit Oct. 5 asking Digby to force the state board to make public his score and to order the board to inform him whether he passed the examination.
>
> Dodrill did not appear at a hearing in the case last week, and Rogers' motion was the latest maneuver in a long controversy that dates back to Feb. 18, 1975.
>
> Digby ruled on that date that Dodrill's license to practice law would be suspended for one year because of unethical conduct in his dealings with four clients. The judge said Digby's [Dodrill's] license couldn't be reinstated until he passed the exam again.
>
> Dodrill missed the deadline for appealing Digby's ruling to the

Being unsuccessful in the mandamus proceedings, Dodrill filed complaint against the members of the Board of Bar Examiners in the United States District Court seeking injunctive and other relief alleging, among other things, that the members of the Board of Examiners were responsible for the publication of the first above quoted article appearing in the *Arkansas Democrat.*

The affidavits, interrogatories and answers thereto, together with other factual materials properly before the trial court require the following findings: (1) that Dodrill, in fact, had passing scores upon the written examination administered by the Board of Bar Examiners in August of 1976; (2) that the Board of Bar Examiners declined to list his name among the applicants who successfully passed the examination at that time; (3) that Dodrill was not listed because the Board was continuing its investigation into Dodrill's conduct during the period of his suspension and to otherwise determine that he, in all respects, conformed to requirements of this court for admission to practice; and (4) that finally, on May 14, 1977, the Board of Bar Examiners certified Dodrill to be licensed, he having successfully passed the examination.

Following the reinstatement of his license, Dodrill filed his complaint in the court below seeking damages against the *Arkansas Democrat* for libel contained in the publication of the two articles above mentioned and for invasion of his right to privacy. In sustaining the *Arkansas Democrat's* motion for summary judgment dismissing Dodrill's complaint, the trial court found, *inter alia,* that Dodrill had gained the status of a "public figure" because of litigation and publicity surrounding his suspension from the practice of law; that the article complained of contained material of general and public concern, namely, requirements for admission to the bar and ef-

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state Supreme Court, and the Supreme Court ruled on July 12 that the appeal had not been lodged in time.

Dodrill then filed suit against the bar group seeking to determine his score.

When the results of the Aug. 9 bar examination were made public, only those who passed the examination were listed. As a rule, the law examiners do not mention those who fail.

forts for readmission to the bar by a previously suspended lawyer; and that Dodrill had failed to demonstrate that the articles were published with actual malice.

We recognize as controlling the time-honored rule that a summary judgment is an extreme remedy. The burden is upon the moving party to demonstrate that there is no genuine issue of material fact for trial, and evidence submitted in support of the motion must be viewed most favorably to the party resisting the motion. *Lallman* v. *Carnes*, 254 Ark. 987, 497 S.W. 2d 47 (1973); *Quillen, Adm's* v. *Twin City Bank*, 253 Ark. 169, 485 S.W. 2d 181 (1972).

A. *THE LIBEL CLAIM*

The central issue presented by this appeal is whether the court erred in finding Dodrill was a "public figure", thus affording the *Arkansas Democrat* First Amendment protection from an action for defamation in the absence of proof of actual malice as that doctrine has been announced by numerous decisions of the United States Supreme Court. *New York Times Company* v. *Sullivan*, 376 U.S. 254 (1964); *Curtis Publishing Co.* v. *Butts*, 388 U.S. 130 (1967); *St. Amant* v. *Thompson*, 390 U.S. 727 (1968); *Rosenbloom* v. *Metromedia, Inc.*, 403 U.S. 29 (1971).

Rosenbloom, supra, extended the privilege announced in *New York Times* v. *Sullivan, supra,* to publications concerning matters of general or public interest regardless of the plaintiff's status. However, the Court in *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323 (1974) repudiated *Rosenbloom* and held that the general rule announced there was inappropriate in those cases where the reputations of private individuals were placed in jeopardy.

In *Gertz,* the Court noted that public figures usually enjoy significantly greater access to channels of effective communication than private individuals. The Court reasoned that private individuals were more vulnerable because of lack of a forum to rebut false statements and that they were more deserving of recovery because they had not thrust themselves

into the vortex of public controversy. The Court defined "public figures" as individuals who

> have assumed rules of especial prominence in the affairs of society. Some occupy positions of such persuasive power and influence that they are deemed public figures for all purposes. More commonly, those classed as public figures have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved. *Id.* 345.

The definition of "public figure" is quite broad and, indeed, one may be held a public figure for limited purposes. Various courts have held included within the definition a football coach,[2] political activist,[3] wife of nationally known television celebrity,[4] editor of newspaper,[5] and a belly dancer.[6] The classification of "public figure" in these instances was justified by the particular facts of those cases. While all of the individuals who have been held to be public figures have not taken active parts in debates on public issues, they nevertheless remained persons in whom the public has a continuing interest in that in each instance the individual had taken affirmative steps to attract public attention or had strived to achieve some degree of public acclaim.

The most celebrated decision dealing with the question of public figure versus private individual is *Time, Inc.* v. *Firestone,* 424 U.S. 448 (1976), which arose out of a libel action by the former wife of an heir of one of America's wealthiest industrial families. The Court rejected the publisher's contention that Mrs. Firestone was a public figure even though it appeared from the Court's opinion, both majority and dissent, that she was a fairly publicized individual who had held a few or several press conferences. The Court particularly pointed to its definition of "public figure" as defined in *Gertz* and concluded that Mrs. Firestone did not

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[2]*Curtis Publishing Co.* v. *Butts,* 388 U.S. 130 (1967).
[3]*Associated Press* v. *Walker,* 388 U.S. 130 (1967).
[4]*Carson* v. *Allied News Co.,* 529 F. 2d 206 (7th Cir. 1976).
[5]*Tait* v. *King Broadcasting Co.,* 1 Wash. App. 250, 460 P. 2d 307 (1969).
[6]*James* v. *Gannett Co., Inc.,* 40 N.Y. 2d 415, 353 N.E. 2d 834 (1976).

assume a role of especial prominence in the affairs of society and that she had not thrust herself to the forefront of any public controversy in order to influence its resolution.

The Court in dealing with the publisher's contention that the Firestone divorce had been characterized by the Florida Supreme Court as a "cause celebre" and that it was a public controversy, observed:

> But in so doing Petitioner seeks to equate 'public controversy' with all controversies of interest to the public. Were we to accept this reasoning, we would reinstate the doctrine advanced in the plurality opinion in *Rosenbloom* . . . which concluded that the *New York Times* privilege should be extended to falsehoods defamatory of private persons whenever the statements concern matters of general or public interest. *Id.* 454.

The Court concluded that a divorce is not the sort of public controversy referred to in *Gertz* even though the matrimonial difficulties of some individuals may be of interest to a portion of the reading public. The Court further observed that Mrs. Firestone did not freely choose to publicize the issues but was compelled to resort to the judicial process to obtain a release from the bonds of matrimony. "We have said that in such an instance '[r]esort to the judicial process . . . is no more voluntary in a realistic sense than that of the defendant called upon to defend his interests in court.' " *Id.* 454. The Court further found that Mrs. Firestone had not assumed special prominence in the resolution of public questions and, therefore, held that she was not a public figure.

The record in the case at bar is devoid of facts supporting the lower court's finding that Dodrill had attained "public figure" status. He had not thrust himself into the vortex of public controversy and, in fact, any showing of a public controversy was absent. Moreover, he neither had taken steps to attract public attention, nor had he strived to achieve a degree of public acclaim. His activities were restricted to complying with the lawful mandate of the circuit court by applying for and taking the regular bar examination in August, 1976, an event in which the names of the

applicants were not released for public dissemination.[7] Whether he passed or failed would no more relegate him to "public figure" status than did the representation of a client in a highly emotional and publicized case relegate Gertz to "public figure" status, or than did the widely publicized activities relegate the celebrated Mrs. Firestone to "public figure" status. We therefore hold that the lower court erred in granting the motion for summary judgment based on the record before it as to Appellant's cause of action for defamation.

B. *THE INVASION OF PRIVACY CLAIM*

The invasion of privacy claim stands upon a different footing than the defamation claim. The law delineating conduct constituting an invasion of privacy and thus, an actionable wrong, is codified in RESTATEMENT (SECOND) OF TORTS, §652A (1977):

> (1) One who invades the right of privacy of another is subject to liability for the resulting harm to the interests of the other.
>
> (2) The right of privacy is invaded by
>
> (a) unreasonable intrusion upon the seclusion of another . . .
>
> (b) appropriation of the other's name or likeness . .
>
> (c) unreasonable publicity given to the other's private life. . .
>
> (d) publicity that unreasonably places the other in a false light before the public . . .

In *Olin Mills, Inc.* v. *Dodd,* 234 Ark. 495, 353 S.W. 2d 22

[7]Application for and administration of the bar examination are not matters of public record. To preserve the integrity of the admission process these matters of necessity must be closely guarded and uncompromised by public dissemination.

(1962) we recognized invasion of privacy[8] as an actionable wrong. *Olin Mills* involved conduct described in Par. 2(b) of the Restatement principles, while the instant case involves conduct allegedly violating Par. 2(d), as above set forth.

The right to recover for an invasion of privacy is conditioned upon the complaining party's demonstrating that (1) the false light in which he was placed by the publicity would be highly offensive to a reasonable person, and (2) that the defendant had knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the plaintiff would be placed. RESTATEMENT (SECOND) OF TORTS, §652E (1977).

A cause of action both for "false light" invasion of privacy and for defamation can be joined in the same action. *See, e.g., Varnish* v. *Best Medium Publishing Co.,* 405 F. 2d 608 (2d Cir. 1968). However, there can be but one recovery for any particular publication. RESTATEMENT (SECOND) OF TORTS, §652E, Comment b. *See also,* 62 Am. Jur. 2d, *Privacy,* §5 (1972).

In *Time, Inc.* v. *Hill,* 385 U.S. 374 (1967), the Supreme Court held that First Amendment protection precluded recovery upon a cause of action for "false light" invasion of privacy by a private individual against a publishing company in the absence of proof that the Defendant published the information with knowledge of its falsity or in reckless disregard of the truth. Thus, actual malice must be demonstrated by one seeking to recover for invasion of privacy. This requires a showing of more than mere

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[8]Neither the United States Constitution nor the Common Law recognized a cause of action for violation of the right to privacy as such. The concept stems primarily from Warren and Brandeis' *The Right to Privacy,* 4 Harv. L. Rev. 193 (1890). The late William L. Proser wrote extensively in this area. His work, *Privacy,* 48 Calif. L. Rev. 383, (1960) was in large measure the inspiration of the American Law Institute's principles noted above. The majority of jurisdictions now recognize the right to privacy and Arkansas has been included in that majority with the decision in *Olin Mills, supra. See also,* Note, *Torts—Invasion of Privacy by Publication of a Photograph,* 3 Ark. L. Rev. 105 (1948-49); Comment, *The Right of Privacy,* 6 Ark. L. Rev. 459 (1952); Comment, *Privacy: The Polygraph in Employment,* 30 Ark. L. Rev. 35 (1976).

negligence. There must be sufficient evidence to permit the conclusion that the Defendant, in fact, entertained serious doubts as to the truth of his publication. In *Logan* v. *District of Columbia,* 447 F. Supp. 1328 (D. D.C. 1978), an action by a private individual for invasion of privacy, the court said:

> Finally, plaintiff's invasion of privacy claims as to the erroneous report that his urine test indicated drug usage must be considered. On this claim plaintiff appears to assert that the article invaded his privacy by placing him in a false light. To recover on such a theory, however, the plaintiff must demonstrate that the article was published with knowledge of its falsity or in reckless disregard of the truth — i. e. that it was published with actual malice. *Time, Inc.* v. *Hill,* 385 U.S. 374, 386-91, 87 S.Ct. 534, 17 L.Ed. 2d 456 (1967); *cf. Cantrell* v. *Forest City Publishing Co.,* 419 U.S. 245, 249-52, 95 S. Ct. 465, 42 L.Ed. 2d 419 (1974). *Id.* 1333.

Where the Plaintiff is not a public figure and the publication is of matters of general or public concern, the rule laid down in *Time, Inc.* v. *Hill, supra,* dictates that a plaintiff must prove actual malice and that decision remains the law with respect to invasion of privacy actions. Later decisions of the Supreme Court which have retreated from the malice standard in private individual defamation actions have not eroded the rule of *Time, Inc.* v. *Hill, supra,* as to "false light" privacy actions.[9] The Plaintiff's burden of proof is governed by the clear and convincing evidence standard rather than by the proponderance of the evidence standard. *New York Times Co.* v. *Sullivan, supra,* 285-286; *Hoffman* v. *Washington Post Co.,* 433 F. Supp. 600, 604 (D. D.C. 1977).

In the instant case, the affidavits and other matters properly before the court, clearly demonstrate that the *Arkansas Democrat* did not publish the articles in question with knowledge of falsity or in reckless disregard of the truth.

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[9]In *Cantrell* v. *Forest City Publishing Co.,* 419 U.S. 245 (1974), the Court consciously abstained from examining the status of *Time, Inc.* v. *Hill, supra,* in the light of *Gertz* v. *Welch, supra.* It is the duty of this court to follow the mandate of *Time, Inc.* v. *Hill* until the rule announced therein has been modified or overruled.

There being therefore no genuine issues of any material fact with regard to the "false light" invasion of privacy claim, we affirm the trial court's action in entering summary judgment with regard to that cause of action.

Affirmed in part, reversed in part.

GEORGE ROSE SMITH, HOLT, and HICKMAN, dissent.

DARRELL HICKMAN, Justice, dissenting. The majority, as it is reconstituted, has decided to take a restrictive approach to the problem presented in this case.

It now literally applies some language from United States Supreme Court decisions, notably the cases of *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 94 S. Ct. 2997, 41 L. Ed 2d 789 (1974), and *Time, Inc.* v. *Firestone*, 424 U.S. 448, 96 S. Ct. 958, 47 L. Ed 2d 154 (1975). It also chooses to ignore some language from those cases and not apply that language I quoted from the *Gertz* case which recognizes that an individual can become a public figure for a "limited range of issues."

While the majority recognizes that a belly dancer and a football coach can be a public figure, it holds that a lawyer, whose license to hold a position of public trust is in issue, is not a public figure. Who, then, is a public figure? Apparently, aside from elected officials who are recognized by all of us as public figures, only notorious criminals or controversial figures of the highest order. It is regrettable the majority has elected to literally and restrictively apply the standard of law applicable. It is always easier to make such an application. It takes no flexibility, tolerance or ingenuity to do so. It is a haven often sought when tough decisions must be made. It is safer.

Whether Dodrill's status as a lawyer affects the majority, I cannot say. He was not representing a client as was Gertz. He was not in litigation over a private personal matter as was Mrs. Firestone. He was, as we said in our original opinion, in the public eye because of his breach of a public trust. Would a physician, seeking return of his license after losing it for im-

properly authorizing drugs, become a public figure? Would a druggist become a public figure under the same circumstances? Such individuals, like Dodrill, would not be ordinary professional people minding their own business, practicing their trade, unwittingly subject to the glare of publicity. They would be individuals who had violated their public trust because of their own misdeeds and were, for good or ill, about to resume their roles as individuals having a public trust. The public in every such instance has a right to know about such a situation and that is a consideration that must be given when deciding such cases.

What right or need does the public have to know about the goings on of a belly dancer or a football coach? Less, I dare say, than about a lawyer whose license has been suspended for unethical conduct.

Finally, and most importantly, the effect of the majority's decision is to limit the First Amendment of the United States Constitution. That is the substantive issue before us. Any limitation of the freedoms contained in that Amendment, for whatever good intentions, should be made only after careful consideration of the consequences. Any limitations, against whoever, for whatever reasons, cut across everyone's right (with some limitations, of course) to say what he pleases, about whom he pleases — an American tradition that no other nation has enjoyed nor any government permitted. It is a freedom that ought to be preserved and it is limited in Arkansas by the majority's decision to grant a rehearing in this case.

I respectfully dissent from this decision and would deny the petition for rehearing.

I am authorized to state that GEORGE ROSE SMITH and HOLT, JJ., join in this dissent.

Rex SUTTON *v.* STATE of Arkansas

CR 78-150 580 S.W. 2d 195

Opinion delivered April 30, 1979
(In Banc)

Appellant, *pro se.*

Steve Clark, Atty. Gen., by: *Ray Hartenstein,* Asst. Atty. Gen., for appellee.

DARRELL HICKMAN, Justice. Rex Sutton was convicted of theft by deception and obtaining a signature by deception in violation of Ark. Stat. Ann. §§ 41-2203 and 41-2213 (Repl. 1977), respectively. He was sentenced to one year on the first charge and six months on the second charge, the sentences to be served concurrently.

Sutton represents himself on appeal and his argument is that the trial judge made a comment which was prejudicial to his case. In response to a question from the jury foreman who requested further directions, it is alleged that the trial judge said, "In a case like this where there is obvious guilt, a jury has wide latitude . . . . "

That alleged comment is not in the certified record. Even if we accept Sutton's allegations and proffered "supplemental record", there was no objection by the experienced trial

lawyer representing Sutton; there was no motion for a new trial wherein it might have been proper to offer an alleged tape recording of the court's comment. There is no compliance with Ark. Stat. Ann. § 27-2127.11 (Repl. 1962) which authorizes settlement of a record that is not stenographically reported. Also, a bystander's bill of exceptions is a method to properly make a record where none exists. That method was not utilized. See *Graham* v. *State,* 264 Ark. 489, 572 S.W. 2d 385 (1978).

In other words, we essentially have the appellant's statement in his brief that the remark was made.

Since that remark is not a part of the record, we cannot declare it reversible error, as it would be. We will not presume it was made.

Affirmed.

PURTLE, J., dissents.

JOHN I. PURTLE, Justice, dissenting. I cannot refrain from expressing my rather strong dissent from the majority in this case, although I am sure the majority of the Court intends to do no real injustice and, no doubt, believe they are upholding the law. They are in fact disregarding the constitutional rights of a citizen of the State of Arkansas and sending him to prison on a failure to comply with a procedural rule of the Supreme Court of Arkansas. They are, in my opinion, straining at a gnat and swallowing a camel. The whole basic system of our Republic is founded upon the equality of all mankind and justice to all, regardless of their station in life or status in society.

The Supreme Court of Arkansas promulgated its rules for the purpose of conducting orderly business and guiding the courts and lawyers in the presentation of matters before this Court. Our rules, generally speaking, are good rules and it is proper and right that they should be observed by the courts and the lawyers. However, it is not reasonable to believe that the average person would be able to understand, much less comply with, all of our rules. In fact, we have on many occasions, in the past, waived the technicalities of our

rules, especially when a person represented himself. This is the least we could do in this case. The appellant has filed the record and a brief before this Court. Perhaps a more disorganized brief has never been presented to this Court. However, within that brief is a copy of an alleged statement made by the trial judge, to the jury, during their deliberations on this action, which should not and cannot be allowed to stand if our system of justice is to prevail. When the jury asked for additional instructions the court, among other things, allegedly stated:

> "EVEN IN A CASE LIKE THIS WHERE THERE IS OBVIOUS GUILT A JURY HAS WIDE LATITUDE . . . "

The above statement was not taken by the court reporter and is "outside" the record so far as the majority is concerned and they even cite a statute and a case to support their position. A hundred statutes and a hundred cases would not change my opinion that we are not doing justice when we fail to look at an error of this magnitude on the ground that it is outside the record. The only reason we have the statement, which is considered outside the record, is that the appellant had the foresight to have his cassette recorder turned on at the time this incident happened. Also contained within the papers filed by the appellant is a sworn affidavit by one of the jurors which states essentially the same thing as the part quoted above. The state, in its reply brief, does not contest the validity of the statement. Therefore, I am assuming it is a true statement.

The state argues, in addition to the "outside the record" matter, that no objection was made at the time this remark was made by the court. It is not necessary that an objection be made when an error is so grave as to deprive a defendant of his constitutional rights. In the case of *Bell* v. *State,* 223 Ark. 304, 265 S.W. 2d 709 (1954), the trial judge very innocently approached the jury, during deliberations, to determine whether they wanted him to remain at the courthouse during the noon hour. Thereupon a series of questions was asked by jurors and answered by the trial judge. In reversing the conviction in that case, we stated:

> "We admire the candor and integrity of character of the trial judge, who unhesitatingly made the above and foregoing statement, but we cannot affirm this case and thereby put the stamp of our judicial approval on such communications between the judge and the jury, lest in the future such communications should be considered a wise course for other judges to follow."

No objection was made in the *Bell* case probably for the reason that the lawyer did not hear the conversation. The same reason exists in the present case.

Although the court may have considered he was "having fun" with the jury, it was not so funny to the appellant when he discovered what the fun was all about. I do not mean to imply that the trial judge intentionally made such an unwise statement for the purpose of having this appellant convicted. Nevertheless, it is a statement which a trial court cannot afford to make even though it may be in fun or without any motive whatsoever. This may have been the very statement that caused the jury to return a guilty verdict in a case which was very weak, to say the least, from the beginning. Even though the judge may have been a man of outstanding character and adjudged by the jurors as a great jurist and leader, this is all the more reason why the jury was apt to perceive his every word as a guiding light to them in concluding the matter which was before them.

We are dealing with an appellant who states that he has no money and is unable to employ counsel. Therefore, he has no choice but to take on his own defense in the manner in which he believes is suitable in obtaining justice. I would like to quote from page 2-C of the appellant's brief:

> "Sutton, naively secure in the knowledge that you can't be held guilty when you are innocent, was confident of justice. Now sadder but wiser, Mr. Sutton realizes that justice and the sum of one's available economic resources are rather directly related in at least some circumstances. Specifically, in this case, where an innocent man seeks redress for an error not in the official record, which is a further miscarriage of justice."

Few lawyers could have stated the situation more succinctly. I am sure every member of the Court fully agrees that justice is not reserved for only those who can afford to pay for it. I am sure they agree with me that every person in the State of Arkansas is considered to have been born equal with every other individual and has guaranteed unto him the rights not to be deprived of life, liberty or property, without due process of law. The fact that a person cannot hire a lawyer should not send him to prison.

I feel we should have waived the formalities of Ark. Stat. Ann. § 27-2127.11 (1962), although it may make our jobs more difficult, in order to see that justice is done in this case and hopefully to prevent such future occurrences. I am sure the trial court, in looking back, would be genuinely sorry for having made such statement if, indeed, it was made. Nevertheless, I feel that, in the interest of justice, the case should be reversed.

NORTHWESTERN NATIONAL CASUALTY COMPANY *v.* Murray F. ARMSTRONG, SOUTHERN FIRE & CASUALTY INSURANCE COMPANY and Curtis COLLINS

78-328 580 S.W. 2d 192

Opinion delivered April 30, 1979
(Division II)

Laser, Sharp, Haley, Young & Huckabay, for appellant.

Bridges, Young, Matthews & Davis, for appellees.

JOHN I. PURTLE, Justice. This case concerns the interpretation of two automobile insurance policies and the exclusions or exceptions from coverage. Both parties presented excellent briefs. Needless to say, their interpretations of the policies differ. After a careful study of the two policies, we have concluded that the trial judge was correct in his interpretation of the policies regarding coverage and exclusions.

The dispute is between Northwestern National Casualty Company, appellant, and Southern Fire & Casualty Insurance Company, appellee. Appellant issued a policy insuring Murray F. Armstrong and appellee issued one insuring Lincoln County, Arkansas. Armstrong borrowed a trailer owned by Lincoln County for his personal use and hitched it to his pickup truck which was covered by appellant's policy. The utility trailer came unhitched while Armstrong was driving along State Highway #11 in Lincoln County. The trailer then crossed the center line and collided with a vehicle driven by Curtis Leon Collins thereby causing damages and injuries. Armstrong filed a complaint against appellant for a declaratory judgment in which he sought to determine if his policy with appellant afforded him coverage against the claim of Collins. Appellant filed an answer denying coverage to Armstrong and also filed a declaratory judgment that

appellee's policy afforded coverage for the claim by Collins.

Although the case was transferred to federal court on the diversity of citizenship, it was, by mutual consent, returned to the Lincoln County Circuit Court. The pleadings were finally joined and each party moved for summary judgment. The trial court decided appellant's policy required it to provide a defense for Armstrong against the claim of Collins and further that Armstrong was not "an insured" under appellee's policy. Appellant (Northwestern National Casualty) appeals on the grounds appellee (Southern Fire & Casualty Insurance Company) should afford basic coverage for Armstrong.

It might be of help to set out the provisions of the policies able counsel rely upon for their argument. Each policy contained the following general insuring clause:

> To pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of:
>
> A. bodily injury, sickness or disease, including death resulting therefrom, hereinafter called "bodily injury," sustained by any person:
>
> B. injury to or destruction of property, including loss of use thereof, hereinafter called "property damage"; . . .

Of course, both policies required such loss to arise out of the "ownership," "maintenance" or "use" of an "owned" or "temporary substitute" automobile. From this point on it appears to be a contest to see which policy can out "exclude" the other.

Under "named insured," of course, both policies are fairly unambiguous. Under the definitions part of the policies, appellant's policy (Northwestern) provides:

> . . .
>
> "owned automobile" means (b) a trailer owned by the named insured

> "trailer" means a trailer designed for use with a private passenger automobile, if not being used for business or commercial purposes with other than a private passenger, farm or utility automobile, or a farm wagon or farm implement while used with a farm automobile.
>
> . . .

Under the terms of appellee's definitions we find:

> . . .
>
> "owned automobile" includes a trailer not described in this policy if designed for use with a four-wheel private passenger automobile and if not being used for business purposes with another type automobile.

The following definitions of "an insured" (not the "named" insured) appear in appellant's (Northwestern) policy:

> . . . "insured" means a person or organization described under "Persons Insured"; . . .
>
> Persons Insured: The following are insureds under Part 1: *** (2) any other person using such automobile with the permission of the named insured, provided his actual operation or (if he is not operating) his other actual use thereof is within the scope of such permission, and. . . .

The definition under appellee's (Southern) "an insured" reads:

> . . .
>
> (c) any other person while using an owned automobile or a temporary substitute automobile with the permission of the named insured, provided his actual operation (or if he is not operating) his other actual use thereof is within the scope of such permission. . .
>
> . . .

Appellee's policy then contained a provision stating none of the following is "an insured":

> . . . (iii) any person or organization, other than the named insured with respect to . . . (2) a trailer while used with any motor vehicle owned or hired by such person or organization and not covered by like insurance in the Company.

In an effort not to be out excluded the appellant inserted in its exceptions the following exception:

> ". . . ; provided, however, the insurance with respect to a temporary substitute automobile or nonowned automobile shall be excess insurance over any other valid and collectible insurance."

So far as coverage is concerned it appears both policies would afford Armstrong coverage except for the exclusions and/or definitions which, as we see it, turn in favor of the appellee for the reason that the policy states it does not protect any person with respect to a trailer when the trailer is used with any motor vehicle owned by such person and the motor vehicle with which the trailer is used is not insured with appellee (Southern Fire & Casualty Insurance Company). Armstrong, who was using the trailer with his own pickup truck, did not have "like" insurance. Instead, his policy was with appellant (Northwestern National Casualty Company). Therefore, in the absence of any statute or regulation, we must give a literal construction to the contract, and we agree with the trial court that appellee's policy excludes coverage for Armstrong under the circumstances. At the same time, we agree that appellant's policy does afford protection for Armstrong against the claim of Curtis Leon Collins, up to the applicable limits of coverage.

We agree with appellant that where the terms and provisions of a contract are conflicting or ambiguous, the contract is to be strictly construed against the insurer and in favor of the insured. However, we here deal with an exclusion from coverage which is fairly apparent after you get that far into the policy. We also agree with appellant that its policy is excess over and above any other valid and collectible in-

surance available to its policyholder. However, appellee excluded this trailer on its July 1975 Edition of Form A-124, Page 1, "None of the following is an insured," (iii) (2) when it excluded a "trailer" while used with any motor vehicle *owned* by an insured unless his motor vehicle was also insured by appellee, Southern Fire & Casualty Insurance Company.

Affirmed.

We agree. GEORGE ROSE SMITH and FOGLEMAN, JJ.

BYRD, J., concurs.

Sharon Lea CANTLIN *v.* Milan PAVLOVICH

78-340 580 S.W. 2d 190

Opinion delivered April 30, 1979
(Division II)

Wootton, Land & Matthews, by: *Gene Matthews, Jr.,* for appellant.

No brief for appellee.

JOHN I. PURTLE, Justice. This case arises out of an automobile collision on a paved apron between Emory Street and the Hot Springs High School parking lot in Hot Springs on December 8, 1975. Appellee had pulled off Emory Street and appellant was leaving the parking lot. The paved apron was not designated for parking or driving.

Prior to the trial the appellant presented a Motion in Limine in which she sought to prevent appellee's attorney from in any manner introducing evidence of or conveying any information that appellant undertook settlement negotiations. The court overruled the motion and stated he would decide the matter when it was presented during the trial. The jury awarded appellee $700 damages and appellant appeals on the grounds:

THE MOTION IN LIMINE SHOULD HAVE BEEN GRANTED

and

THE COURT ERRED IN REFUSING TO GIVE AMI 901 AND 903.

The Motion in Limine was proper and should have been granted. However, it within itself would not have been prejudicial error if the court had rejected the matters concerning

settlement negotiations when presented. However, when witness Floyd McDaniel testified, "To my recollection, she (appellant) came down and asked me if she could pay this out. And I told . . . ", the objection of appellant to the testimony was overruled by the court. This was clearly part of the negotiations or offer to settle. Also, the court allowed the introduction of a repair estimate on appellee's vehicle, over objection, to be introduced. The estimate was made out to appellant. The court refused to allow appellant to explain she had made the offer to settle for the purpose of protecting her license to drive a vehicle rather than because she felt she was at fault. We believe this evidence of negotiation was not proper either under our prior case law or Uniform Rules of Evidence, Rule No. 408, which reads as follows:

> "COMPROMISE AND OFFERS TO COMPROMISE — Evidence of (1) furnishing, offering, or promising to furnish, or (2) accepting, offering, or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for, invalidity of, or amount of the claim or any other claim. Evidence of conduct or statements made in compromise negotiations is likewise not admissible. This rule does not require exclusion if the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negativing a contention of undue delay, or proving an effort to obstruct criminal investigation or prosecution."

We now discuss the refusal of the court to give AMI 901 and 903 as requested. Both parties requested 901 be given; therefore, there would have been no error. However, we believe 901 is a proper instruction to be given under the circumstances. There is no reason why the rules should not apply to parking lots. It might be advisable to omit the words "on the street or highway" from § A. Although we have not previously ruled directly on this point, we find many other states have applied the common law Rrules of the Road to other areas such as parking lots and private property. We would not go so far as to hold that statutory rules of the road apply to other than streets or highways. The common law rules do not depend upon positive or negative legislation but

have developed by judicial decisions and public policy growing from the experience and practice of society in general. Uses and customs coupled with common sense are the basis for such law. From the experience, observations and acceptance of certain practices, it is common sense that the common law rules of the road (AMI 901), which simply state the duty of the operator of an automobile to others, should apply to areas which are frequently used by the public even though such areas are not designated as part of the system of public streets and highways. Cases which have held "proper lookout" and "reasonable care" should be applied to places not on a street or highway are *Erwin Mfg. Co.* v. *Croft,* 222 Ala. 680, 133 So. 717 (1931); *Sientki* v. *Haffner,* 145 F. Supp. 435 (D.C.N.Y. 1956); *Cavalier* v. *Peerless Ins. Co. of Keene, N.H.,* 246 La. 336, 164 So. 2d 347 (1964). We have held that the rules of the road do not apply to off-street areas when the use of the street was not involved. *Bean* v. *Coffee,* 169 Ark. 1052, 277 S.W. 522 (1922).

The testimony indicates appellee was using Emory Street immediately before he turned onto the paved apron separating Emory Street from the designated parking lot at the high school. Ark. Stat. Ann. § 75-618 would appear to certainly be applicable and the facts, when they are developed, may well show it to be proper to insert other statutes or ordinances within the framework of AMI 903 which we believe to have been a proper instruction under the facts of this case. Although all the record was not abstracted, we do know that there seems to be a difference of opinion as to whether appellee turned at an intersection or not but, in any event, he did turn off Emory Street immediately before the collision.

Since evidence of negotiations was improperly admitted and for the further reason that AMI 901 and 903 should have been given, we must reverse.

Reversed and remanded.

We agree. HARRIS, C.J., and FOGLEMAN and HOLT, JJ.

Bob McFERRIN et al *v.* Arnold KNIGHT,
Circuit and County Clerk, et al

78-294 580 S.W. 2d 463

Opinion delivered May 7, 1979
(In Banc)

David Osmon; Norman C. Wilbur; and *H. David Blair,* of *Murphy, Blair, Post & Stroud,* for appellants.

Drew Luttrell, for appellees.

GEORGE ROSE SMITH, Justice. This appeal in effect challenges the validity of a local option election held in Baxter county in connection with the general election on November 7, 1978. The electors voted in favor of the manufacture and sale of intoxicating liquors within the county. We reverse the chancellor's decree and dismiss the case, on the ground that a chancery court has no jurisdiction to review the sufficiency of a petition seeking a local option election.

The petitions for a local option election were filed with the circuit and county clerk on September 7, 1978. Amendment 7 to the Constitution of 1874 provides that initiative and referendum measures, in counties, may be ordered by petitions signed by persons equalling 15% of the total number

of votes cast in the last general election for the office of circuit clerk. In the present instance the clerk approved the petitions, certifying that 7,295 votes had been cast for the office of circuit clerk and that the petitions contained 1,278 valid signatures.

The clerk was actually in error in relying upon the 15% requirement contained in Amendment 7, because it is firmly settled that Amendment 7 has no application to local option petitions, which are governed by statute. *Brown* v. *Davis,* 226 Ark. 843, 294 S.W. 2d 481 (1956). The controlling statute actually provides that a county-wide local option petition must contain signatures equalling 15% of the qualified electors in the county. Ark. Stat. Ann. § 48-801 (Repl. 1977). In the present instance the petitions did not contain that many signatures.

The appellants, however, in challenging the petitions, did not at first raise the point that 15% of the county electorate had not signed the petitions. Instead, the appellants appealed to the chancery court and questioned the sufficiency of the petitions on other grounds, which we need not enumerate. With respect to those grounds the chancellor sustained the validity of the petitions and refused to prohibit the election. When the appellants finally raised the point that the petitions did not contain 15% of all the qualified electors in the county, the chancellor held that the objection was not timely.

As we have indicated, the chancery court actually had no jurisdiction to review the sufficiency of the petitions. That authority, in local option cases, is purportedly conferred by statute. Section 48-801.1 (Repl. 1977), which in turn refers to Section 2-311 (Repl. 1976). Ever since the leading case of *Walls* v. *Brundidge,* 109 Ark. 250, 160 S.W. 230, Ann. Cas. 1915C, 980 (1913), it has been consistently held that when the Constitution of 1874 was adopted, chancery courts had no jurisdiction with respect to election contests or the adjudication of political rights, and such jurisdiction cannot be conferred by statute. This want of subject-matter jurisdiction is an issue which the court raises itself, even though the parties have not done so. *Roper* v. *Rodgers,* 249 Ark. 416, 459 S.W.

2d 419 (1970). It follows that the chancery court should have dismissed the case, for want of jurisdiction.

We do not overlook the fact that under the express language of Amendment 7 the sufficiency of local initiative and referendum petitions is subject to review by the chancery court. The validity of that provision is not open to question, because of course the original jurisdiction of chancery courts can be enlarged by constitutional amendment. Local option petitions, however, as we have pointed out, are not filed under Amendment 7; so the statutory attempt to enlarge the jurisdiction of chancery courts must fail.

One other point must be discussed. In *Catlett* v. *Republican Party of Ark.*, 242 Ark. 283, 413 S.W. 2d 651 (1967), we dismissed a case pertaining to election matters, because the chancery court had no jurisdiction. In doing so, however, we explained that we did not remand the case with directions that it be transferred to law, because no justiciable controversy remained in that instance.

In the case at bar, however, a justiciable question does remain. That is, the appellants contend that the failure of the local option petitions to contain the signatures of 15% of the county's total electorate is a jurisdictional defect that can be raised at any time and that renders void the wet-dry election which was held last November in Baxter county. We could, of course, remand the case to chancery so that it could be transferred to circuit court for the decision of that question. We see no reason, however, to adopt that circuitous procedure when the proper parties are before us and the question has been presented by the briefs.

We have found no authority on the exact point, but we think it plain that the 15% requirement is not jurisdictional. The manifest purpose of a minimum signature requirement is to make it certain that trivial matters cannot be readily placed upon the ballot. *State ex rel. Graham* v. *Board of Examiners,* 239 P. 2d 283 (Mont., 1952). There the number of signatures on an initiative petition fell short of the constitutional minimum, but the court held that the deficiency was immaterial where no such challenge was made until after the election. Similarly, we have held that the sufficiency of the

petition is of no importance after the question has been submitted to and voted upon by the people. *Beene* v. *Hutto,* 192 Ark. 848, 96 S.W. 2d 485 (1936). Moreover, Amendment 7 provides that the failure of the courts to determine the sufficiency of a petition before the election does not militate against the validity of a measure which has been approved by a vote of the people. In view of all these considerations we are convinced that the 15% requirement is not jurisdictional.

The decree is reversed, for want of jurisdiction in the chancery court, and the appellants' challenge to the election is dismissed.

Calvertis JARRETT *v.* STATE of Arkansas

CR 79-22 580 S.W. 2d 460

Opinion delivered May 7, 1979
(In Banc)

John W. Achor, Public Defender, by: *James Phillips,* Deputy Public Defender, for appellant.

Steve Clark, Atty. Gen., by: *Alice Ann Burns,* Asst. Atty. Gen., for appellee.

GEORGE ROSE SMITH, Justice. By information Jarrett was charged with theft of property and with robbery, with three previous felony convictions. At a bench trial the court found Jarrett guilty of the two offenses and sentenced him to 30 days' confinement for the theft and to 5 years for the robbery. For reversal it is argued that the proof is insufficient to sustain a finding of guilty upon either charge.

At the time of the offenses police officer Baer, off duty, was acting as a security guard at a grocery store. From a place of concealment the officer saw Jarrett and three other men load a grocery cart with packages of meat. The other three then went toward the front of the store, but Jarrett pushed the loaded cart into a storeroom, marked Employees Only. There, within the officer's sight, Jarrett began to put the packages of meat into two large sacks that had been stuck in the back of his pants. When Jarrett saw the officer he started to run, but he stopped when the officer drew his revolver and ordered him to stop. Baer tried to handcuff Jarrett and succeeded in getting one bracelet on his left wrist. The officer's testimony then continues:

> I . . . was attempting to put the other bracelet on his

> right wrist when the fight started. . . . He broke and tried to run, and of course I was holding on to the one bracelet, and I've got a gun in the other hand, which means I can't grab him. We started fighting, bouncing off. There's all kinds of merchandise, boxes, there's an ice machine, a baler. We bounced off the ice machine and the baler. I tried to handcuff him to the baler, because my car was out front with two more suspects. We continued to fight, wrestle, he was continually trying to break and get away, pushed me away, knocked me away. . . . We got up closer to the baler, and of course we are still fighting and I was trying to handcuff him to it.

At that point the officer's gun went off accidentally. Both men stopped fighting, and Jarrett was handcuffed and taken into custody.

First, the proof supports the court's finding that Jarrett was guilty of theft of property. Under the new Criminal Code a person commits theft of property if he knowingly exercises unauthorized control over the property of another person with the purpose of depriving the owner thereof. Ark. Stat. Ann. § 41-2203 (Repl. 1977). It was reasonable for the trial judge to believe that if Jarrett meant to buy the large quantity of packaged meat he would have taken it to the check-out counter. Instead, he rolled the cart into a storeroom, where the public was not supposed to be, and began putting the meat into sacks. The trial judge could infer from the evidence that Jarrett was exercising unauthorized control over the property with the intention of taking it out of the store in sacks, as if it had been paid for. In fact, no other explanation for Jarrett's conduct is readily apparent.

The proof also supports the conviction for robbery, because the crime of robbery has been materially changed by the Criminal Code. As pointed out in the Commentary to Section 41-2103, under prior law robbery consisted of the felonious taking of money or other valuable thing from the person of another by force or intimidation. That definition put the primary emphasis upon the taking of property. But the Code redefines robbery to shift the focus of the offense from the taking of property to the threat of physical harm to the victim. As the Commentary states: "One consequence of

the definition is that the offense is complete when physical force is threatened; no transfer of property need take place."

Under the Code robbery is defined in this language:

> A person commits robbery if with the purpose of committing a theft or resisting apprehension immediately thereafter, he employs or threatens to immediately employ physical force upon another. [§ 41-2103.]

"Physical force" means, among other things, any bodily impact or the threat thereof. § 41-2101

Needless to say, it is our duty to enforce the new statute as it is written, which we have actually already done in *Wilson* v. *State,* 262 Ark. 339, 556 S.W. 2d 657 (1977). Here the proof supports a finding that Jarrett, immediately after committing a theft, resisted apprehension by employing or threatening to employ physical force upon Officer Baer. The evidence therefore sustains the conviction.

Affirmed.

HICKMAN and PURTLE, JJ., dissent.

JOHN I. PURTLE, Justice, dissenting. I cannot compel myself to remain silent in view of the majority opinion. I could not sleep well if I refrained from registering this dissent. My brothers have again confounded me by their reasoning in affirming this case. Apparently the prosecuting attorney wanted to see how far he could go with a literal interpretation of the language in our new Criminal Code. It would be funny if we were not dealing with the liberty of another human being.

Robbery is defined in Ark. Stat. Ann. § 41-2103 (1) (Repl. 1977):

> A person commits robbery if with the purpose of committing a theft or resisting apprehension immediately thereafter, he employs or threatens to immediately employ physical force upon another.

Appellant had placed some meat from a shelf in a grocery store in a sack while he was in the back of the store. The officers were perched upon their seat behind one-way mirrors and observed what appeared to be a theft in the making. Before appellant attempted to leave the store the officer rushed him and he started to flee. Thereupon the officer drew his service revolver and ordered appellant to stop as he obviously did. While the officer was holding his revolver in one hand he was attempting to handcuff the appellant with the other. After clamping his left hand into the cuffs he attempted to put the other one on while appellant was resisting the force being used upon him. About this time the revolver discharged and both men became frightened and settled down. There is no indication appellant exerted any force whatsoever except to try to keep from being handcuffed. He made no threats to employ physical force upon anyone so far as the record reveals. Obviously the main force used was by the officer while he was trying to handcuff appellant to a wire on a baler machine. Naturally, there was physical force when appellant pulled back. The two may have even scuffled but the most that can be said is that appellant was resisting arrest. The officer stated: "He was continually trying to break and get away."

Appellant had no weapon other than the meat he had placed in a sack. He inflicted no injury upon the officer. Nevertheless, he was charged, convicted and sentenced to five years in the Department of Correction for "robbery."

I do not believe the General Assembly intended that every supposedly attempted theft would be considered a robbery. If they did, the comments following § 41-2103 and common sense no longer have any application to the law. Most any shoplifting or theft or resisting arrest case is now classified as a robbery if this opinion stands.

There was only one entrance and exit from this Safeway Store on Asher Avenue. The appellant would have to have attempted to walk past the checkout counters with his bag of groceries before he could reasonably have been charged with attempted theft. Witnesses for appellant contended he was there for the purpose of purchasing items and the facts do not dispute this, except it would be unusual to put the meat in a

sack instead of a cart. I am sure he probably intended to try to steal the items but he was still in the preparation and planning stages inside the store when he was handcuffed and arrested. The store employee testified the meat was still in the cart. I don't know whether it was in a sack or a cart but it was still inside the store and it never left the store. Appellant never attempted to leave the store without paying for the meat or whatever it was.

Giving the evidence its highest probative value, appellant possibly committed the offense of resisting arrest pursuant to Ark. Stat. Ann. § 41-2803 (Repl. 1977). Unless this statute was intended to apply in cases like this, it may as well never have been enacted.

In practical application the majority view here would allow a robbery conviction for a person who took a 15-cent item and ran and, while running, accidentally bumped into someone in a crowd of people. I believe in the strict enforcement of our penal statutes but I do not believe in applying them to abstract or ridiculous situations like this. It is no wonder our penal institutions are overflowing and that we have so much criticism of the Department of Corrections for releasing inmates early. I hope appellant is one of those who obtains an early release.

Our criminal justice system should be designed for the purpose of an equal application of the laws and to do justice. This Court is the last resort for those who feel they have not received justice in the lower courts, and if we fail them then they have nowhere else to turn. I submit that when we render an opinion affirming a conviction like this we have failed to look out for individual rights and the image and structure of our "Criminal *Justice* System."

I am authorized to state that HICKMAN, J., joins me in this dissent.

Garrett HACKWORTH and Bertha C. HACKWORTH and Richard M. COURSON *v.* FIRST NATIONAL BANK OF CROSSETT, Crossett, Arkansas

78-329 580 S.W. 2d 465

Opinion delivered May 7, 1979
(Division II)

Paul S. Rainwater, for appellants.

Arnold, Hamilton & Streetman, for appellee.

JOHN A. FOGLEMAN, Justice. Appellee, First National Bank of Crossett, brought this foreclosure action against appellants Garrett Hackworth and Bertha C. Hackworth, d/b/a The Hack Shop and Richard M. Courson, the uncle of Bertha Hackworth, on a real estate mortgage and a security agreement covering inventory, furniture and fixtures of The Hack Shop, a business operated by Garrett Hackworth. Appellants contended that the security interest held by appellee had been extinguished by payment of the original

notes secured by the security agreement. The chancery court sustained appellee's contentions and ordered foreclosure. We affirm.

The suit was brought on appellee's note No. 09693, dated October 6, 1976, for $12,750.00, executed by Garrett and Bertha C. Hackworth. Appellee contended that this note was a renewal of its note No. 04913, dated September 26, 1975, for $12,750.00, also executed by Garrett and Bertha C. Hackworth. A real estate mortgage was given by Harry and Betty Courson, parents of Bertha Hackworth, to secure this note. Appellee contended that both note No. 04913 and note No. 09693 were secured by both the real estate mortgage and the security interest in the inventory, furniture and fixtures of The Hack Shop, by virtue of the security agreement. On this basis, the property was attached and sold under the orders of the chancery court in this proceeding.

Appellants contend that the attachment was wrongful because the bank had no security interest at the time of the attachment. Richard M. Courson is a party because he loaned money to Garrett and Bertha Hackworth on the basis of a security agreement covering the same personalty. This security agreement was executed on July 11, 1977.

The sole point for reversal is the assertion that the finding of the chancellor was clearly against the preponderance of the evidence.

The security agreement on which the bank relied was dated September 26, 1974. A financing statement evidencing this security interest was filed in the offices of the Secretary of State of the State of Arkansas and the Circuit Court Clerk and Recorder of Ashley County. This statement showed no maturity date on the debt secured. No termination statement was ever filed. This security agreement secured an original loan of $38,439.42, evidenced by two notes, one for $13,000.00 and the other for $25,439.42, both due one year after date. The original notes were executed by the Hackworths and by Mrs. Hackworth's parents. The bank contended that this indebtedness was not paid but was extended on September 26, 1975, by renewal notes and that the unpaid balance of the note for $13,000.00 was again extended for six

months by the renewal note dated October 6, 1976. There was a balance of $12,516.43 principal and $648.12 interest due on this note when the foreclosure suit was filed. This was the only indebtedness owed the bank by the Hackworths at that time. The decision turns substantially upon the question whether the note executed on September 26, 1975, was a renewal of one of the two promissory notes described in the security agreement with the bank.

In support of their contention that the note on which the foreclosure suit was based was not a renewal, appellants rely on the testimony of Garrett Hackworth and the fact that the original note was marked paid by the bank. This mark was placed upon the note by J. B. Posey, Vice Chairman of the Board of Directors of First National Bank of Crossett. The date of payment indicated was "9-25-75." There was no notation "Paid by Renewal" similar to that put on a later note extending the debt of the Hackworths which was evidenced by the note dated September 26, 1975, which appellee contends was a renewal or extension of one of the original notes and which appellants contend was a new loan.

Garrett Hackworth testified that the original note dated September 25, 1974, was paid to the bank on September 26, 1975, the date of the note the bank claims was a renewal or extension of the balance then due on the original note. He said that new notes were executed on September 26, 1975 and a new real estate mortgage taken to secure them. He testified that he asked Posey if the inventory was included and that Posey replied, "No, not with this type of collateral. We would not need the security of merchandise." He added that he had asked if he needed to sign another security agreement and that Posey answered that one would not be needed and that the bank had sufficient collateral in the real estate. He said that the proceeds of the notes executed on September 26, 1975, were used to pay off the original notes. He pointed out that the later notes both bore a notation "realty mortgage" and that the note later paid had a notation, "Payment of this note is secured by a realty mortgage." There was no reference to a security agreement on either note. Garrett Hackworth said that there was no discussion of collateral at the time the note on which this suit is based was signed, but that, when he paid the larger note in July of 1977, Posey stated that the

bank would be willing to go ahead and renew this note, if "the store" was put up for collateral, and showed him a new security agreement already prepared. Hackworth testified that he told Posey he could not give the bank a "first mortgage" on the store, because he had already given one to Robert Courson, but that he would be glad to give the bank a second mortgage. According to Hackworth, Posey declined this offer. Hackworth stated that when he executed the security agreement with Robert Courson and the accompanying financing statement on July 6, 1977, he did not realize that the bank claimed a security interest in the inventory, furniture and fixtures.

Posey testified that the transaction which took place on September 25 and 26, 1975, was the result of an agreement on the part of the bank to renew the balance due on the two original notes after Garrett Hackworth had reported that his father-in-law was in a "deteriorating condition" and that the notes could not be paid except in installments similar to those being made on the larger of the two notes. Posey said that the Hackworths never requested that the bank release its security interest and that there had never been any discussion about renewing or releasing security interests. He acknowledged that he made the "paid" notation on the original note, but said that it was not paid in "good funds." Posey explained the taking of a new real estate mortgage, and not a new security agreement, by stating that, because of payments made, the amounts of the notes were changed, but that a change in amount on the security agreement was unnecessary. He stated that he did not request that Hackworth execute a new security agreement at the time the larger note was paid, but said that the bank did offer to renew the debt represented by the note on which this suit is based and, when Hackworth did not pursue the matter, there was no discussion of "mechanics." Posey denied that a new security agreement had been prepared. No request was ever made for a termination statement on the bank's security interest. A secured party is required to file such a statement upon demand of the debtor when there is no outstanding secured obligation and no commitment to make advances. Ark. Stat. Ann. § 85-9-404 (Supp. 1977).

On the testimony outlined above, there was only a ques-

tion of credibility to be resolved by the chancellor. There are additional facts, however, that weigh heavily in favor of appellee, and probably assisted the chancellor to resolve the question without difficulty.

James Nolley, the owner of Guy Nolley Insurance Agency, had issued a policy of insurance on the contents of The Hack Shop on March 3, 1975. It was for a term of three years. It had a loss payable clause in favor of appellee. This policy remained in effect until November 10, 1977, without any change in the mortgage clause. The premium was billed in annual installments which were paid by Hackworth. Nolley testified that it was the practice of his agency to check on each anniversary of such a policy to determine whether the mortgagee still has a mortgage. Although Nolley considered every third year to be the anniversary of a three year policy, he said that his agency attempted to inquire about the mortgagee every year. He had no specific recollection of having asked Hackworth about this. Posey testified that at a conference with the Hackworths on May 1, 1977, they had a conversation about payment of premiums on this policy, and he was assured that they had been paid. He also stated that he made a trip to the agency to ascertain whether the premiums had been paid and the coverage was still in effect.

It is also significant that the first real estate mortgage was not released until the bank agreed to release both mortgages upon payment of the larger of the two notes executed on September 26, 1975. The undisputed evidence also shows that Hackworth periodically furnished the bank with inventories of the collateral covered by the bank's security agreement during the entire period any of the indebtedness remained outstanding. One of them was dated December 31, 1976.

Hackworth testified that he never requested a termination statement because he didn't know that a request was required. He denied having had any discussion with the Guy Nolley Insurance Agency about the mortgage clause, and said that removal of the mortgage clause never entered his mind. He admitted that inventories were furnished because the bank requested them, but said that the reason he furnished them was because he owed the bank, was buying

merchandise and making "other" notes. The actions of the parties certainly tend to corroborate the testimony of Posey.

Even though we try chancery cases de novo, we do not reverse the chancery court's decree, unless the chancellor's findings are clearly against the preponderance of the evidence. Since the question of preponderance turns largely upon the credibility of the witnesses, we defer to the superior position of the chancellor. *Massey* v. *Price,* 252 Ark. 617, 480 S.W. 2d 337; *Loftin* v. *Goza,* 244 Ark. 373, 425 S.W. 2d 291; *Guaranty Financial Corp.* v. *Harden,* 244 Ark. 846, 427 S.W. 2d 548; *Dodds* v. *Dodds,* 246 Ark. 313, 438 S.W. 2d 54; *Marine Mart, Inc.* v. *Pearce,* 252 Ark. 601, 480 S.W. 2d 133.

Most of appellants' arguments turn upon the question whether the security agreement remained in force after September 25, 1974, and we cannot say that the chancellor's finding in this regard was clearly against the preponderance of the evidence. Appellants did express their disagreement with our decision in *Associated Business Investment Corp.* v. *The First National Bank of Conway,* 264 Ark. 611, 573 S.W. 2d 328 (1978), and expressed a preference for *Safe Deposit Bank & Trust Company* v. *Berman,* 393 F. 2d 401 (1st Cir., 1968). The question there involved was whether a security agreement covered advances made after the original obligation had been paid. The question here is primarily a factual one, i.e., whether the original obligation had been paid. Even so, in the security agreement in this case, the indebtedness recited therein covered "all future advances made by secured party for taxes, insurance, repairs or otherwise advanced to debtor prior to satisfaction hereof." The indebtedness, according to the chancellor's holding, was not paid, but even if it had been, the loan on September 26, 1975, would have been a future advance made, not only prior to satisfaction of the security agreement, but, since, under the Hackworths' version, it was made to enable them to pay the notes described in the agreement, it was necessarily made before those notes were actually paid.

We find no conflict in our decision and that of the Fifth Circuit Court of Appeals. The security agreement in that case secured only certain *notes* (not *indebtedness*) and renewals and extensions thereof. The secured creditor in that case sought

to enforce a "future advance," rather than an extension or renewal of the notes described in the security agreement, against a trustee in bankruptcy, who stood in the position of a subsequent lien creditor.

The Hackworths also contend that the court erred in dismissing their counterclaim for damages for wrongful attachment because appellee, in obtaining an attachment of the property covered by the security agreement, did not comply with Ark. Stat. Ann. §§ 34-2119 — 34-2123 (Supp. 1977). This statute does not apply to attachments. It applies only to actions in which the plaintiff claims a right to possession of property in possession of another, which would usually, if not always, be a replevin suit. This attachment merely held the property attached as security for the satisfaction of a judgment which may be recovered. Ark. Stat. Ann. § 31-101 (Repl. 1962). By it, the property was taken into the custody of the sheriff to be held subject to the order of the court. Ark. Stat. Ann. §§ 31-110, -114 (Repl. 1962).

Appellants also contend that the attachment was wrongful because appellee did not allege or prove any of the essential grounds for attachment under Ark. Stat. Ann. § 31-101 et seq (Repl. 1962). We disagree. Appellee filed a verified "Complaint for Foreclosure and Order of Attachment." This pleading contained an allegation that the value of the security was diminishing and that Hackworth was in the process of selling or disposing of the collateral and that the collateral was in danger of being sold, concealed or moved from the premises in derogation of the rights and interest of appellee, without the proceeds being applied to the debt owing to appellee, and contrary to the terms of the security agreement. It was further alleged that, if the property were not attached, it would greatly diminish to the detriment of appellee. On the same day this complaint was filed, the court ordered the issuance of the attachment, but provided that appellants might obtain release of the property upon filing a corporate surety bond for $15,000, in favor of appellee. Appellee filed its attachment bond on August 3, 1977. The allegations made by appellee stated a ground for attachment under subdivision 8 of § 31-101. Ark. Stat. Ann. § 31-149 (Repl. 1962) provides a method under which a defendant may move for discharge of an attachment and have a hearing if the grounds for attach-

ment are controverted. No such motion was filed. The only controversion of the allegations of the complaint was denials in the answer filed.

No hearing on the grounds for attachment in advance of the trial was held or sought, even though the court ordered a commissioner to sell the attached property upon the petition of appellee, to which appellants filed a response. The order of sale recites that the matter came on for hearing upon appellee's petition, but a transcript of the hearing does not appear in the record.

At the trial, W. C. Norman, Jr., president of the bank, testified that during June, July and August of 1977, he was trying to work out a solution to the default status of the Hackworth loan and to negotiate a settlement with Garrett Hackworth and his attorney. According to Norman, Hackworth was conducting a sale at The Hack Shop. Norman exhibited a newspaper advertisement which he said was typical of that being conducted in a newspaper and on radio. Norman said this caused the bank concern about the dissipation of the collateral without the debt to the bank being paid, and caused the bank to apply for attachment of this collateral, which was accomplished on August 4, 1977. He said that the bank's efforts at this time to secure a commitment from Hackworth that would insure payment of the debt had been unsuccessful.

Hackworth testified that the sale advertised was promotional only, to raise funds, rather than a "going out of business sale," even though it was called a liquidation sale in the advertising done. He said that he had discussed the sale with Posey, but that, after it had gone on for ten days, it was stopped by the attachment on August 4. He said that he learned on July 28, 1977, that the bank was planning to file the suit.

Again, we are unable to say that the holding of the trial court sustaining the attachment was clearly against the preponderance of the evidence.

The decree is affirmed.

We agree. HARRIS, C.J., and HOLT and PURTLE, JJ.

Jerry CASHION *v.* STATE of Arkansas

CR 79-4 580 S.W. 2d 470

Opinion delivered May 7, 1979
(Division I)

Oliver Cox, for appellant.

Steve Clark, Atty. Gen., by: *Robert J. DeGostin, Jr.,* Asst. Atty. Gen., for appellee.

CONLEY BYRD, Justice. Appellant Jerry Cashion in January, 1970, entered guilty pleas to two separate burglaries (Cases 1576 and 1577) and received two concurrent 15 year sentences with eight years suspended. In January, 1973, after appellant had been paroled from the Department of Corrections, the trial court revoked the eight year suspended sentence in Case No. 1577. On April 26, 1978, the trial court revoked the eight year suspended sentence in Case No. 1576.

In this post conviction proceeding, appellant contends that the court had no authority on April 26, 1978, to revoke

the suspended sentence in Case No. 1576, since such action would in effect make the two sentences run consecutively instead of concurrently. We must agree with appellant.

In *Williams, Standridge & Deaton* v. *State,* 229 Ark. 42, 313 S.W. 2d 242 (1958), we pointed out that once a valid concurrent sentence has been put into execution, the trial court is without jurisdiction to modify the sentence to make the sentences run consecutively. Consequently, it follows that since the trial court here originally ran the sentences concurrently, it was without authority to revoke the suspension in such a manner as to make them run consecutively.

Reversed with directions to set aside the revocation in case No. 1576.

We agree: HARRIS, C.J., and GEORGE ROSE SMITH and HICKMAN, JJ.

Leon REA et al *v.* Katherine RUFF et al

78-249 580 S.W. 2d 471

Opinion delivered May 7, 1979
(Division II)

Blackmon & Zakrzewski, by: *Wayne Zakrzewski,* for appellants.

Philip E. Meadows, for appellee Millers Ins. Co.

Pinson & Reeves, by: *Kenneth Reeves,* for appellee Katherine Ruff.

FRANK HOLT, Justice. This action was instituted by appellants seeking a declaratory judgment as to their rights in the proceeds of an insurance policy on a motel damaged by fire. Appellee Ruff, as first mortgagee, was named loss payee in the policy. The court found she was entitled to the policy proceeds. Hence this appeal.

Appellee Ruff and her husband, now deceased, sold the motel to appellants Woodrow and Mollie Horton in 1964 by escrow contract. The contract provided that appellants, as the purchasers, would procure insurance coverage on the motel (and a restaurant) in the amount of $60,000 with loss payable to the sellers. Thereafter, appellants Horton sold their interest in the motel to appellants Leon and Nadine Rea, who assumed the balance due appellee Ruff under the escrow contract. The motel was damaged by fire in January, 1978. At the time of the fire, there was in effect an insurance policy issued by appellee Millers Insurance Group naming appellee Ruff as loss payee.

Appellants first contend the court erred in entering an order without a trial and that until there is evidence submitted, the chancellor could not make "a valid determination of the issues." Appellants' declaratory action alleged that appellee Ruff had impliedly authorized the proceeds of the insurance policy to be applied to the repair of the building. Appellee Ruff responded by denying that she had so agreed or that she had been aware of the plans or reconstruction in progress. We first observe, in answer to appellants' contention, that the chancellor's action was based upon appellants' agreement. Admittedly, appellants' attorney, with appellees' attorney, approved an order of the court providing that "[b]y

agreement of all the parties," written briefs would be submitted to the chancellor and opposing counsel on or before a certain date and "[t]hat judgment declaring the rights of the parties herein will be rendered based on said briefs as submitted." Further, appellants made no objection to this agreement until after the court's action when they filed a motion to set it aside asserting that they should have been permitted to introduce proof. As to appellants' motion, we find no ruling on it. The burden is on the party making a motion to obtain a ruling from the court and failure to do so constitutes a waiver of the motion precluding its consideration on appeal. *Flake* v. *Thompson, Inc.,* 249 Ark. 713, 460 S.W. 2d 789 (1970). In the circumstances here, we cannot say that the court erred in entering judgment.

Appellants next contend that the court erred in awarding the insurance money to appellee Ruff since she knew of the fire loss and the intentions of the insurance company and the appellants to apply the proceeds to the property's reconstruction. Appellee Ruff asserted her claim to the proceeds as the project neared completion. Appellants now assert that appellee Ruff is estopped to claim the proceeds.

It is well settled that, in a situation such as the one at bar, the loss payee is entitled to the insurance proceeds. *Price* v. *Harris,* 251 Ark. 793, 475 S.W. 2d 162 (1972). The facts of that case are almost identical to the case at bar. In dealing with the estoppel argument, among others, we said:

> Because of our previous holdings that a stipulation that property should be insured for the benefit of the mortgagee constitutes an appropriation in advance of the insurance money to the satisfaction of the mortgage indebtedness, *Bonham* v. *Johnson,* 98 Ark. 459, 136 S.W. 191 (1911), appellant is not entitled to relief under these contentions.

See also *Sharp* v. *Pease,* 193 Ark. 352, 99 S.W. 2d 588 (1936); and *Kissire* v. *Plunkett-Jarrell Gro. Co.,* 103 Ark. 473, 145 S.W. 567 (1912).

Appellants assert further that even if appellee Ruff is entitled to the proceeds, appellants should be allowed to apply

the payments to their debt as the payments become due, arguing that the case is similar to *Crone* v. *Johnson,* 240 Ark. 1029, 403 S.W. 2d 738 (1966), as appellants will be placed in an "obviously inequitable" position if appellee is awarded the proceeds. *Crone* is inapposite. It dealt with a case where the mortgagor defaulted and the mortgagee was attempting to accelerate the entire debt, foreclose, and also collect the insurance proceeds. We disallowed this as being an inequitable result. Here appellants' same argument was made in *Price, supra.* There we rejected that argument, noting that we did not overlook appellant's reliance on *Crone, supra.* Here it is undisputed that appellee Ruff did not seek acceleration of the debt nor a foreclosure. She only sought and was awarded the insurance proceeds, as a loss payee, which she has applied to appellants' indebtedness.

Affirmed.

We agree: HARRIS, C.J., and FOGLEMAN and PURTLE, JJ.

James B. HATCHER *v.* Sue Guyant HATCHER

78-295 580 S.W. 2d 475

Opinion delivered May 7, 1979
(In Banc)

Coleman, Gantt, Ramsay & Cox, for appellant.

Baim, Baim, Gunti, Mouser & Bryant, for appellee.

DARRELL HICKMAN, Justice. The Jefferson County Chancery Court granted the appellee, Sue Guyant Hatcher, temporary maintenance and attorney fees in a divorce action. The appellant, James B. Hatcher, objected to the court's order, arguing that Ark. Stat. Ann. § 34-1210 (Repl. 1962) which authorizes such an award violates the equal protection clauses of the United States and Arkansas Constitutions in

that it granted rights to temporary alimony, maintenance and attorney fees only to women and not to men. See U.S. Const. Amend. XIV, and Ark. Const. Art. 2, § 3.

The appellant raises on appeal from the temporary order the constitutional issue as well as whether the court's award was excessive.

Mrs. Hatcher was awarded $3,200.00 per month as "temporary support and maintenance," and a $1,500.00 temporary attorney's fee. There was no breakdown of how much was allotted as temporary alimony, and how much as support, if any, for the minor child. The order also provided that the appellant was to pay all medical, dental and drug bills incurred by the appellee and her son, Lynn Brady Guyant. (The minor son is by a prior marriage of Mrs. Hatcher. However, she alleged that the appellant was responsible for his support.) The appellee was given temporary possession of a Mark V automobile and their home. It was not disputed that the appellant's adjusted gross income for 1977 was $274,000.00.

Since the trial court entered its order, the United States Supreme Court has issued a decision which we consider controlling and which requires us to declare that the law in question is unconstitutional. In *Orr v. Orr,* 47 U.S.L.W. 4224 (March 5, 1979), the United States Supreme Court declared a similar Alabama statute unconstitutional.[1]

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[1]The Alabama statutes in question provided:

Ala. Code, Title 30.

§ 30-2-51. If the wife has no separate estate or if it be insufficient for her maintenance, the judge, upon granting a divorce, at his discretion, may order to the wife an allowance out of the estate of the husband, taking into consideration the value thereof and the conditions of his family.

§ 30-2-52. If the divorce is in favor of the wife for the misconduct of the husband, the judge trying the case shall have the right to make an allowance to the wife out of the husband's estate, or not make her an allowance as the circumstances of the case may justify, and if an allowance is made, it must be as liberal as the estate of the husband will permit, regard being had to the condition of his family and to all the circumstances of the case.

§ 30-2-53. If the divorce is in favor of the husband for the misconduct of the wife, and if the judge in his discretion deems the wife entitled to an allowance, the allowance must be regulated by the ability of the husband and the nature of the misconduct of the wife.

The court applied the following test in determining the constitutionality of the Alabama statute:

> "To withstand scrutiny" under the equal protection clause, " 'classifications by gender must serve important governmental objective and must be substantially related to achievement of those objectives.' "

Several possible governmental objectives that could justify the existence of such a statute were examined by the court. First, allocation of family responsibilities in which the wife plays a dominant role. The court found that this purpose could not now sustain such laws, commenting:

> No longer is the female destined solely for the home and the rearing of the family, and only the male for the marketplace and world of ideas.

Next, the court considered two other possible purposes: (1) "to provide help for needy spouses, using sex as a proxy for need"; and, (2) to compensate "women for past discrimination during marriage" which arguably has left them unprepared to fend for themselves in the working world after a divorce. These two objectives were recognized as legitimate and important governmental objectives. However, the court held that since "individualized hearings at which the parties' relative financial circumstances are considered *already* occur," the gender-based classification was unnecessary and the state's purposes could be effectuated without it. (Emphasis in original.)

More importantly, the court noted that the use of such a gender classification gives "an advantage only to the financially secure wife whose husband is in need."

> Where, as here, the States' compensatory and ameliorative purposes are as well served by a gender-neutral classification as one that gender-classifies and therefore carries with it the baggage of sexual stereotypes, the State cannot be permitted to classify on the basis of sex. And this is doubly so where the choice made by the State appears to redound — if only in-

> directly — to the benefit of those without need for special solicitude.

Orr v. *Orr, supra,* at 4228.

The Arkansas law in question, Ark. Stat. Ann. § 34-1210 (Repl. 1962), is very much like the Alabama law. It reads:

> Maintenance and Attorney's Fees Pending Action — Attorney's Fees for Enforcement of Decree. — During the pendency of an action for divorce or alimony, the Court may allow the wife maintenance and a reasonable fee for her attorneys, and enforce the payment of the same by orders and executions and proceedings as in cases of contempt, and the Court may allow additional attorney's fees for the enforcement of payment of alimony, maintenance and support provided for in the decree.

The Arkansas law permits, but does not require, alimony and attorney fees; the Alabama law is identical in that regard. We have held that the allowance of temporary alimony and attorney's fees is within the sound discretion of the court. So long as they are within reasonable limits they will not be disturbed. *Livingston* v. *Livingston,* 247 Ark. 1137, 449 S.W. 2d 386 (1970); *Brabham* v. *Brabham,* 240 Ark. 172, 398 S.W. 2d 514 (1966). In Alabama such an award is based upon all the circumstances of the case. Alabama Code, Title 30 § 30-2-52. The Arkansas law only provides for such relief to the wife with no reference to a reciprocal right for a husband. So does the Alabama law. The fact that the Arkansas law in question only relates to temporary, as opposed to permanent, alimony is not significant. We have even held that a wife is entitled to temporary alimony based upon the sole fact that the husband sued her for divorce. *Kearney* v. *Kearney,* 224 Ark. 585, 274 S.W. 2d 779 (1955). It is not a question of temporary or permanent alimony. It is a question of a gender-based classification of the statute. The same arguments made to justify the Alabama law can be made regarding the Arkansas statute in question.

There is no doubt that the Arkansas law cannot survive application of the principles of the *Orr* case. "A gender-based

classification which, as compared to gender-neutral one, generates additional benefits only for those it has no reason to prefer cannot survive equal protection scrutiny," *Orr* v. *Orr, supra,* at 4228. Therefore, we declare Ark. Stat. Ann. § 34-1210 (Repl. 1962) unconstitutional in violation of the equal protection provisions of the United States and the Arkansas constitutions.

The appellee has argued that we should simply hold that the law applies to both wives and husbands. We have never applied this statute in favor of husbands. When the will of the General Assembly is clearly expressed, we are required to adhere to it without regard to consequences. *Walker* v. *Allred,* 179 Ark. 1104, 20 S.W. 2d 116 (1929). It is not the function of this court to legislate; to do so would be a clear violation of this court's authority. Divorce and the incidental rights, responsibilities and liabilities of a divorce, are purely statutory. *Ex parte Helmert,* 103 Ark. 571, 147 S.W. 1143 (1912); *Ramsey* v. *Ramsey,* 259 Ark. 16, 531 S.W. 2d 28 (1975); *Wheat* v. *Wheat,* 229 Ark. 842, 318 S.W. 2d 793 (1958). We held in *Young* v. *Young,* 207 Ark. 36, 178 S.W. 2d 994 (1944):

> The Legislature — not the courts — determined the grounds for, the defenses against, divorce: Because divorce is always regulated by statute.

Since the *Orr* decision, the Arkansas General Assembly passed, and the Governor of Arkansas signed into law, Act 705 of 1979. It amends Ark. Stat. Ann. § 34-1210 to read:

> During the pendency of an action for divorce or alimony, the court may allow to the wife or to the husband maintenance and a reasonable fee for her or his attorneys, and enforce the payment of the same by orders and executions and proceedings as in cases of contempt, and the court may allow either party additional attorney's fees for the enforcement of payment of alimony, maintenance and support provided for in the decree.

It seems that the General Assembly has addressed, by Act 705, the problems created by *Orr* and although we take judicial knowledge of the Act, we do not rule on its legality nor application since it is not before us. However, as far as

these parties are concerned, it is relevant to their pending divorce case. This matter is remanded for the chancery court to reconsider its order in view of the *Orr* decision, our decision and Act 705.

The United States Supreme Court, in *Orr,* cautioned litigants as to the effect of the *Orr* decision. It may not result in much change. It was pointed out that in Alabama, alimony is sometimes a matter of contract and, therefore, enforceable as a contract between the parties. Arkansas also has recognized this distinction. *Armstrong* v. *Armstrong,* 248 Ark. 835, 454 S.W. 2d 660 (1970). Furthermore, parties who have not raised the constitutional issue in prior proceedings may be precluded from raising it at a later date. *Orr* v. *Orr, supra.*

We do not reach the second argument of the appellant, that the award was excessive, because this matter may be rendered moot at a rehearing. It may be that the order of the trial court, based on the statute declared unconstitutional, can be remedied on a rehearing. Also, this was a temporary and not final adjudication of the rights of the parties.

The appellee also argues that the appellant did not properly appeal from the temporary award of attorney's fees. The record reflects that the appellant appealed from the order entered by the court and that order included attorney fees.

It may be that the *Orr* decision and our decision will at least for a period of time cause some problems to litigants. However, we resist the temptation to rule beyond the issues before us. It is best that any legal problem resulting from *Orr* be addressed by the General Assembly or through our judicial system. We cannot cure all the ills created by such cases, nor should we presume to anticipate them.

Reversed and remanded.

HARRIS, C.J., not participating.

GEORGE ROSE SMITH and FOGLEMAN, JJ., concur in part and dissent in part.

JOHN A. FOGLEMAN, Justice, concurring in part and dis-

senting in part. I concur only in those parts of the majority opinion in which the majority declines to legislate and in which it holds that the case should be remanded to the Chancery Court of Jefferson County for consideration in the light of *Orr* v. *Orr,* 440 U.S. 268, 99 S. Ct. 1102, 59 L. Ed. 2d 306 (1979) and Act 705 of 1979.

I do not think that it is appropriate for this court to render a decision invalidating an act of the General Assembly in an abstract consideration of that statute in relation to a decision of the United States Supreme Court invalidating a statute, which could not have had any application to this case at this stage, without a more comprehensive treatment of both our statute [Ark. Stat. Ann. § 34-1210 (Repl. 1962)], which was pertinent to this case, and the background peculiar to this case. The majority properly declines to express itself as to the effect of Act 705 of 1979, leaving this matter to the trial court. We should also let the trial court determine the effect of *Orr* on its decree in the background of the concrete facts. I also suggest that the majority has disregarded the presumption of constitutionality that attends every act of the General Assembly. See *Collins* v. *State,* 261 Ark. 195, 548 S.W. 2d 106, cert. den. 434 U.S. 878, 98 S. Ct. 231, 54 L. Ed. 2d 158 (1977); *Gibbs* v. *State,* 255 Ark. 997, 504 S.W. 2d 719; *Hooker* v. *Parkin,* 235 Ark. 218, 357 S.W. 2d 534; *Neal* v. *Still,* 248 Ark. 1132, 455 S.W. 2d 921; *Hickenbottom* v. *McCain,* 207 Ark. 485, 181 S.W. 2d 226, cert. den. 323 U.S. 777, 65 S. Ct. 189, 89 L. Ed. 621 (1944); *Hardin* v. *Fort Smith Couch & Bedding Co.,* 202 Ark. 814, 152 S.W. 2d 1015; *Miller Levee District No. 2* v. *Evers,* 200 Ark. 53, 137 S.W. 2d 915; *Ward* v. *Bailey,* 198 Ark. 27, 127 S.W. 2d 272; *Phillips* v. *Rothrock,* 194 Ark. 945, 110 S.W. 2d 26; *Easley* v. *Patterson,* 142 Ark. 52, 218 S.W. 381; *Dabbs* v. *State,* 39 Ark. 353, 43 Am. Rep. 275.

In order to put the matter in proper perspective, I will first outline the factual background. This is the second marriage for both parties. Appellant pays alimony of $10,200 per year to his former wife. He had "adjusted gross income" of $274,587 in 1977. He admits monthly take-home pay of $2,000 and monthly income of $2,596 from other sources. He has $13,552 in savings accounts and stocks and bonds worth $51,278. He claims living expenses of $2,000 per month and

indebtedness of $133,474. Just a month prior to the hearing, he had represented to appellee that he was the sole stockholder of Acme Construction Company, but appellee was told after appellant filed this divorce suit that he was a minority stockholder and that the majority stockholders were his daughter and son-in-law. Two years previously, when she had contemplated divorce and appellant desired a reconciliation, appellant had told her he was worth a million dollars and had $750,000 in certificates of deposit earning interest at the rate of $200 per day and that they could take trips, do anything they wanted to, and build a fine new home.

At the time of the marriage, appellee had been employed by John Tucker Furniture Company as a salesman, performing duties as an interior decorator. In January, before the hearing in the trial court, she had talked with one Larry Pegrim about employment as an interior decorator, but appellant had objected to her going into business with him. She felt that the opportunity might be again available to her. She had obtained psychiatric help because of extreme nervousness, which she attributed to her husband's conduct. She owned a dwelling house in North Little Rock from which she received $300 per month rent, but made a monthly mortgage payment of $165 on this residence. She also paid the cost of upkeep and had replaced an air-conditioner and a dishwasher in it.

The testimony of appellee on the critical points is undisputed. Appellant had been giving her $2,000 per month for household and personal expenses for two or three years, after he had increased the allowance from $1,500. She had numerous credit cards. For five years, appellant also had paid all medical and dental expenses of appellee and of her two children by a previous marriage. In addition, appellant furnished appellee with an automobile and the gasoline she used. He also had paid for the entertaining done by the couple. He told her to spend whatever she wanted to.

Obviously, these parties contracted the traditional, conventional marriage and this case should be treated in that light and not in the light of some other marriage or some set of statistics that may or may not be indicative of a breakdown of either the family as an institution or even of our previous

concepts of marriage, and the duties and obligations attendant thereon.

Whether I agree with the majority in *Orr* v. *Orr,* supra, is of no consequence, because it is the law of the land today. I do not agree that *Orr* has the effect the majority of this court has given it, because *Orr* dealt only with a statute governing the award of alimony upon the dissolution of a marriage by divorce. In Arkansas, the award of alimony upon divorce has always been governed by statute. We are not dealing here with a statute having to do with such an award. We are dealing with a statute that governs while the marriage continues in existence, and is in recognition of its continued existence. We are also dealing with a case in which the husband, a wealthy man, brought a suit for divorce against his wife, whose means are rather limited to say the least.

Appellee sought the allowance of temporary alimony and reasonable attorney's fees. We have used the term "temporary alimony" but our statute does not speak in terms of alimony. It relates to maintenance of the wife during the pendency of the action and attorney's fees incurred in the litigation. The court awarded "temporary support and maintenance" and "temporary attorney's fees." We are not considering permanent alimony or property awards, or the condition of the wife after the marriage contract is terminated by divorce, if that time is ever reached. We are considering what happens to this needy wife during the course of the litigation brought by the husband. It is not a question of how she can fend for herself following the divorce. It is, how can she fend for herself in the divorce action and while the marriage contract is still in effect? The disparity between her economic situation and that of her marriage partner is at once apparent. It results from the mutual designs of the parties and the long-standing, well recognized common law concepts of marriage, which may today be said to be, and to have been, the result of a long history of economic discrimination against women, which was only slightly diminished by the married women's acts. Even after those acts, the trend toward making the sexes similarly situated with respect to economic opportunity has been slow and no one can say, with any confidence, that such a point has been reached. Certainly it has not been attained to that degree that sex is not a valid

basis for classification in considering the wife's survival during the divorce action and assuring her the means for defending it. Eliminating the statutory provision for maintenance, costs of suit and attorney's fees to the needy wife would discriminate in favor of the non-dependent wives who find themselves defending a divorce suit, along with any husband who wants to rid himself of any obligation to a marriage partner, whom he has made dependent on him. But we all know far more women than men will be "disadvantaged" by elimination of "temporary alimony," suit money and attorney's fees, which I submit can be allowed in a case such as this, with or without the statute.

Divorce is statutory and the chancery courts exercise only the powers conferred by statute, not inherent chancery powers, in granting divorces and dividing property and awarding alimony when the marriage is dissolved. *Young* v. *Young,* 207 Ark. 36, 178 S.W. 2d 994, 152 ALR 327, in which *Bowman* v. *Worthington,* 24 Ark. 522, and *Ex parte Helmert,* 103 Ark. 571, 147 S.W. 1143, were cited. Still it was pointed out in *Young* that our statutes provide that the action for alimony or divorce shall be by equitable proceedings.[1] See Ark. Stat. Ann. § 34-1201 (Repl. 1962). Our statement in *Young* may well be accurate insofar as the power of the court to act is concerned. But it concerns the matter of *divorce* only. It should be noted that the quotation from *Helmert* in *Young,* recognizes that matters relating to divorce and alimony were originally of ecclesiastical origin and that the courts *generally* look to the statutes as the source of their power. Furthermore, *Helmert* was directed only to the question of power of the chancellor to make an order granting alimony in vacation. It should be noted that in *Young,* the court was concerned only with *grounds* for, and defenses against, *divorce.* Nothing said in *Young* related to allowance of support and maintenance or attorney's fees to the wife, pending divorce.

In any event, this court has said that the chancery courts and this court have the power to award support and

[1]To say the least, procedures in divorce cases are according to rules in equity cases. See *Jackson* v. *Jackson,* 253 Ark. 1033, 490 S.W. 2d 809. And relief may be denied on equitable grounds. *Krohn* v. *Krohn,* 221 Ark. 564, 254 S.W. 2d 453.

maintenance or "alimony" and attorney's fees to a wife in cases where a divorce was not granted to either party, without placing reliance upon any statute. See *McDougal* v. *McDougal,* 205 Ark. 945, 171 S.W. 2d 942; *Gabler* v. *Gabler,* 209 Ark. 459, 190 S.W. 2d 975. This is done on the basis that, even though a decree for divorce is denied, "alimony" may be awarded for the support and maintenance of the wife as in an independent action for alimony. *Shirey* v. *Shirey,* 87 Ark. 175, 112 S.W. 369; *Pryor* v. *Pryor,* 88 Ark. 302, 114 S.W. 700.

It has long been recognized in this state that an independent action for alimony may be maintained, without the necessity for alleging any grounds for divorce. *Wood* v. *Wood,* 54 Ark. 172, 15 S.W. 459; *Shirey* v. *Shirey,* supra; *Kientz* v. *Kientz,* 104 Ark. 381, 149 S.W. 86. Alimony is defined, at least for the purpose of such cases, as an allowance which a husband, by order of the court, pays to his wife, being separate from him, for her maintenance. *Wood* v. *Wood,* supra; *Shirey* v. *Hill,* 81 Ark. 137, 98 S.W. 731; *Bowman* v. *Worthington,* supra. Alimony (as thus defined before its extension by statute) applied only to divorce a mensa et thoro, presently referred to as divorce from bed and board or limited divorce, because that type of divorce presumes the relation of husband and wife still to exist, although the parties are separated. *Hill* v. *Rowles,* 223 Ark. 115, 264 S.W. 2d 638; *Bowman* v. *Worthington,* supra. See also *Rose* v. *Rose,* 9 Ark. 507.

Only by statute was the meaning of the word alimony extended to include an allowance by the court on dissolving the bonds of matrimony. *Bauman* v. *Bauman,* 18 Ark. 320; *Wood* v. *Wood,* supra. The holding in *Bowman* v. *Worthington,* supra, was based upon a statute that preceded Ark. Stat. Ann. § 34-1201. That statute was construed to bar the allowance of either alimony or maintenance, except as an incident to divorce. It was pointed out in *Wood* that the ruling was in line with many English and American cases but antagonistic to many others in which there was a broader jurisdiction of suits in equity for alimony alone, where a husband separated himself from his wife, without cause, and without furnishing her reasonable support. This court then concluded that § 34-1201 was in conformity with those authorities recognizing the jurisdiction of courts of equity in actions for support and maintenance or "alimony" and that it was the legislative in-

tent that an action for alimony be the action which had been utilized in those chancery courts that had held that such an action was maintainable *in equity*. The action was said to be by bill in equity. *Rosenbaum* v. *Rosenbaum,* 206 Ark. 865, 177 S.W. 2d 926. And, in such a case, the wife must establish her grounds for relief by a preponderance of the evidence. *Rosenbaum* v. *Rosenbaum,* supra. Her ability to earn any amount necessary for her support is properly taken into consideration. *Rosenbaum* v. *Rosenbaum,* supra.

It was on the basis of the holding in *Wood* that this court recognized the power of the chancery court to award "alimony" in a divorce proceeding, even though a divorce be denied. *Horton* v. *Horton,* 75 Ark. 22, 86 S.W. 824. It was but a short step to the holding that an equity court not only could, but in a case where the separation was not the fault of the wife, should, make some provision for the maintenance of the wife. *Kientz* v. *Kientz,* supra. Whenever there is cause for separate maintenance, an award for personal support of the wife is proper. *Walls* v. *Walls,* 227 Ark. 191, 297 S.W. 2d 648. And we have said that the suit for separate maintenance may be maintained "under the broad powers of equity." *Womack* v. *Womack,* 247 Ark. 1130, 449 S.W. 2d 399.

It seems clear to me that, even in a proceeding for divorce, the chancery court may, and should, exercise its equitable powers in matters pertaining to separate maintenance of the wife during its pendency. It must be remembered that a decree for judicial separation is not a divorce at all. It has no effect upon the marital status, which continues existent just as before the decree, which merely regulates the personal rights of the spouses in relation to the still continuing marital status. *Myers* v. *Myers,* 226 Ark. 632, 294 S.W. 2d 67; *Hill* v. *Rowles,* supra.

Alimony pendente lite is nothing more than separate maintenance during the pendency of a divorce action. See *Slocum* v. *Slocum,* 86 Ark. 469, 111 S.W. 806; *Glenn* v. *Glenn,* 44 Ark. 46.

In this state, temporary alimony during the pendency of the action is allowed only on the basis of need. *Tracy* v. *Tracy,* 184 Ark. 832, 43 S.W. 2d 539. We have repeatedly held that

the allowance of alimony pendente lite is within the sound discretion of the chancellor. *Lewis* v. *Lewis,* 222 Ark. 743, 262 S.W. 2d 456; *Gladfelter* v. *Gladfelter,* 205 Ark. 1019, 172 S.W. 2d 246; *Casteel* v. *Casteel,* 38 Ark. 477; *Hecht* v. *Hecht,* 28 Ark. 92.

The exercise of jurisdiction in divorce matters is based to a great extent upon the law of marriage and divorce as administered in the ecclesiastical courts, except as it may have been affected by statute. The basis for this approach was stated in *State ex rel Fowler* v. *Moore,* 46 Nev. 65, 207 Pac. 75, 22 ALR 1101 (1922), viz:

> Prior to 1858, and from a very remote period in England, the ecclesiastical tribunals had exclusive jurisdiction over divorce, except that divorces a vinculo matrimonii were occasionally granted by special acts of Parliament during that time.
>
> The common law which we received in this country from England was the common law as it existed when this jurisdiction still belonged to the ecclesiastical courts, and it has been held by this court that the law of marriage and divorce, as administered by the ecclesiastical courts, is a part of the common law of this country, except as it has been altered by statute. *Wuest* v. *Wuest,* 17 Nev. 217, 30 Pac. 886.

However, as indicated above, those courts could not grant an absolute divorce, and they could, at the most, grant a divorce from bed and board. *Maynard* v. *Hill,* 125 U.S. 190, 8 S. Ct. 723, 31 L. Ed. 654 (1888). Of course, we adopted the common law of England. Ark. Stat. Ann. § 1-101 (Repl. 1976).

At a very early date, this court recognized the fact that our chancery courts exercise the jurisdiction once vested in the English ecclesiastical courts. In *Rose* v. *Rose,* 9 Ark. 507, we said:

> *** But beyond this the jurisdiction over divorces and alimony (which is not necessarily an integral part of a decree for a divorce even when granted *a mensa et thoro,* and had no place in the English divorce *a vinculo*

> *matrimonii*) belonged exclusively to the ecclesiastical courts, and was never exercised in England by any other courts except only during the usurpation of Cromwell while the spiritual courts were closed, *** which jurisdiction the chancery courts renounced upon the restoration and resumption of authority by the ecclesiastical courts. *** So, in our body politic, if by any means the ordinary tribunals for affording relief be destroyed, some other tribunal must be found to supply its place, which is generally the courts of equity, it being the boast of those tribunals to give relief where others are incompetent. Upon this general foundation, then, in reference to which our constitutional and statutory provisions as these subjects are to be interpreted, it is altogether safe to assume that the chancery courts of this **State have rightfully, as to divorce and alimony, all the** powers of the English ecclesiastical courts as well as additional powers conferred by our statutes.

In *Bauman* v. *Bauman,* 18 Ark. 320, this court said that the chancery courts ought to employ the same rules of law which the ecclesiastical courts do, except insofar as they be found unsuited to our courts, or in conflict with specific constitutional or statutory provisions. It was the universal and unquestioned practice of the ecclesiastical courts to award alimony to the wife, whether as plaintiff or defendant, out of the husband's property, upon what was called, in ecclesiastical parlance, an allegation of faculties made in her behalf and some showing of the husband's ability. *Glenn* v. *Glenn,* 44 Ark. 46. The cited case involved alimony pendente lite.

It has been said that, in enacting the statute permitting alterations in alimony and maintenance, our legislature acted "in analogy to the alimony of the spiritual courts." *Bauman* v. *Bauman,* supra. Thus, the chancery courts today should not hesitate to exercise the powers of the ecclesiastical courts in matters pertaining to alimony and maintenance, unless prohibited from doing so by statute.

Marriage itself is "gender-based" and requires "gender-based" classifications. Only a male can be a husband and only a female can be a wife. *Singer* v. *Hara,* 11 Wash. App.

247, 522 P. 2d 1187 (1974); *Baker* v. *Nelson,* 291 Minn. 310, 191 N.W. 2d 185 (1971), appeal dismissed for want of a substantial federal question, 409 U.S. 810, 93 S.Ct. 37, 34 L. Ed. 2d 65; *Anonymous* v. *Anonymous,* 67 Misc. 2d 982, 325 N.Y.S. 2d 499 (1971); *Jones* v. *Hallahan,* 501 S.W. 2d 588, 63 ALR 3d 1195 (Ky. App., 1973); *M.T.* v. *J.T.,* 140 N.J. Super. 77, 355 A. 2d 204 (1976). There are no "equal protection" barriers to a state's requiring that husbands be males and wives be females. *Baker* v. *Nelson,* supra; *Singer* v. *Hara,* supra; *Jones* v. *Hallahan,* supra. In disposing of the equal protection argument, the Minnesota Supreme Court, in *Baker* (in which the U.S. Supreme Court found no substantial federal question), said:

> The equal protection clause of the Fourteenth Amendment, like the due process clause, is not offended by the state's classification of persons authorized to marry. There is no irrational or invidious discrimination. Petitioners note that the state does not impose upon heterosexual married couples a condition that they have a proved capacity or declared willingness to procreate, posing a rhetorical demand that this court must read such condition into the statute if same-sex marriages are to be prohibited. Even assuming that such a condition would be neither unrealistic nor offensive under the Griswold rationale, the classification is no more than theoretically imperfect. We are reminded, however, that "abstract symmetry" is not demanded by the Fourteenth Amendment.

Marriage is, and always has been, a contract between a man (husband) and a woman (wife). *B.* v. *B.,* 78 Misc. 2d 112, 355 N.Y.S. 2d 712 (1974). *Anonymous* v. *Anonymous,* supra. Marriage has been defined as "the civil status, condition, or relation of one man and one woman united in law for life, for the discharge to each other and the community of the duties legally incumbent upon those whose association is founded on the distinction of sex. Black's Law Dictionary, 4th Ed., p. 1123; *B.* v. *B.,* supra; 55 C.J.S. 806, Marriage, § 1. Marriage is an important institution that is fundamental to our very existence and survival. *Loving* v. *Virginia,* 388 U.S. 1, 87 S. Ct. 1817, 18 L. Ed. 2d 1010 (1967); *Skinner* v. *Oklahoma,* 316 U.S. 535, 62 S. Ct. 1110, 86 L. Ed. 1655 (1942); *Gress* v. *Gress,* 209

S.W. 2d 1003, 15 ALR 2d 700 (Tex. Civ. App., 1948). As put in *Maynard* v. *Hill,* supra:

> *** Other contracts may be modified, restricted, or enlarged, or entirely released upon the consent of the parties. Not so with marriage. The relation once formed, the law steps in and holds the parties to various obligations and liabilities. It is an institution, in the maintenance of which in its purity the public is deeply interested, for it is the foundation of the family and of society, without which there would be neither civilization nor progress. ***

It has been said that the home and family are the foundation of society. *In re McLaughlin's Estate,* 4 Wash. 570, 30 P. 651 (1892). Just two years ago, the United States Supreme Court classified the family unit as "perhaps the most fundamental social institution of our society." See *Trimble* v. *Gordon,* 430 U.S. 762, 97 S. Ct. 1459, 52 L. Ed. 2d 31 (1977). A doctrine of general acceptance is that, in divorce suits, the court represents the interest of the state throughout the proceedings. *State ex rel Fowler* v. *Moore,* supra. See also, *Pickston* v. *Dougherty,* 109 So. 2d 577, 71 ALR 2d 618 (Fla. App., 1959). The reason the state is an interested party is because it is important to society, as represented by the state, that the marital status and the home be preserved wherever possible. *Cahaley* v. *Cahaley,* 216 Minn. 175, 12 N.W. 2d 182, 157 ALR 1 (1943); *Gress* v. *Gress,* supra.

We have treated marriage in the same light as that in which it is viewed in other jurisdictions. In *Marshak* v. *Marshak,* 115 Ark. 51, 170 S.W. 567, LRA 1915E 161, Ann. Cas. 1916E 206, we said:

> *** Marriage was instituted for the good of society, and the marital relation is the foundation of all forms of government. For that reason the state has an interest in every divorce suit, and the marital relation, once established, continues until the marriage contract is dissolved upon some ground prescribed by statute. ***

See also, *Phillips* v. *Phillips,* 182 Ark. 206, 31 S.W. 2d 134.

It is the public policy of this state to surround the marriage relation with every safeguard and to support and maintain the marriage status wherever it is reasonable to do so. *Phillips* v. *Phillips,* supra; *Hill* v. *Rowles,* supra.

Marriage has been regarded as a civil contract everywhere in this country. *Meister* v. *Moore,* 96 U.S. 76, 24 L. Ed. 826 (1878); Ark. Stat. Ann. § 55-101 (Repl. 1971); *Reaves* v. *Reaves,* 15 Okla. 240, 82 P. 490 (1905); *Dodson* v. *State,* 61 Ark. 57, 31 S.W. 977. See also, *Smiley* v. *Smiley,* 247 Ark. 933, 448 S.W. 2d 642; *Bickford* v. *Carden,* 215 Ark. 560, 221 S.W. 2d 421. We have called it a solemn contract. *Worden* v. *Worden,* 231 Ark. 858, 333 S.W. 2d 494; *Shatford* v. *Shatford,* 214 Ark. 612, 217 S.W. 2d 917. It is a contract to which society is a party and in which it has a deep interest. *State ex rel Fowler* v. *Moore,* supra; *Pickston* v. *Dougherty,* supra; *State* v. *Bittick,* 103 Mo. 183, 11 LRA 587 (1891). See also, *Smiley* v. *Smiley,* supra. It is subject to regulation under the state's police power. *Dodson* v. *State,* supra. Even so, the right to enter into the marriage contract is not conferred by statute. *Meister* v. *Moore,* supra. But because of the state's interest in its preservation, the parties themselves cannot terminate it. *Smiley* v. *Smiley,* supra. The common understanding of marriage in this country is that the two parties have undertaken to establish a life together and assume certain duties and obligations. *Lutwak* v. *U.S.,* 344 U.S. 604, 73 S. Ct. 481, 97 L. Ed. 593 (1953). The contract is to be husband and wife and to assume all rights and duties of the marital relationship. *Jambrone* v. *David,* 16 Ill. 2d 32, 156 N.E. 2d 569 (1959). Among these obligations are those stated in *Safranski* v. *Safranski,* 222 Minn. 358, 24 N.W. 2d 834 (1946), as follows:

> *** Marriage is a civil contract which differs from other contracts in that it cannot be dissolved by the parties themselves but only by the judgment of a competent court. The marriage contract creates a status or relationship which carries responsibilities and duties which the parties may not by mutual agreement terminate or otherwise avoid. Amongst the obligations imposed thereby is the obligation of the husband to care for and support his wife, to provide a home for her, and to maintain, support, educate, and provide a home for any children born of such marriage. ***

Long ago, we said that by the contract of marriage, the husband assumes the obligation to support his wife and the law will enforce the duty. *Bowman* v. *Worthington,* 24 Ark. 522, 538.

It has always been one of the duties and obligations of a husband to support and maintain his wife, in the manner suitable to his station and condition in life (or according to the station in which they live as long as they are married), even though they live separately, if the separation is not through her fault. *McConnell* v. *McConnell,* 98 Ark. 193, 136 S.W. 931, 33 LRA (n.s.) 1074; *Kientz* v. *Kientz,* 104 Ark. 381, 149 S.W. 86; *Welch* v. *Welch,* 225 Ark. 372, 282 S.W. 2d 600; *Pledger* v. *Pledger,* 199 Ark. 604, 135 S.W. 2d 851; *Bonner* v. *Bonner,* 204 Ark. 1006, 166 S.W. 2d 254; *Stearns* v. *Stearns,* 211 Ark. 568, 201 S.W. 2d 753. It has been recognized in at least one jurisdiction that the duty of support under the marriage is not necessarily totally gender-based. In *Williams* v. *Williams,* 34 Ill. App. 2d 210, 181 N.E. 2d 182 (1962), the court said:

> The marital obligation is the obligation to live, conjugally, with the other, to love and support, protect and defend the other. It is a composite of many responsibilities and duties; ***

In this state, recognition has been given to changing social conditions and the fact that the marriage contract is not necessarily static and is subject to change by the state, but not the parties. In our recently adopted Arkansas Criminal Code, recognition has been given to modern realities of the situation regarding the obligation of one spouse to the other with reference to support and also regarding the likelihood that a marriage partner of one sex is more likely to be dependent than the other, in connection with Ark. Stat. Ann. § 41-2405 (Repl. 1977), the section on non-support. Under that section, a person commits the offense of non-support if, without just cause, he fails to provide support to his spouse who is physically or mentally infirm or *financially dependent.* Under this code, "he" or "him" includes any natural person, so either a husband or a wife could be guilty of non-support. The following portion of the commentary to this section clearly recognizes conditions in Arkansas:

> It should also be observed that the section is facially neutral with respect to the sex of the offender; wives and mothers as well as husbands and fathers are subject to prosecution. This effects a minor change in the law. Under old § 41-2405 (Repl. 1964), a woman could be prosecuted for abandoning or deserting an infirm or financially dependent husband but not for failure to support him. Parity of treatment was dictated by equal protection considerations as well as the general Code policy against defining an offense that, by its terms, can only be committed by a person of a particular sex. The practical effect of treating husband and wife the same with respect to support of each other is slight since the "victim" spouse must be either "physically or mentally infirm, or financially dependent." Given present employment opportunities for the respective sexes, a wife is far more likely to be financially dependent.

I have devoted most of my extended discussion to the matter of temporary alimony. But, for the most part, it is equally applicable to the allowance of suit money, including attorney's fees. In this state, there has always been a concern about the ability of the dependent marriage partner to adequately defend a divorce suit. In *Glenn* v. *Glenn,* 44 Ark. 46, we said:

> In the absence of any proof of separate property in a wife, it is just and reasonable to compel the husband to furnish the wife with means to defend a suit by him for a divorce. Otherwise she would be at his mercy. And for the same reason he would be secure against the best founded suit for a divorce on her part, if she were bound helpless to prosecute. He is compelled to furnish her with necessaries suitable to her station in society, and to his means. Alimony, *pendente lite,* may be a greater necessity than anything else. ***

In *Bauman* v. *Bauman,* 18 Ark. 320, it was held that attorney's fees and money to defray the expenses of the suit are to be considered in fixing the amount of alimony pendente lite, either as a part thereof, or in addition thereto. There has been

no change in our position throughout the years.[2] The purpose of awarding suit money is to insure an efficient preparation of the case and a fair and impartial trial, and where the suit is brought by the husband, to enable the wife to defend the action or prosecute a cross-complaint. 1 Nelson, Divorce and Annulment 404, § 12.04.

We have never considered the allowance of suit money and attorney's fees to be a matter of right. *Ryan* v. *Baxter,* 253 Ark. 821, 489 S.W. 2d 241; *Tilley* v. *Tilley,* 210 Ark. 850, 198 S.W. 2d 168; *Warren* v. *Warren,* 215 Ark. 567, 221 S.W. 2d 407; *Gladfelter* v. *Gladfelter,* 205 Ark. 1019, 172 S.W. 2d 246; *McGuire* v. *McGuire,* 231 Ark. 613, 331 S.W. 2d 257. Attorney's fees may be denied a wife on equitable grounds, even where the husdand is unsuccessful in a suit against the wife. *Reibstein* v. *Reibstein,* 220 Ark. 783, 249 S.W. 2d 847.

In a highly regarded text on divorce, the author points out that in some jurisdictions it has been held that the power to award temporary alimony or suit money must be derived from statute. Arkansas is not one of those states. The writer continues, saying that the decided weight of authority holds that jurisdiction of the matrimonial action includes, as an incident, power to award both temporary alimony and suit money, pending the action. 1 Nelson, Divorce & Annulment, 408, § 12.09. That authority considers "temporary alimony," "alimony ad interim" and "alimony pendente lite" as synonymous terms. 1 Nelson, Divorce & Annulment, 403, §

[2]I am not unaware of *Walker* v. *Walker,* 148 Ark. 170, 229 S.W. 11 and *Kincheloe* v. *Merriman,* 54 Ark. 557, 16 S.W. 578, 26 Am. St. Rep. 60. I do consider that what is said in those cases is dictum, insofar as *defending* a suit for divorce is concerned. *Kincheloe* involved an action at law by an attorney against a husband to recover fees for services rendered the wife in connection with a contemplated suit for divorce against the husband, which was never instituted. Statements that services of an attorney in a suit for divorce have no relation to protection of a wife are inconsistent with our other decisions on the question, at least where a defense by the wife is concerned. In *Walker,* the court permitted a husband to exempt his wages in a garnishment proceeding by which the wife sought to recover a judgment for attorney's fees in a decree awarding her a divorce. Perhaps the right to fees in such a case is only statutory, as stated in *Walker.* I do not believe that the same can be said when the husband brings the suit. Neither temporary alimony (separate maintenance) nor attorney's fees have ever been allowable to a wife who brings a suit against a husband, without a showing of merit in her cause of action. *Countz* v. *Countz,* 30 Ark. 73.

12.02. According to him, "suit money" ordinarily means money necessary to enable a spouse, generally the wife, to carry on and defend the matrimonial action. 1 Nelson, Divorce & Annulment, 404, § 12.04.

This court has always recognized that in matters pertaining to allowance of support and maintenance or alimony pendente lite, and attorney's fees as well, the relative financial abilities of the parties are an important consideration. See, e.g., *Rosenbaum* v. *Rosenbaum,* 206 Ark. 865, 177 S.W. 2d 926; *Tilley* v. *Tilley,* supra; *Warren* v. *Warren,* supra; *McGuire* v. *McGuire,* supra. This court has not hesitated to treat the matter of support and maintenance on the basis of equity, as previously pointed out. Furthermore, we have recognized in *Orr* v. *Orr,* 206 Ark. 844, 177 S.W. 2d 915, that a wife was entitled to have the equitable remedy of specific performance of a written contract which was a property settlement, dividing personal property in a divorce action, in affirming a chancery court's denial of a motion to transfer the case to law.

Since an action for separate maintenance is a suit in equity which is not governed by any statute, and the allowance of alimony is within the power of the courts of equity, independent of statute, I think that a court of equity can, by exercise of equitable powers, award the wife in this case separate maintenance (or alimony in the classic, rather than the statutory, sense) during the pendency of the action and attorney's fees for her defense in this case, regardless of the constitutionality of § 34-1210, just as this court did in approving the allowance of alimony to a wife against whom a divorce was granted. By the same token, I think that a court of equity could avoid the equal protection impact of *Orr* by using the powers of equity to award separate maintenance and attorney's fees to a husband who is dependent upon his wife, without any statutory authorization. The powers of the court of equity in dealing with change are extensive and, were it not so, they probably would never have come into being. In support of my position, I take the liberty of quoting extensively from two sections of American Jurisprudence, Vol. 27, Equity, §§ 12 and 103, pp. 529 and 624:

§ 12. New and novel cases.

Ordinarily, the fact that an action in equity is an unusual one because the facts upon which it is based are unusual is not sufficient to condemn the petition or complaint, since it is a distinguishing feature of equity jurisdiction that it will apply settled rules to unusual conditions, and mold its decrees so as to do equity between the parties. Peculiar and extraordinary cases will arise in the complex and diversified affairs of men, which, perhaps, cannot be classed under any of the distinct heads of equity jurisdiction, but which must be acknowledged, nevertheless, to come within the legitimate powers of a court of equity, because complete justice cannot otherwise be done between the parties. Therefore, when no remedy exists at law, courts of equity, to prevent injustice and in many cases on principles of general policy, will go far in granting relief. Indeed, it is the duty of a court of equity to adapt its practice and course of proceeding to the *existing state of society,* and not, by too strict an adherence to forms and rules established under different circumstances, to decline to administer justice and enforce rights for which there is no other remedy. While the court, in the exercise of its power to accord extraordinary relief, is restrained by fixed rules and established principles, a want of jurisdiction is not inferred from the novelty of the disputed question. By the *adaptation of old rules to new cases,* the jurisdiction of equity may be said to be constantly growing and expanding. The fact that there is no precedent for the precise relief sought is not fatal to equity jurisdiction, since precedent is only a guide and not a bar. So, where grounds calling for the exercise of equitable power exist, the court will not hesitate to act; otherwise, gross injustice might be perpetrated under the guise of forms of law. *** [Emphasis mine.]

§ 103. Relief available, generally; adaptation to facts and circumstances.

The power of equity is said to be coextensive with the right to relief; it is as broad as equity and justice require. In the administration of remedies, an equity court is not bound by the strict or rigid rules of the common law; on the contrary, the court adapts its relief and

molds its decrees to satisfy the requirements of the case and to protect and conserve the equities of the parties litigant. The court has such plenary power, since its purpose is the accomplishment of justice amid all of the vicissitudes and intricacies of life. It is said that equity has always preserved the elements of flexibility and expansiveness so that *new remedies may be invented or old ones modified in order to meet the requirements of every case and to satisfy the needs of a progressive social condition.* In other words, the plastic remedies of equity are molded to the needs of justice and are employed to protect the equities of all parties, and the flexibility of equitable jurisdiction permits innovation in remedies to meet all varieties of circumstances which may arise in any case. Moreover, the fact that there is no precedent for the precise relief sought is of no consequence. Where grounds calling for the exercise of equitable power to furnish a remedy exist, the court will not hesitate to act, even though the question presented is a novel one. But while it is generally the province of equity to administer a remedy where none exists at law, a court of equity may not, by avowing that there is a right but no remedy known to the law, create a remedy in violation of law or without authority of law. *** [Emphasis mine.]

While a court of equity may not be able to give the plaintiff all he asks, there is no doctrine which prevents the court from giving him as much as it can. Thus, it has been held that in an action to establish a fee interest in land, the fact that the court might not be able to decree a title in fee would not render it powerless to decree a life estate or a tenancy for years.

This is not a novel approach in Arkansas. In *Whitaker & Co.* v. *Sewer Improvement Dist. No. 1 of Dardanelle, Ark.*, 229 Ark. 697, 318 S.W. 2d 831, this court capsuled the matter just quoted from the text, thus:

A court of equity is a court of conscience: a forum wherein justice is done, sometimes stripped of technicalities and red tape. A court of equity should be as alert to afford redress as the ingenuity of man is to cause situations to develop which call for redress. ***

I do not agree that *Orr* has so altered the marriage contract that Ark. Stat. Ann. § 34-1210, with its stated limitations and those put upon it by the court, is unconstitutional. Not only is there flexibility in equity, but the Fourteenth Amendment allows considerable flexibility. In *Skinner* v. *Oklahoma,* 316 U.S. 535, 62 S. Ct. 1110, 86 L. Ed. 1655 (1942), wherein the U.S. Supreme Court had discussed marriage, the court, speaking through Mr. Justice Douglas, said:

> It was stated in *Buck* v. *Bell,* supra, that the claim that state legislation violates the equal protection clause of the Fourteenth Amendment is "the usual last resort of constitutional arguments." 274 US p. 208, 71 L ed 1002, 47 S Ct 584. Under our constitutional system the States in determining the reach and scope of particular legislation need not provide "abstract symmetry." *Patsone* v. *Pennsylvania,* 232 US 138, 144, 58 L ed 539, 34 S Ct 281. They may mark and set apart the classes and types of problems according to the needs and as dictated or suggested by experience. See *New York ex rel. Bryant* v. *Zimmerman,* 278 US 63, 73 L ed 184, 49 S Ct 61, 62 ALR 785, and cases cited. It was in that connection that Mr. Justice Holmes, speaking for the Court in *Bain Peanut Co.* v. *Pinson,* 282 US 499, 501, 75 L ed 482, 489, 51 S Ct 228, stated, "We must remember that the machinery of government would not work if it were not allowed a little play in its joints." Only recently we reaffirmed the view that the equal protection clause does not prevent the legislature from recognizing "degrees of evil" (*Truax* v. *Raich,* 239 US 33, 43, 60 L ed 131, 136, 36 S Ct 7, LRA 1916D 545, Ann Cas 1917B 283) by our ruling in *Tigner* v. *Texas,* 310 US 141, 147, 84 L ed 1124, 1128, 60 S Ct 879, 130 ALR 1321, that "the Constitution does not require things which are different in fact or opinion to be treated in law as though they were the same."

I believe that, even if § 34-1210 is unconstitutional, the chancery court, in the exercise of its powers, both as the successor of the ecclesiastical courts and as a court of equity, could have made the awards made in this case, in spite of *Orr.*

I am authorized to state that Mr. Justice George Rose Smith joins in this opinion.

Jerry BOYETTE *v.* STATE of Arkansas

CR 79-24 580 S.W. 2d 473

Opinion delivered May 7, 1979
(Division I)

Greene & Cottrell, by: *J. H. Cottrell, Jr.,* for appellant.

Steve Clark, Atty. Gen., by: *Robert J. DeGostin, Jr.,* for appellee.

DARRELL HICKMAN, Justice. Jerry Boyette was found guilty as charged of theft by receiving by the trial court sitting without a jury. He raises one point for reversal: The court

should have granted appellant's motion for a directed verdict because the information alleged that the stolen property belonged to Hawaiian Tropic while the proof at trial was that Roy Huddle owned the property. We agree.

The information alleged that on September 15, 1976, Boyette ". . . did unlawfully, feloniously, receive and retain certain stolen property having a value in excess of $100.00, such being the property of Hawaiian Tropic, P. O. Box 511, Daytona Beach, Florida, knowing that said property was stolen, ... " A subsequent amended information changed the date from September 15 to September 9.

Several witnesses for the State testified that the property in question, suntan lotion, belonged to Roy Huddle, a distributor for Hawaiian Tropic. No one stated that the property belonged to Hawaiian Tropic.

Steven Hickey, a vice president of Hawaiian Tropic, testified that the property had been sold to Roy Huddle before it was stolen. Huddle and one of his employees stated that it belonged to Huddle. Huddle said he found his warehouse broken into on the 15th of September. He found several pallets of suntan lotion missing. He had checked his warehouse two weeks before. An employee of Petty's Drugs, to whom Boyette had sold the merchandise, stated that the property was returned to Huddle when it was discovered that the property was stolen and Huddle could identify it.

At the close of all the evidence, Boyette's attorney moved for a directed verdict on the ground raised here on appeal.

There is no question that the allegation of ownership in the information contradicts the proof of ownership at trial.

This court recognizes that an erroneous allegation of ownership of property does not affect any substantial right of the defendant charged, if the offense is described with such certainty as to identify the act so there can be no doubt about the particular offense charged. Ark. Stat. Ann. §§ 43-1012 and 1014 (Repl. 1977); *Von Tonglin* v. *State,* 200 Ark. 1142, 143 S.W. 2d 185 (1940); and, *Tucker and Peacock* v. *State,* 194 Ark. 528, 108 S.W. 2d 890 (1937). The issue here, then, is

whether the crime is "so identified and described in the indictment or information as to make definite and certain the offense charged," so that Boyette could prepare for trial and would be able to plead former jeopardy, if he were ever charged with the same offense again. *Von Tonglin* v. *State, supra.*

Here, the only description in the information which identifies the alleged crime is the date and ownership of the property. When we disregard the erroneous allegation of ownership, all that is left is an allegation that Boyette possessed undescribed stolen property on September 9, 1976. That is not enough.

Since the crime is not described with the certainty required, the variance between the allegation in the information and proof at trial as to ownership is a fatal defect which requires reversal. *Von Tonglin* v. *State, supra.*

Reversed and remanded.

We agree. HARRIS, C.J., and GEORGE ROSE SMITH and BYRD, JJ.

Lee WILLIAMS *v.* STATE of Arkansas

CR 78-219 580 S.W. 2d 488

Opinion delivered May 7, 1979
(In Banc)

William M. Cromwell, of *Rose, Kinsey & Cromwell,* for appellant.

Steve Clark, by: *Joseph H. Purvis,* Deputy Atty. Gen., for appellee.

JOHN I. PURTLE, Justice. On September 22, 1978, appellant was convicted in the Sebastian County Circuit Court for the offense of Public Servant Bribery, the same being Ark. Stat. Ann. § 41-2703. He was fined the sum of $5,000 and appeals from said judgment.

The appeal is based upon an alleged grant of immunity to appellant by Charles Karr, Prosecuting Attorney. There was never any court order or other written agreement granting immunity to the appellant. This is then a fact question upon which the trial court has ruled.

Before we review the facts we will state that the burden was upon the appellant to prove the grant of immunity.

The charge in this case arose from the transactions between appellant, who was in the bail bond business in the Fort Smith area, and a former assistant city attorney, who was charged with Forgery in the Second Degree but convicted of the lesser included offense of Soliciting Unlawful Compensation. During the course of the investigation of the charges against the assistant city attorney some of appellant's records were subpoenaed by the prosecuting attorney. The wrong records were seized and the appellant made this known and then voluntarily surrendered the correct records

to assist in the prosecution of the assistant city attorney.

The evidence shows appellant and his attorney were the source of the original information concerning the assistant city attorney and that they cooperated fully throughout the case. Also, appellant and his attorney continued to show they expected immunity to be granted in return for their cooperation. However, there is nothing in the record to show the prosecuting attorney ever committed himself fully to the proposition that immunity would be granted to appellant.

Both appellant and his attorney testified that they understood all along that immunity would be or had been granted. It is evident the case against the assistant city attorney could not have been made without the testimony of appellant. Charles Karr stated he never promised immunity and one of his deputies stated he had no knowledge of such a promise ever having been made by Karr.

Appellant relies heavily upon our decision in *Hammers* v. *State,* 263 Ark. 378, 565 S.W. 2d 406 (1978). There we found, and it was undisputed, that the state had an agreement with the witness to grant immunity conditioned upon her agreement to testify against another party. Before the trial the accused entered a plea and it was not necessary for the witness, who had been granted immunity, to testify. She was ready, willing and able to testify but the plea negated the need for her testimony. When the witness Hammers was subsequently charged, she pleaded the grant of immunity. There we held the grantee of the promise of immunity was entitled to rely upon the undisputed promise of immunity and the state was bound to live up to its bargain.

We do not have the same facts before us as we had in *Hammers,* supra. We recognize the fact that appellant and his attorney expected and hoped for immunity but they have failed to meet the burden of showing there was ever an actual grant of immunity. Therefore, the trial court did not err in failing to grant appellant's motion to dismiss because he had been granted immunity.

Affirmed.

HARRIS, C.J., and FOGLEMAN, J., concur in the results.

James PACE *v.* STATE of Arkansas

CR 78-182 580 S.W. 2d 689

Opinion delivered May 14, 1979
(Division II)

Tom J. Keith, Public Defender, for appellant.

Steve Clark, Atty. Gen., by: *Robert J. DeGostin, Jr.,* Asst. Atty. Gen., for appellee.

JOHN A. FOGLEMAN, Justice. Appellant James Pace was sentenced to consecutive terms of ten years for aggravated robbery and five years for theft of property, after a jury trial on a charge of robbing the Pizza Hut in Bentonville and taking $375 on February 17, 1978. He asserts the following points for reversal:

I.

THE COURT ERRED IN REFUSING TO

SUPPRESS ORAL STATEMENTS MADE BY THE APPELLANT AT HIS APARTMENT WHERE HE WAS NOT ADVISED OF HIS CONSTITUTIONAL RIGHTS AND THE ORAL STATEMENTS MADE AT THE SHERIFF'S OFFICE AFTER BEING ADVISED OF HIS CONSTITUTIONAL RIGHTS.

II.

IT WAS ERROR FOR THE TRIAL COURT TO DENY THE APPELLANT'S MOTION TO SUPPRESS EVIDENCE SEIZED BY A WARRANTLESS SEARCH.

III.

IT WAS ERROR FOR THE TRIAL COURT TO ADMIT INTO EVIDENCE A RED KNIT CAP (STATE'S EXHIBIT NO. 2).

IV.

IT WAS ERROR FOR THE TRIAL COURT TO DENY THE APPELLANT'S MOTION TO STRIKE STATE'S EXHIBITS NOS. 6, 7 AND 8.

We find no merit in them and affirm.

I.

Appellant actually objects to, and sought to suppress, four separate statements. The first of these was made to police officers in the apartment where they found appellant. We need not give extensive consideration to his arguments that, because he was in custody and had not been given the warnings mandated by *Miranda* v. *Arizona,* 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694, 10 ALR 3d 974 (1966), his first statement was involuntary. Pace was asked by one of the officers if anyone else had been at the apartment that night. His response that Scott Rhodes had been there ten or fifteen minutes earlier, changed his shoes and left through the back door, was exculpatory, not incriminating. It was not productive of any "poisonous tree" fruit. Instead, it caused the of-

ficers to be uncertain whether Pace was a suspect or a witness. In spite of the fact that, before Pace made this statement, one of three officers in Pace's apartment had drawn a weapon as Pace emerged from his bathroom at the request of these officers, the trial judge found that the circumstances indicated that having a weapon "at the ready," until it was discovered that Pace was not armed, was reasonable and that the officer "re-holstered" his weapon when it became apparent that Pace was unarmed, and we cannot say that this holding was erroneous. There is a proper basis for the trial judge's finding that the inquiries made by the officers at this stage were investigatory, not accusatory.

After a thorough suppression hearing, at which appellant neither testified nor offered any evidence, the trial judge made extensive findings of fact, and concluded with a holding that he saw no evidence in the record that the statements of appellant were anything other than voluntary. We cannot say that the court erred under the *Degler* standard, because we cannot say that these findings are clearly against the preponderance of the evidence. *Degler* v. *State,* 257 Ark. 388, 517 S.W. 2d 515. Neither can we say that an independent view of the totality of the circumstances dictates a result different from that reached by the trial judge.

Gary McVay, a Bentonville police officer, was told, at approximately 9:40 p.m. on February 17, 1978, that there had been a robbery at the Pizza Hut on Highway 71. He was the first police officer to arrive at the scene, but he was soon joined by Officer Holloway, another Bentonville policeman. After the manager of the Pizza Hut pointed out to McVay the direction taken by the robber when he left, McVay went to the back door and saw two sets of human tracks in the three to four inches of fresh snow on the ground. One of them led to the Pizza Hut and the other away. McVay, with the aid of his flashlight, followed the tracks that led away from the Pizza Hut for a distance of approximately five blocks, or 500 to 600 yards, to Apartment 7 of apartments in the 1300 block of South Main Street. He found only one set of footprints on the streets along the way. McVay said the tracks were so obvious, anyone could have followed them.

At 12th Street, along the route of the tracks, McVay was

joined by Deputy Sheriff Tom Hutcheson and by Deputy Sheriff John Green, each of whom was driving his police vehicle. Officer Holloway joined them when they reached the apartment. McVay knocked on the door and Kathy Workman answered. When McVay asked whether anyone else was there, she said that James Pace was in the apartment. She told McVay that she had been there all evening, but that Pace had taken Demarious (DiDi) Haney to work at about 5:00 p.m., and, after an absence of about two hours, returned and remained at the apartment. She told McVay that Pace was then in the bathtub, and, when McVay said he needed to talk to him, stepped aside from the door and started for the bathroom. McVay and Holloway then entered the apartment and McVay stepped halfway through the middle room and asked Pace to come out. Hutcheson then entered the apartment and also asked Pace to come out of the bathroom. Pace came out, holding a towel in front of him. Hutcheson had drawn his pistol and pointed it at the bathroom door. When Pace came out, Hutcheson told him to put the towel down. Pace did so and proved to be nude and unarmed. Hutcheson then put his weapon away. McVay said that he could tell by observing Pace's stomach muscles that Pace was breathing heavily, as if he had been running. When asked, Pace said that he had been at the apartment since approximately 8:30. It was then he made the statement about Scott Rhodes. McVay then went out the back door of the apartment and followed the tracks he found there to the Pizza Hut.

When the officers arrived at the apartment, Green, who went to cover the back door, noticed a set of tracks at the back entrance. McVay had looked at them before entering the apartment. McVay said that the tracks at the front door and those at the back seemed similar. It was then snowing lightly, and it appeared that the tracks at the back of the apartment were almost as fresh as those at the front, and McVay said that the two sets of tracks seemed to have been made at approximately the same time, but that those entering the apartment were fresher. When McVay followed the tracks leading away from the back door, they turned out to be the second set of tracks McVay had seen when he first went to the Pizza Hut.

When McVay left, Green, Hutcheson and Holloway were still at the apartment. While talking to Pace, McVay had seen Green pick up a pair of wet boots with some snow on them. Green had come into the apartment when he heard the voices of the other officers inside the apartment. At that time Pace was standing in the kitchen with McVay and Hutcheson. Green asked no questions, and apparently said nothing. Shortly after McVay left, the other officers left Pace and Workman in the apartment, after Green had told Pace not to leave because the officers would probably want to talk to him again. When Pace stated that he was to pick up his girl friend DiDi Haney at her place of employment at about 11:00 p.m., Green told him that would be all right, but that Pace should return to the apartment. Pace was not told that he was under arrest or in custody. According to Green, he thought that Pace might be a witness instead of a suspect, because of the statement about Rhodes, even though he knew at the time that Pace had said that Rhodes had changed into tennis shoes and that the tracks leading from the back door had not been made by tennis shoes. Hutcheson and Green searched the area for other footprints that might support Pace's story, but found none. Hutcheson said that the officers were then still in the investigatory stage. Green went back to the Pizza Hut and searched for other tracks there, but found no evidence that lent support to Pace's story.

McVay, Green, Hutcheson and Holloway met Don Harrelson, a criminal investigator for the Benton County sheriff's office, and reported their findings to him. Harrelson and Green then went to Pace's apartment and requested that he accompany them to the sheriff's office for questioning and Pace agreed to go. When asked what he would have done if Pace had not agreed, Green said that he probably would have taken Pace into custody. Pace was taken to the criminal investigation office, where he was given the "Miranda warnings" as to his constitutional rights, and signed a waiver of them on a form on which they were expressly stated. Harrelson testified that he read each item separately to Pace, and asked if he understood that right. Pace replied affirmatively each time, and Harrelson wrote "yes" after each item as the answer was given. It was after the completion of this process that Pace was asked to sign the waiver. This took place at 11:00 p.m.

Pace was interviewed by Harrelson for about 40 minutes. He made a statement in which he substantially repeated the statement he had previously made about Scott Rhodes. He said that Kathy Workman had been present in the apartment when Scott Rhodes was there. Harrelson then went to talk with Miss Workman, who had come to the sheriff's office along with DiDi Haney. Harrelson gave her the "Miranda warnings," after which Miss Workman told him that she had not seen Scott Rhodes and that she had prepared Pace's bath.

Harrelson again talked with Pace, after asking Pace if he wanted his rights read to him again and receiving a negative reply accompanied by a statement by Pace that he understood his rights. Pace then elaborated upon the story about Scott Rhodes. He said that Rhodes had come to Pace's house, had said that he was going to rob the Pizza Hut, and that Rhodes then had a four inch .30 caliber pistol. Pace said Rhodes was gone about 30 minutes, returned and gave Pace the money in a white pillow case and the pistol. Pace said that he had put the pistol, which Rhodes said he had stolen from John Martinez, in his attic. Pace also said that he had put the money in his own shoes and had intended to stash it when he went out to get DiDi, but had not done so.

Pace had been turned over to the jailers for booking. The jailers, Bob Ridout and Cecil Weatherford, conducted a strip search of Pace. They found a quantity of money in both his shoes. Ridout advised the investigating officers of this. After Pace's second statement, the investigating officers attempted to question Workman further, but she asked for an attorney. They also talked to Demarious Haney and then talked to Pace again. After the money was found, Pace decided that he wanted to tell the whole story. Harrelson said that he asked Pace if he knew his rights and if he wanted them read again. Pace said he knew his rights. He never asked for an attorney and did not ask the officers to stop the questioning. Harrelson said that Pace said:

> I went to rob the Pizza Hut and I got back to the apartment and told Kathy when I got to the Pizza Hut some girl was talking on the telephone. I knocked her on her ass and then I ran home and got in the bathtub — I

> got home, I dumped the money on the bed. Kathy said, "Where did you get this?" and I said, "I robbed something."

Harrelson also stated that Pace was asked, after making this statement, if he had a gun and told the officers where they could find it in the attic at his apartment under some "rags and papers and stuff" and gave explicit instructions as to how it could be found. Harrelson said that thereafter the pistol, a blue sweat jacket and a pillow case were recovered from the apartment and that Police Chief Dan Moody took charge of them. He said that this search was conducted on the basis of a written consent signed by Pace at 11:15 p.m.

Harrelson talked to Pace again on February 23, 1978, after Pace had said that he would give a full confession which could be recorded on tape. Harrelson said that Pace again signed a waiver of rights which had been read to him by Chief Moody. It was witnessed by Harrelson. Harrelson said that he had thought that the statement had been taped, but later found that the recording machine had not worked. He said that Pace had stated that he got the gun from John Martinez at Bella Vista, two days prior to the robbery, that the money found in his shoe was the money taken from the Pizza Hut, and that he had run back to the apartment on foot, describing the route he had taken. Harrelson said that he could not remember the route Pace described. Harrelson said that Pace had repeatedly said that he didn't want to tell some facts because he might get Kathy Workman in trouble.

The time that the officers actually placed Pace under arrest is unclear from the record. It may be that he was not actually arrested and "booked" until after his second statement at the sheriff's office, but there is also testimony from which it might be inferred that this took place after the first statement, made just after his arrival there. In our view, the officers' interpretation of the time of arrest is of little consequence. If the investigation had focused on Pace and his freedom of action was restricted when he was interrogated, he may have been considered as having been in custody, so far as interrogation is concerned. For the purposes of this opinion, we consider that Pace was in custody when he accompanied the officers to the sheriff's office, even though we do not agree

with appellant that the focusing of the investigation on Pace was equivalent to his being in custody. See *Reeves* v. *State,* 258 Ark. 788, 528 S.W. 2d 924. See also, *Oregon* v. *Mathiason,* 429 U.S. 492, 97 S. Ct. 711, 50 L. Ed. 2d 714 (1977).

The exclusionary rule does not apply to voluntary statements and statements made without coercion, following proper advice as to constitutional rights, even though the accused was in custody at the time. *Miranda* v. *Arizona,* 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694, 10 ALR 3d 974 (1966); *U.S.* v. *Joslyn,* 371 F.S. 423 (Ariz., 1974); *Hale* v. *State,* 252 Ark. 1040, 483 S.W. 2d 228; *O'Neal* v. *State,* 253 Ark. 574, 487 S.W. 2d 618; *Blanton* v. *State,* 249 Ark. 181, 458 S.W. 2d 373, cert. den. 401 U.S. 1003, 91 S. Ct. 1240 (1971). It appears to us that the state met its burden of proving that the statements of Pace were voluntary. We do not find any basis for holding that the interrogation was rendered coercive by reason of the fact that the officers took no steps to make it clear to appellant that he had no legal obligation to accompany them to the sheriff's office, as required by Rule 2.3, Arkansas Rules of Criminal Procedure, or by reason of the presence of his parole officer, Steve Bertschy, who had, on a previous occasion, caused appellant's apartment to be searched under a "white warrant." These facts were known to the trial judge. On the undisputed facts, we cannot say that the totality of the circumstances is such that the incriminating statements given by Pace were involuntary.

II.

Appellant argues that evidence seized pursuant to a consent to search executed by him should have been suppressed because the officers violated Rule 11.5, Arkansas Rules of Criminal Procedure (Repl. 1977), by failing to advise Pace that he could withdraw or revoke this consent. When Harrelson was asked whether he had advised Pace, after he had been placed under arrest, that he could revoke the consent, Harrelson answered in the negative. According to Harrelson's version, however, Pace was not arrested until after the consent was signed and after the money was found in his shoes. Harrelson testified that the written consent to search was signed by Pace at about 11:15 p.m., during the interview at which he made his first statement at the sheriff's of-

fice. He said that he advised Pace that he did not have to sign it, that he could require Harrelson to attempt to get a search warrant and that he could revoke it. When cross-examined on his recollection about advising Pace that he had a right to revoke the consent, Harrelson said that he was sure that "we did because we always do. I don't just say that I vividly remember it, I can't say that." This statement falls short of establishing the lack of any basis for this officer's statement that he did advise Pace that he had a right to revoke the consent. Evidence of the habit of this officer or routine practice of the sheriff's officers in this regard was relevant on the question. Ark. Stat. Ann. § 28-1001, Rule 406 (Supp. 1977).

Furthermore, Rule 11.5, Rules of Criminal Procedure, does give one the right to withdraw or limit a consent previously given, but there is nothing in the rule requiring that the person giving the consent be advised of a right to revoke it. Appellant's reliance upon a commentary relating to a proposed section of the rules that was never adopted is misplaced. There is nothing to indicate that Pace ever desired to revoke the consent to search. His explaining in detail how the officers would find the pistol is certainly inconsistent with a desire to revoke a consent otherwise voluntarily given.

Appellant contends, however, that the consent could not have been voluntary because of coercive conditions existing at the time. These alleged conditions were the presence of his parole officer, Steve Bertschy, and illegal arrest or detention of appellant. There was evidence that Pace's apartment had been searched on a previous occasion under the authority of a "white warrant" issued by Bertschy, and that some of the officers conducting the investigation participated in that search. Although Bertschy was present during a substantial part of the interrogation, there is no evidence that he actually participated in it, or in Pace's arrest, or in the investigation of the crime. His presence, without taking steps to negate its effect, as appellant now contends he should have done, certainly did not render the consent involuntary, either when considered separately or in conjunction with all other factors. We find nothing to suggest that Pace's arrest was illegal.

III.

At about 11:00 p.m. William Hall, another Bentonville police officer, went with Holloway to search for physical evidence. He backtracked the tracks leading from the front door of the Pace apartment. He described the tracks as distinctive. He picked up a red cap he described as a "ski mask type of cap," beside the tracks, about 200 or 300 feet, or "four houses," north of Pace's apartment. The cap was turned inside out and had two eye holes cut in it. The word "Arkansas" was printed on the side. Hall said that it matched the description of a cap worn by the robber.

Appellant objected to the introduction of this cap because McVay did not find it when he followed the tracks from the Pizza Hut to the apartment. He now argues that none of the three witnesses who were present at the time of the robbery testified that the cap was similar or identical to the "red ski mask" worn by the person who committed the robbery. It is easy to understand how McVay could have failed to see the cap. Hall testified that he almost "missed the cap" and Hall was looking for physical evidence, while McVay was concentrating on following the tracks. Appellant made no objection in the trial court on the ground that the witnesses who saw the robber did not identify the cap, or because of the alleged dissimilarity of the cap, on the bases that it was not designed and constructed as a ski mask and none of the witnesses mentioned the word "Arkansas" in describing the cap. We do not consider such matters when they are raised for the first time on appeal. Furthermore, error cannot be predicated upon a ruling admitting evixdence unless a timely objection is made stating the specific ground of objection if the ground is not apparent from the context. Ark. Stat. Ann. § 28-1001, Rule 103(a)(1) (Supp. 1977). At any rate, we find no error. Appellant's objections argued here really go to the weight to be given this piece of evidence, but not to its admissibility. The objection made in the trial court really goes to the question of relevance, and we find no error on that ground.

IV.

While Bentonville Police Chief Moody was testifying

during the trial, he identified certain objects found in a search of Pace's apartment. He testified that two searches were made. Green and Hutcheson participated in the first one. They did not find the jeans, jacket or pillowcase at that time. Moody thought that this search was made at about 11:00 p.m. and that a second search was conducted at about 1:00 a.m. The later successful search, according to him, was after Pace had told them where to find the weapon. Moody then observed that the jacket was marked "10:31 p.m." Moody thereafter testified that the jacket was found on the first search and that the officers were then admitted by an occupant of the apartment. He said that Demarious Haney, who lived at the apartment, had given consent to this search, and that Harrelson had possession of that written consent. Moody said that the other items were found on the occasion of the second search.

Each of the exhibits had been admitted into evidence after the trial judge had asked if appellant had any objection and appellant answered "no" or appellant's attorney had volunteered that he had no objection. Thereafter, the marking on the jacket was discovered. At the conclusion of the testimony of this witness, appellant's attorney said, "Your Honor, I move to strike" and the judge remarked, "I have already ruled on that." Doubtless, the judge referred to the hearing on the motion to suppress, at which he had upheld the search, saying that he found no wilful invasion of appellant's rights.

Appellant's attorney did not specify which of the exhibits should be stricken. In view of the testimony of Moody and testimony given by Harrelson, we find no error, at least as to those items found on the second search. Harrelson had said that he did not participate in a search until after the last statement was made by Pace. This commenced at 1:35 a.m. At the trial, Harrelson, who testified before Moody did, reiterated the statement that he participated in a search of the apartment at this time and that he was accompanied by Moody, Green and Hutcheson. Harrelson also testified that the apartment had been searched earlier without the gun having been found, but that he was not present. It was his recollection that the "coat" had been found on the first search. It was also Harrelson's recollection that Moody had

told Pace that the officers had been to his apartment and had not found the gun.

Green had testified at the suppression hearing that there had only been one search of the apartment and that it took place before the money was found in Pace's shoes. He stated, however, that the gun was found on that occasion and that Harrelson and Moody were present. All other evidence indicates that Harrelson never left the sheriff's office until after Pace had confessed and given directions for finding the gun. There was certainly a preponderance of the evidence to show that the successful search was conducted after Pace executed his written consent.

There was no basis for striking any of these exhibits. Even if the jacket was recovered on the first search, and even if that search preceded Pace's written consent, there is undisputed evidence that a proper consent had been given by an occupant of the premises. And even if the jacket should have been stricken, the evidence without the jacket is so overwhelming that the error, even if it is of constitutional proportions, is harmless, beyond a reasonable doubt. See *Freeman* v. *State,* 258 Ark. 617, 527 S.W. 2d 909; *Sims* v. *State,* 258 Ark. 940, 530 S.W. 2d 182; *McCoy Farms, Inc.* v. *J & M McKee,* 263 Ark. 20, 563 S.W. 2d 409; *Harrington* v. *California,* 395 U.S. 250, 89 S. Ct. 1726, 23 L. Ed. 2d 284 (1969); *Chapman* v. *Calif.,* 386 U.S. 18, 87 S. Ct. 824, 17 L. Ed. 2d 705, 24 ALR 3d 1065 (1967), reh. den. 386 U.S. 987, 87 S. Ct. 1283, 18 L. Ed. 2d 241 (1967); *Gilbert* v. *California,* 388 U.S. 263, 87 S. Ct. 1951, 18 L. Ed. 2d 1178 (1967).

The judgment is affirmed.

We agree. HARRIS, C.J., HOLT and PURTLE, JJ.

Josephine Louise LADD *v.* Lon H. LADD, Sr.

78-142 580 S.W. 2d 696

Opinion delivered May 14, 1979
(In Banc)

[redacted]

Kincaid, Horne & Trambo, for appellant.

Charles E. Hanks and *Pearson & Pearson,* by: *Thomas Pearson,* for appellee.

FRANK HOLT, Justice. Appellant and appellee were married on September 11, 1961, in New Mexico and lived there as husband and wife until May, 1976, when they moved to Arkansas. About a year later, appellee filed for divorce and appellant counterclaimed. Appellee was granted a divorce on the ground of appellant's habitual drunkenness. Her counterclaim was dismissed. All jointly owned Arkansas property was ordered sold and the proceeds divided between the parties. Appellant was awarded certain items of personalty as her separate property. She was denied any interest in other property allegedly acquired by the parties during their marriage in which she claimed ½ interest as community property. The court declined to rule on the parties' respective interests in a $90,000 promissory note secured by a real estate mortgage on New Mexico property on the ground that it had no jurisdiction to decide title to foreign property. Appellee was ordered to pay appellant $500 per month alimony and her current medical and hospital bills. For reversal appellant asserts that the court erred in failing to award her ½ interest in the promissory note, ½ interest in items of personal property which were community property when removed from New Mexico to Arkansas, and a ½ interest in property purchased with community funds by appellee in Arkansas. Appellee cross-appeals asserting that the court erred in awarding alimony to appellant.

Pursuant to Ark. Stat. Ann. § 27-2139 (Repl. 1962), appellee has filed a motion with this court seeking dismissal of appellant's appeal with respect to the ownership of the $90,000 note, payable on its face to appellee and appellant, which is secured by New Mexico property and held by a New Mexico bank for collection. Appellee's motion is based upon the ground that appellant has, subsequent to this appeal, instigated an action in a New Mexico court to recover her alleged interest in the note, and therefore this constitutes an abandonment of her appeal. Appellant responds that the New Mexico action was initiated because appellee had asserted complete ownership of the note to the escrow bank, that the bank had contacted appellant's attorneys requesting that legal action be taken so they would not have to decide ownership, and that the action taken was done to protect her proprietary rights in the note and was not intended to affect or abandon her appeal to this court. The New Mexico trial court's order directed that all proceeds on the note, not to exceed $1,000 per month, be distributed to appellee and, should a court of competent jurisdiction adjudge appellant is entitled to ½ of the proceeds, the bank shall provide for a recoupment. The order recognized the pendency of the appeal here.

Appellee cites 4 Am. Jur. 2d, Appeal and Error § 264:

> There is considerable authority that a party against whom an adverse judgment has been rendered and who, pending an appeal therefrom, prosecutes another action based upon the same cause and involving the same parties and issues, will be held to have waived or abandoned his right of appeal.

However none of the cases cited there deal with the exact situation presented here. Our few cases dealing with abandonment of appeal have involved cases which had been prosecuted to judgment in other courts. See *Church* v. *Gallic,* 76 Ark. 423, 88 S.W. 979 (1905); and *Pillow* v. *King,* 55 Ark. 633, 18 S.W. 764 (1892). Here it does not appear that the injunctive proceeding in the New Mexico court was prosecuted to a final judgment. To the contrary, it appears the proceeding was stayed pending disposition of the appeal here. The court's order, in effect, merely provided for a continued collection of the note by the escrow bank with

payments to appellee and recoupment for appellant for any excess payments collected by the appellee in the event a court of competent jurisdiction, as here, adjudges appellant is entitled to ½ interest in the proceeds of the note. In the circumstances, we hold that the appellant, by her New Mexico proceeding, has not waived or abandoned her right to appeal with respect to this note. Accordingly, appellee's motion to dismiss the appeal is denied.

We now turn to appellant's first contention which is that the court erred in finding that it did not have jurisdiction to decide title to the promissory note secured by the mortgage on the New Mexico property. We agree. The note is personalty and, the parties being within the jurisdiction of the court, may have title to it adjudicated by an Arkansas court. *Bell* v. *Wadley,* 206 Ark. 569, 177 S.W. 2d 403 (1944). Here it appears uncontradicted that, early in their marriage, appellee's separate funds were used by him to purchase a motel. Thereafter the motel was sold by him resulting in the promissory note in dispute. It is argued by appellant, however, that since the note on its face is payable to both appellant and appellee, it is therefore jointly owned and she should be entitled to a ½ interest. We disagree. Under New Mexico law, which is applicable here, property acquired after marriage by a spouse in exchange for his or her property owned prior to marriage remains the separate property of that spouse unless transmutation into community property is shown by clear, strong, and convincing evidence. *Burlingham* v. *Burlingham,* 384 P. 2d 699 (N.M. 1963). Here, as indicated, it is uncontradicted that the source funds for the purchase of the motel were appellee's separate property. Consequently, appellant's evidence is insufficient to meet New Mexico's requirements on the theory of transmutation. Therefore appellee is entitled to the entire interest in the promissory note.

We next consider appellant's contention that certain personalty is community property and, therefore, the court erred in failing to award her ½ interest in those items which were removed to Arkansas. Appellee responds that the contested property is separately owned by him pursuant to a reconciliation agreement signed by the parties in New Mex-

ico. It is true that parties may, by written agreement, provide that property, which would otherwise be community property, is separate property. § 40-3-8, N.M.S.A., 1978. (§57-4A-2, N.M.S.A., 1953). Here the agreement provided that it is the parties' desire to make a complete and final settlement of all their property rights now owned by them and property which they might hereafter acquire by either of them; that each of them is fully and completely informed of the financial and personal status of the other and had given mature thought to the agreement and its obligations; that they understand the agreement and its obligations and "the agreement is in full satisfaction of all obligations which each of said parties now has or might hereafter, or otherwise, have, toward the other;" and their present separation is the result of "her activities and her desire." The agreement further provided that the appellant agrees to transfer certain shares of stock to appellee, her interest in their Albuquerque home with an equity of approximately $18,000, and all the furniture and fixtures in the home. Appellee agreed to transfer to appellant a 1957 Facel Vega automobile, $5,000 in jewelry which had been given to the appellant by the appellee, her personal effects, an oil painting, and a silver service. The agreement also provided that all property acquired by either of them subsequent to the date of the agreement would be the separate property of the party acquiring the same and the agreement could be "incorporated in any decree which may hereafter be obtained by either party." The chancellor found that the agreement did not bear upon nor was decisive of the issues in the case. However, appellee invokes this agreement as controlling their property rights and contends that the property now sought by appellant is his separate property. Appellant argues that the agreement is void because of fraud, duress, undue influence, and a violation of public policy.

The validity of the contract is determined by the place in which it was made. *Simpson* v. *Weatherman,* 216 Ark. 684, 227 S.W. 2d 148 (1950). Although New Mexico does not seem to have dealt with the validity of a reconciliation agreement, it has ruled on the validity of property agreements in contemplation of divorce. We deem that law applicable in this situation. The leading case appears to be *Beals* v. *Ares,* 185 P. 780 (N.M. (1919), which holds that when the husband was the manager of the community property, as it appears here,

and the wife did not have any knowledge of the assets, the husband had the burden of proving that the agreement concerning property rights was fair since the parties held the positions of trustee and beneficiary. The court stated that (1) the transaction was presumably fraudulent, and (2) a duty devolved upon the husband to show (a) a payment of adequate consideration for the transfer of the wife's property, (b) full disclosure, and (c) that the wife had independent and competent counsel. See also *Unser* v. *Unser,* 526 P. 2d 790 (N.M. 1974); and *Trujillo* v. *Padilla,* 442 P. 2d 203 (N.M. 1968).

Here, according to appellee, appellant did not know the details of his financial holdings or business affairs. The agreement left her "out in the cold." The reconciliation was conditioned upon the agreement, which was drafted by his attorney, and she could "take it or leave it." He would have filed for a divorce if she had not signed the agreement. According to the appellant, she was not familiar with appellee's assets at the time of the agreement; she had no source of income other than him; she signed the agreement because of her desire to effect a reconciliation after a three weeks' separation; and she did not take the agreement to an attorney and signed it the day she read it. In the circumstances, we hold that the appellee has not met his burden of proof required by *Beals, supra, Unser, supra,* and *Trujillo, supra,* to establish that the agreement settling their property rights was fair and equitable. Additionally, we think the contract was unconscionable and contrary to public policy. Paragraph 1 of the agreement provides that "each party understands that the agreements and obligations assumed by the other are assumed with the express understanding and agreement that they are in full satisfaction of all obligations which each of said parties now has or might hereafter, or otherwise have, toward the other." The effect of this provision is to relieve appellee of any marital obligations of support during the continuance of the marriage and, as such, is void as against public policy. See *Towles* v. *Towles,* 182 S.E. 2d 53 (S.C. 1971).

Having found that the agreement interposed by appellee as controlling their property rights is invalid and unenforceable, we now consider appellant's contention that the

court erred in failing to award her ½ interest in certain property acquired during their marriage and domicile in New Mexico and then removed to Arkansas. Specific items in which she claims ½ interest include a $4,000 Jaguar, a large quantity of jewelry valued by appellee at $29,650 (this does not include $5,280 worth of jewelry which the court awarded to appellant on the basis it was a gift from appellee), and 7 Corvairs valued at $1,250. It is undisputed that these items were acquired in New Mexico during their marraige and domicile there. Therefore New Mexico law is applicable in determining the ownership of these movable personalty items. Leflar, American Conflicts Law, §233. Property acquired in New Mexico during their marriage and domicile there by either party is presumed to be community property. § 40-3-12, N.M.S.A., 1978 (previously codified as § 574A-6, N.M.S.A., 1953). This presumption may be rebutted by a showing of separateness by a preponderance of the evidence. *Burlingham* v. *Burlingham, supra.* No evidence was presented to rebut the presumption of community property as to these recited items other than the 1965 property agreement. Since the 1965 agreement is unenforceable, appellant is entitled to a ½ interest in the cars and jewelry, which is $17,450.

Appellant also claims a ½ interest in certain property acquired by appellee in his name when the parties moved to Arkansas inasmuch as the funds used for the purchases were derived from the sale or conversion of community property in New Mexico. Upon the parties moving to Arkansas, appellee purchased certain property in his own name. The specific items in which appellant claims a ½ interest are: a tract of land valued at $32,000, appellee's interest in a liquor store valued at $26,000, a trailer home valued at $5,000, and 2 fire trucks valued at $5,000. The appellee himself testified that these properties were acquired in his name in Arkansas by using funds derived from liquidation of assets acquired during their marriage and domicile in New Mexico. The funds expended were derived from the cashing of 2 certificates of deposit totaling $60,000 and the sale of a boat for $38,000.

Appellant argues that the New Mexico assets were community property and under the "source" doctrine, her interest in the newly acquired property remains the same as that held in the exchanged property. Every state agrees with

this doctrine, at least to the extent that the parties are viewed as retaining the same equitable title. Leflar, supra, § 233. The "source" doctrine originated in the case of *Depas* v. *Mayo,* 11 Mo. 314 (1848). See also *Tomaier* v. *Tomaier,* 146 P. 2d 905 (Cal. 1944). In *Depas* the parties were domiciled in Louisiana where funds were acquired as community property. The parties moved to Missouri where the husband purchased property in his name with funds acquired by them in Louisiana. Appellee argues that *Depas* is not applicable as it was admitted there that the wife was entitled to ½ of the money which was used to purchase the Missouri property. We do not think the distinction important. Here it appears undisputed that the property used to purchase the Arkansas property was obtained from the sale or conversion of property acquired during their marriage and domicile in New Mexico. As previously discussed, the presumption is that all property acquired there during marriage and domicile is community property and the burden is upon appellee to show otherwise.

Appellee stated that the majority of the money used to purchase the certificates of deposit, in his name with appellee as survivor and later cashed by him, was from funds obtained as reimbursement of money that he had put into a family owned corporation during the marriage. This evidence does not suffice to overcome the presumption of community property as there was no evidence that the funds put into the company originally were not community property. Neither was there any evidence showing that the boat was not community property. Appellee again relies upon the 1965 property settlement as controlling. As indicated, it is invalid and unenforceable. Accordingly, we hold that appellant is entitled to a ½ interest in the recited specific items purchased by appellee in this state with funds acquired from the New Mexico property; i.e., the tract of land, the liquor store, the trailer home, and 2 fire trucks, which is $34,000.

Finally, appellee contends that the court abused its discretion in awarding alimony to appellant. He admits, however, that the court could award alimony even though the divorce was awarded to the husband for the fault of the wife. *Walker* v. *Walker,* 248 Ark. 93, 450 S.W. 2d 1 (1970); and *Lewis* v. *Lewis,* 255 Ark. 583, 502 S.W. 2d 505 (1973). Even so, here appellee argues that since the divorce was awarded to

him for appellant's habitual drunkenness and without a finding of fault on his part, the $500 per month award was without merit. The parties were married for approximately 15 years during which time appellant helped rear appellee's two sons. It appears that appellant was in good health at the time of their marriage in 1961 and at his request discontinued her employment. He was a manufacturer's representative, which required considerable traveling and entertainment of his prospective customers. Drinking was a part of the entertainment. Appellant accompanied him and a drinking problem resulted after about 4 years. After a 3 weeks' separation, a reconciliation was effected as previously discussed. When they moved to Arkansas, she had free access to the liquor store in which appellee had purchased an interest. Within a year, the present litigation ensued. By this time, appellant's drinking problem had become acute requiring a short period of hospitalization. She is also suffering from a progressive heart disease. Her health does not permit her to work. She has no assets other than some jewelry and some household furnishings. Her only income upon their separation was the alimony paid by appellee. According to appellee's balance sheet, he has a new worth of $121,000 and his family owned corporation has retained earnings of $130,000. As indicated the court awarded $500 a month alimony. However, in view of our modification of the decree as regards their respective property rights, we think $350 alimony at the present is amply sufficient.

Affirmed in part, reversed in part and remanded for entry of a decree not inconsistent with this opinion.

BYRD, J., dissents.

Booker T. WESTBROOK *v.* STATE of Arkansas

CR 78-161 580 S.W. 2d 702

Opinion delivered May 14, 1979
(In Banc)

[redacted]

Julius D. Kearney, for appellant.

Steve Clark, Atty. Gen., by: *E. Alvin Schay,* Asst. Atty. Gen., for appellee.

JOHN I. PURTLE, Justice. The Chief of Police for the City of Dermott, Arkansas, was shot and killed on August 29, 1977, while attempting to place the appellant under arrest. The record does not show what appellant was to be charged with but apparently it was for an offense of some type for which no warrant had been issued. During the arrest process the decedent and appellant struggled for possession of decedent's pistol which was discharged once or twice before appellant obtained possession after which time he shot the chief one or more times. The charges were filed in Chicot County. Appellant moved for a change of venue and the court, acting without a hearing, changed the venue to Drew County. Dermott is approximately midway between Lake

Village and Monticello, the county seats of Chicot and Drew Counties. Appellant was tried in Drew County Circuit Court on April 21, 1978, and received the death penalty. Appellant sets out 14 points in his appeal from the verdict and sentence. We will discuss each point raised on appeal but more than one point may be discussed under the same heading.

I.

THE TRIAL COURT ERRED IN FAILING TO GRANT APPELLANT'S MOTION FOR AN INDEPENDENT PSYCHIATRIC EXAMINATION BY A PRIVATE PSYCHIATRIST.

The matter of whether an accused is entitled to a psychiatrist of his own choosing when his defense to the charge is that of insanity has been decided by this Court several times. The most recent case is *Andrews* v. *State*, 265 Ark. 390, 578 S. W. 2d 585 (1979). In the *Andrews* case we were asked to declare Ark. Stat. Ann. § 41-601 (Repl. 1977) unconstitutional. It was argued that since the defense of insanity is an affirmative defense that it placed the burden of proof on the defendant in violation of his constitutional rights. We have reviewed the authorities cited by appellant in support of this argument and find that such argument is invalid in this case. It is true that the defense of not guilty by reason of insanity placed the burden of proof of such defense upon the defendant. Because the defendant is required to affirmatively prove certain defenses, it does not follow that the state is relieved of the overall burden of proving the guilt of the accused beyond a reasonable doubt. The state has that burden in the beginning, throughout the trial, and at the end. In support of this position we cite *Hale* v. *State*, 246 Ark. 989, 440 S.W. 2d 550 (1969); *Grissom* v. *State*, 254 Ark. 81, 491 S.W. 2d 595 (1973); *Barber* v. *State*, 248 Ark. 64, 450 S.W. 2d 291 (1970); and *Maxwell* v. *State*, 259 Ark. 86, 531 S.W. 2d 468 (1976).

II.

THE TRIAL COURT ERRED IN DENYING APPELLANT A HEARING ON THE RECORD BEFORE RULING ON HIS MOTION FOR A CHANGE OF VENUE.

Appellant timely moved for a change of venue. The trial court scheduled a hearing on this motion; however, when appellant appeared to argue the motion the trial court was engaged in the trial of a civil case. During a break in the civil trial the court informed appellant and the state that he was changing the venue from Chicot County to Drew County and therefore there would be no need for a hearing. Apparently the court felt the granting of the motion negated the necessity of a hearing. Had appellant protested the change to Drew County, or asked for another change, he might have been entitled to have us consider it on appeal. It is too late to argue it after the trial. It does not follow that a change of venue would have been granted upon a second request because it is still a matter which is left to the sound discretion of the trial court. On the other hand, it may well have been that appellant would have been able to convince the court that the trial should have been held in one of the other counties in the district. The other four counties, Ashley, Bradley, Cleveland and Dallas, are more distant from Dermott than either Lake Village or Monticello. In support of our position that appellant would have been entitled to a hearing on his motion for a change of venue we rely upon *Walker* v. *State,* 241 Ark. 300, 408 S.W. 2d 905 (1966); *Chitwood* v. *State,* 210 Ark. 367, 196 S.W. 2d 241 (1946); *Wood* v. *State,* 248 Ark. 109, 450 S.W. 2d 537 (1970); and *Williams* v. *State,* 160 Ark. 587, 255 S.W. 314 (1923). Under the circumstances, no prejudicial error was committed.

III.

THE TRIAL JUDGE ERRED IN DENYING APPELLANT'S MOTION FOR DISQUALIFICATION OF JUDGE AND IN DENYING APPELLANT A HEARING THEREON.

The court denied appellant's motion for disqualification without a hearing. The trial judge and his son were allegedly listed on their law office door as attorneys in the same firm. Additionally, the motion argues that the son, who serves as court reporter for his father, actually conducted a part of the initial investigation of this case as deputy prosecuting attorney.

Obviously, the consent of the parties was not obtained to allow the presiding judge to retain jurisdiction to hear this case. Without a hearing there is nothing upon which we can base our opinion except the allegations contained in the motion to disqualify. The motion contained reasons which, if true, would require the judge to recuse himself.

Although the burden was upon the appellant to show cause for disqualification of the presiding judge, he could hardly do so without the opportunity to be heard on his motion. We held in the case of *Byler* v. *State,* 210 Ark. 790, 197 S.W. 2d 748 (1946), that because the judge's wife was a cousin of the victim the judge was disqualified because of such relationship. This fact was not known at the time of the *Byler* trial. However, in the present case it was known and a motion was made but never heard. Therefore, we feel it was error for the judge to fail to hold a hearing to determine whether he should remove himself from the case. We are not holding as a matter of law that the judge was disqualified but rather that, in view of the serious allegations made in the motion, a hearing should have been held. We agree with the reasoning in *SCA Services, Inc.* v. *Morgan,* 557 F. 2d 110 (1977), wherein it was held that a relative of the presiding judge being a member of the firm which appeared as counsel of record for one of the parties should have recused himself even though the relative had no actual personal relationship with either of the parties.

IV.

THE TRIAL COURT ERRED IN FAILING TO FIND APPELLANT UNFIT TO PROCEED OR TO ACQUIT HIM DUE TO MENTAL DISEASE AT THE HEARING ON THOSE ISSUES.

Again the judge should have made a finding after the hearing held for appellant on the motion to determine whether appellant was unfit to proceed to trial due to mental disease or defect. The evidence certainly raised a question which should have been ruled on by the court. We recognize the burden is upon the accused to establish that he was suffering from a mental disease or defect to the degree which would require him to be acquitted. In this case two psy-

chiatrists testified, sometimes equivocally, that appellant was capable of assisting in his defense and that he understood the nature and extent of his actions. However, another psychiatrist and a psychologist testified that he was definitely suffering from mental disease to the extent that he could not assist in his defense nor did he realize the nature of his activities at the time of the incident in question. No witness testified that appellant would be rated in a higher category than a moron. For these reasons we believe the trial court should have made a determination of appellant's mental condition and whether or not he was competent to proceed to trial. This matter will be discussed further in conjunction with another point.

We held in *Deason* v. *State,* 263 Ark. 56, 562 S.W. 2d 79 (1978), that the burden of proving incompetence was on the defendant. In *Deason,* the defendant accepted the report of the psychiatrist without objection and entered a plea of guilty. There we held that the court was under no duty to hold a hearing sua sponte at the time of the sentencing. However, here the appellant does not accept but strongly disputes reports of the psychiatrists and requested a hearing. Although a hearing was held, the court never made any finding or ruling, other than he would let the jury decide the matter. We think it was proper that the trial court should have made a specific ruling at this stage of the trial.

V.

THE TRIAL COURT ERRED IN REFUSING TO GRANT APPELLANT A CONTINUANCE WHILE HE SOUGHT TO SECURE RECORDS AND A WITNESS FROM THE STATE HOSPITAL.

The basic defense of appellant was that he was not guilty ot the crime charged by reason of mental disease or defect. Ark. Stat. Ann. § 41-601 (Repl. 1977) states:

> (1) It is an affirmative defense to a prosecution that at the time the defendant engaged in the conduct charged, he lacked capacity, as a result of mental disease or defect, to conform his conduct to the requirements of law or to appreciate the criminality of his conduct.

(2) As used in this Code (§§ 41-101 — 41-3110) the terms "mental disease or defect" do not include an abnormality manifested only by repeated criminal or otherwise antisocial conduct.

(3) When a defendant is acquitted on grounds of mental disease or defect the verdict and judgment shall so state.

The burden of proof required by this defense is a preponderance of the evidence. Thus, it is clear that the proof of this affirmative defense is much less than the burden required of the state in the overall case which is that of proof beyond a reasonable doubt. However, it is reasonably expected and indeed demanded that the state and its witnesses will not intentionally mislead the defense or refuse to furnish properly requested information. Although the appellant was presumed to be sane, he could show, by a preponderance of the evidence, that he was not guilty because of mental disease or defect.

Appellant insists he was denied crucial evidence to aid in his defense when he was not furnished the full records of the state hospital relating to the two prior commitments to the state hospital in 1972 and 1974. The record discloses that appellant filed a motion on October 4, 1977, to obtain these particular records. He was entitled to this information as a matter of law, as set out in Ark. Stat. Ann. § 41-605 (8) (Repl. 1977). This motion was granted on paper but appellant never received the records. On December 5, 1977, he was again told by the court that the information would be forthcoming. In fact, an order was issued to the state hospital to furnish appellant with the requested information. February 6, 1978, the request was renewed for these records. February 8, 1978, appellant filed a discovery request for these same records. On February 22, 1978, Dr. Whitehead and Dr. Oglesby appeared and gave testimony in response to a subpoena duces tecum but they failed to bring the missing records as required by the subpoena. On April 14, 1978, appellant's counsel drove to Little Rock and was told by Dr. Whitehead that the other records did not exist but he could check at Benton where the records were supposed to be kept. Counsel was advised by the Benton unit that the records were

probably in Little Rock. On this same date Dr. Whitehead told counsel that Dr. Buford, the treating physician or psychiatrist for the 1972 and 1974 commitments of appellant, was no longer there and might be dead. In truth, Dr. Buford was still employed as a colleague of Dr. Whitehead. The request for the missing records was renewed on April 18, 19 and 20, 1978. On this date, and previously, appellant had requested a continuance for the reason that he was not prepared fully to defend this action. The reason given was that he had not been furnished the records which had been so often requested by the appellant.

Due to the nature of the defense we feel it was necessary that appellant have these records, if they exist, in order to fully prepare his defense. We note that Dr. Buford allegedly testified before the same prosecutor and trial judge on April 16 or 17, 1978. Even if the prosecuting attorney did not have the material requested in his possession, there was no reason why more compulsory processes could not have been utilized to obtain these vital records. It may be that something in these records would have enabled appellant to furnish stronger proof on his behalf. During trial the court reporter stated he would take care of getting the requested records to defense counsel. Perhaps he thought he could, but he did not.

We held in *Williamson* v. *State,* 263 Ark. 401, 565 S.W. 2d 415 (1978), that appellant was entitled to receive the tapes from which witnesses' statements had been transcribed and furnished by the prosecutor to the defense. The tapes were held to be the best evidence, and we feel the notes in this case fit into the same category. In *Williamson* we held the tapes were needed for the purpose of comparing the transcribed statements with the oral statements as recorded on the tapes in order to check for possible errors. In the present case it may have been that the notes would reveal that Dr. Buford, who also saw appellant during his 1977 confinement at the state hospital, would have been a favorable witness for the defense. The record does disclose that Dr. Buford had previously diagnosed the appellant as paranoid schizophrenic and placed him on unusually heavy dosages of antipsychotic drugs.

We do not feel this case is controlled by the facts in

Thacker v. *State,* 253 Ark. 864, 489 S.W. 2d 500 (1973), where we held the trial court did not abuse its discretion in refusing to grant a continuance because of the absence of witnesses subpoenaed by the defendant. In *Thacker* the court granted a hearing on the motion but the defendant refused to testify in support thereof. In the present case the materiality of the records has been clearly shown and the need for them was apparent. We recognize our prior holding that the granting of a continuance is within the sound judicial discretion of the trial court. *Brown* v. *State,* 252 Ark. 846, 481 S.W. 2d 366)1972); *Nash* v. *State,* 248 Ark. 323, 451 S.W. 2d 869 (1970); and *Walker* v. *State,* 100 ARk. 180, 139 S.W. 1139 (1911).

VI.

THE TRIAL COURT ERRED IN REFUSING TO GRANT INSTRUCTIONS ON LESSER INCLUDED OFFENSES AFTER ALL THE ELEMENTS OF LESSER OFFENSES WERE ELICITED.

Appellant was charged under Ark. Stat. Ann. § 41-1401 (1) (b) (Repl. 1977) with the crime of capital murder which requires proof that the actions of a person be premeditated and deliberated in causing the death of a law enforcement officer. There are few, if any, offenses which shock and arouse a community so much as the crime charged here. Passion and prejudice often arise in the minds of our citizens without their actual knowledge of its existence. We have previously considered this in the earlier portion of this opinion where we dealt with disqualification and change of venue. This case went to the jury with only one possible conviction — capital murder. We believe the jury should have been afforded the opportunity to consider lesser included sentences. As we view the evidence as presented at the trial, it warranted the court to give instructions down through manslaughter. This would include murder in the first degree, Ark. Stat. Ann. § 41-1502 (Repl. 1977), murder in the second degree, Ark. Stat. Ann. § 41-1503 (Repl. 1977), and manslaughter, Ark. Stat. Ann. § 41-1504. At the new trial it may develop that the facts will not require all of these instructions.

We are not unmindful of our decisions in such cases as *Caton & Headley* v. *State,* 252 Ark. 420, 479 S.W. 2d 537

(1972), which deal with cases where the evidence presented at the trial mandates either a conviction of the offense charged or acquittal. However, when the evidence presented shows the accused might be convicted of a lesser offense than that charged or of an offense which is necessarily included in the offense charged, it is the duty of the court to present instructions to embrace all degrees of a particular offense, and included offenses, to which the evidence is applicable. We stated in *Walker* v. *State,* 241 Ark. 300, 408 S.W. 2d 905 (1966), that the necessary elements of deliberation and premeditation in the offense of murder may be inferred from the factual circumstances as shown by the evidence, provided the circumstances clearly warrant the jury in such inferences or conclusions. If the evidence is such as to be inconsistent with any other hypothesis than that of the crime charged, then an instruction on a lesser included offense would not be required. In cases too numerous to mention we have stated that deliberation and premeditation may be inferred from the circumstances of the case as presented at trial. However, it is equally clear that if the evidence presented warrants instructions on lesser included offenses, such instructions must be given. Premeditation and deliberation are not required to exist for any particular length of time and may be formed almost on the spur of the moment. When we review all of the facts and evidence in this case, we cannot escape the conclusion that lesser included offenses should have been presented to the jury through instructions by the court. It was reversible error to fail to give the additional instructions for consideration by the jury.

VII.

THE TRIAL COURT ERRED IN COMMENTING TO THE JURY ON THE GOVERNOR'S PARDONING POWER DURING DELIBERATIONS ON THE QUESTION OF SENTENCE.

In the case of *Bush* v. *State,* 261 Ark. 577, 550 S.W. 2d 175 (1977), we unequivocally held it was prejudicial error when a trial judge discussed the matter of possible parole with the jury, in response to the question of a juror. We held it immaterial whether an immediate objection was made because it was the judge's own error. We also held in *Bell* v. *State,* 223

Ark. 304, 265 S.W. 2d 709 (1954), that even though the trial judge innocently approached the jury, during deliberations, as to whether they wanted him to remain at the courthouse during the noon hour that the resulting conversation was reversible error. In *Bell* we specifically held that it was not even necessary for the defense counsel to make an objection in order for the remarks to constitute reversible error. Also, in *Adams* v. *State,* 263 Ark. 536, 566 S.W. 2d 387 (1978), we held that before a federal constitutional error could be held harmless that we must be able to declare it was harmless beyond a reasonable doubt. For the above reasons we hold the remarks on the power of the Governor to pardon were prejudicial and reversible error.

VIII.

THE TRIAL COURT ERRED IN REFUSING TO REQUIRE FULL DISCLOSURE.

We have previously discussed this under Point V wherein we pointed out the critical need for this information. We only add at this time that the orders and efforts of the court, reporter and prosecuting attorney brought no relief to appellant. Such efforts amounted to an empty gesture in so far as results to appellant are concerned. The court possesses the power to get this information and the evasive conduct of the state hospital employees should not be allowed to go unnoticed. The appellant is entitled to these records, if they exist, before he is put to a second trial. Therefore, it was prejudicial error to fail to furnish appellant with the requested information, if it was in existence. It was the duty of the state to show that the requested information did not exist.

IX.

THE TRIAL COURT ERRED IN CREATING AN IMPROPER INFLUENCE AND RELATIONSHIP WITH THE JURY THROUGH HIS COMMENTS TO A JUROR DURING THE PERIOD OF THEIR DELIBERATIONS.

We do not agree that the comment of the trial judge to a juror that the judge's daughter wanted him to say hello to the

juror was prejudicial. However, it would have been much better had the judge seen fit to wait to convey this message until the trial had ended.

X.

THE VERDICT ON GUILT WAS CONTRARY TO THE LAW AND THE GREAT WEIGHT OF THE EVIDENCE.

XI.

THE VERDICT ON SENTENCE WAS CONTRARY TO THE LAW AND THE GREAT WEIGHT OF THE EVIDENCE.

These two very important points are considered together. In view of the fact that we have already found reversible error, we need not set out a full discussion on these points for the reason that if the case is before us again it will, no doubt, contain other evidence and perhaps some of the existing evidence will not be included.

We do not feel that there should be a wooden application of the death penalty in every instance where an officer is killed. This is, of course, the purpose of considering aggravating and mitigating circumstances which will be discussed later in this opinion. We fully recognize that it is within the province of the jury to weigh the evidence and resolve conflicts and discrepancies in testimony. This Court considers only that evidence which is most favorable to the state on appeal and it is our duty to affirm if there is substantial evidence to support the jury's finding. *Neal* v. *State,* 259 Ark. 27, 531 S.W. 2d 17 (1975); *Scott* v. *State,* 254 Ark. 271, 492 S.W. 2d 902 (1973); and *Stout* v. *State,* 263 Ark. 355, 565 S.W. 2d 23 (1978). In *Stout* we stated:

> Appellant contends that the circumstances do not exclude every other reasonable hypothesis other than that appellant acted with premeditation and deliberation. Ordinarily, this determination is for the jury, particularly on the question of the reasonableness of another hypothesis, if the evidence does more than give rise to a suspicion and does not leave the jury solely to specula-

tion and conjecture in determining whether other hypotheses are excluded. *Upton* v. *State,* 257 Ark. 424, 516 S.W. 2d 904; *Abbott* v. *State,* 256 Ark. 558, 508 S.W. 2d 733. On appellate review of the question, we view the evidence in the light most favorable to the state. *Abbott* v. *State,* supra. When we do so, and remember that the jury rejected appellant's version, the evidence is sufficient. See *Leonard* v. *State,* 251 Ark. 1090, 476 S.W. 2d 807; *McCray* v. *State,* 254 Ark. 601, 494 S.W. 2d 708.

XII.

THE INSTRUCTIONS GIVEN ON THE QUESTION OF AGGRAVATING AND MITIGATING FACTORS TO BE CONSIDERED IN DELIBERATING A SENTENCE DID NOT REFLECT THE LAW.

We agree with appellant that the forms used for aggravating and mitigating circumstances, which were obviously drawn up for use in the case of James Wilkerson, Jr., were not in accordance with the statutes in force at the time of trial. The court used what was designated as Form A to present the aggravating circumstances to the jury. Paragraph D on Form A, which was checked by the jury, provided: The capital murder was, beyond a reasonable doubt, committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody. Paragraph F provided: The capital murder was, beyond a reasonable doubt, committed for the purpose of disrupting or hindering the lawful exercise of any governmental function, including enforcement of laws, or political function. Therefore, two aggravating circumstances were found by the jury to have existed. The present statute, Ark. Stat. Ann. § 41-1303 (5) states: The capital murder was committed for the purpose of avoiding or preventing an arrest or effecting an escape from custody; No. 7 provides: The capital murder was committed for the purpose of disrupting or hindering the lawful exercise of any governmental or political function. Therefore, Form A, as given to the jury, Paragraphs D and F, includes wording which would allow the same act (attempting to avoid arrest) to result in the finding of two aggravating circumstances.

Form B was used by the court to guide the jury in deter-

mining mitigating circumstances. This form listed mitigating circumstances, B thru G. Paragraph A was added after G and it provided the jury could find that one or more mitigating circumstances existed or one or more circumstances did not exist. Although every question had a space to be checked, when it was found that a mitigating circumstance did not exist, none of these blanks were checked. The court obviously assumed that since none of them were checked either positively or negatively it meant the jury found none of them to exist. We think the jury should have been instructed to check the affirmative or negative blank on each question presented to them.

The forms presented to the jury were obviously made up prior to the Arkansas Criminal Code and were improper. Also, counsel for appellant was not permitted to inspect these forms prior to their submission to the jury. Had such an opportunity been afforded, counsel would have probably objected to the erroneous instructions. No doubt, in the next trial these forms will be given proper consideration.

XIII.

THE DEATH PENALTY AS HERE APPLIED IS UNCONSTITUTIONAL.

In view of the results reached we do not consider the argument that the verdict in this case was arbitrary, capricious, wanton and freakish. It must await reconsideration before we make a determination of this argument. We have dealt with the Stewart-Powell-Stephens opinion in *Gregg* v. *Georgia,* 428 U.S. 153 (1976), and are not unmindful of the requirements set out therein. For a complete discussion on this point, see *Collins* v. *State,* 261 Ark. 195, 548 S.W. 2d 106 (1977).

XIV.

THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION FOR A NEW TRIAL.

This argument is rendered moot in view of the fact that the case is being remanded for a new trial. We do feel that the

facts in this case did require a new trial but different considerations may be before the court when the matter is again prosecuted. Our reasons for believing a new trial was warranted in the present situation are contained in discussion in this case under prior points.

Reversed and remanded.

Petition of David Wayne
PITCHFORD Ex Parte

79-32 581 S.W. 2d 321

Opinion delivered May 21, 1979
(In Banc)

Pro Se

CARLETON HARRIS, Chief Justice. David Wayne Pitchford filed an *ex parte* motion, styled "David Wayne Pitchford v. Ex Parte", in this court seeking to take the bar examination. Mr. Pitchford is not a graduate of a law school and the petition does not reflect whether he attended college. Pertinent provisions of Rule XII of the Rules Governing Admission to the Bar read as follows:

Rule XII
REQUIREMENTS FOR TAKING EXAMINATION

1. Graduation from a law school shall not confer the right of admission to the bar, and every candidate shall be subject to an examination.

* * *

3. No candidate shall be allowed to take the Bar Examination unless he has graduated, or completed the requisites for graduation, from a law school approved by the American Bar Association or the State Board of Law Examiners.[1]

* * *

It is asserted that the rule is a violation of Ark. Stat. Ann. § 25-101 (Repl. 1962) which provides:

Qualifications for admission. — Every citizen of the age of twenty-one [21] years, of good moral character, and

[1]There is also a requirement for college pre-law training, but that is not here involved.

> who possess [possesses] the requisite qualification of learning and ability, may, upon application, and in the manner hereinafter provided, be admitted to practice as an attorney and counselor at law in the courts of this state. Provided, it shall be lawful for the Supreme Court to admit to practice as an attorney and counselor at law in the courts of this state any citizen under the age of twenty-one [21] years who is of good moral character and who possesses the other requisite qualifications of learning and ability, and who is a graduate of any accredited, recognized or Class A law school.

Before proceeding with the discussion of the contentions, it is probably well to first pass upon a motion for default judgment filed by Mr. Pitchford. While this motion was denied on March 19, 1979, specific reasons were not given. The motion for default judgment is not proper. The motion was denied because, in the first place, the Board of Law Examiners was not made a party; rather, as shown at the outset, the petition was simply an *ex parte* proceeding. Since the Board was not a party, it was not required to file an answer.[2] Mr. Pitchford himself recognized that the Board was not a party in a letter to the clerk dated January 6, 1979, wherein he stated:

> I respectfully represent that, I do not have to serve or even notify either of the members of the above mentioned organization.
>
> My Motion arises out of a rule that the honorable Supreme Court of Arkansas inacted [sic] and has nothing to do with the Board of Law Examiners. That is why it is styled 'David Wayne Pitchford vs. Ex Parte.'

Of course, Mr. Pitchford is correct in that the rule is a court rule, and we are simply being asked to set it aside.

The present Ark. Stat. Ann. § 25-101 was an amendment to the Civil Code, passed in 1873 as Act 88, and was last amended in 1927. The contention that our rule violates this

[2]The chairman did direct a letter to the clerk, sending copy to Mr. Pitchford, pointing out that the Board was not a party to the action, and he did express his personal views that the matter was controlled by Amendment 28 to the Arkansas Constitution.

statute appears to be the principal argument advanced by petitioner.

It is also asserted that the rule:

> 3) * * * violates the rights provided by, the Constitution of the State of Arkansas, Article 2, sub-section 12, in that, no power but the General Assembly can set aside or suspend the laws of the State of Arkansas.
>
> 4) That the rule subject of this motion is in direct opposition to, and violates the rights provided by, the Declaration of rights, within the Constitution of Arkansas, Article 2, sub-section 2, in that it deprives one the pursuit of their happiness, and liberty, for a person who has graduated from a law school or has a diploma from a law school should not be considered any more qualified to take the Bar examination and practice law than a person who has obtained the same knowledge of the law elsewhere.

It is further contended that the rule violates the rights provided by the Fourteenth Amendment.

We first discuss the argument relating to constitutional rights. Petitioner is in error in declaring that no power but the General Assembly can set aside or suspend the laws of the State of Arkansas, for certainly a constitutional amendment which changes prior procedure is superior to a legislative act, and Amendment 28, hereafter discussed more fully, places the authority to regulate the practice of law in the State Supreme Court.

In *McKenzie* v. *Burris,* 255 Ark. 330, 500 S.W. 2d 357 (1973), this court said:

> Since the practice of law is a profession licensed as a privilege or franchise and its members officers of the court and a necessary arm of the judicial system, it is not a natural right, the regulation of which is limited by the state constitution.

As to the Fourteenth Amendment, in the same case the Court commented:

> The right to practice in state courts is not a privilege or immunity under the Fourteenth Amendment to the United States Constitution. [Citing cases.] It is only when there is no rational basis for denying the right or privilege to practice in a state or there is arbitrary action or invidious discrimination by state officers excluding one from the practice that the 'due process' and 'equal protection' clauses of the Fourteenth Amendment come into play. [Citing cases.] But it was recognized in *Konigsberg,*[3] as it had always been, that states are free to determine who may practice in their courts, so long as the power to do so is not exercised in an arbitrary or discriminatory manner. [Citing cases.]

The United States Supreme Court has said that the fact that rules may result in "incidental individual inequality" does not make them offensive to the Fourteenth Amendment. *Martin* v. *Walton,* 368 U.S. 25; *Phelps* v. *Board of Education,* 300 U.S. 319.

As earlier stated, petitioner's principal argument is based on Ark. Stat. Ann. § 25-101, heretofore set out. Petitioner points out that the statute, in referring to people who have reached the age of 21 years, makes no requirement whatsoever for graduation from a law school in order to be permitted to take the bar examination and that it only provides that the person shall have "the requisite qualification of learning and ability," which he, in oral argument, contended could be acquired by study elsewhere than in law school.

It might be here pointed out that there is no contention in his petition that he has obtained the equivalent of a law school education by study in a law office;[4] the entire petition

[3]*Konigsberg* v. *State Bar of California,* 353 U.S. 252.

[4]Mr. Pitchford mentioned in oral argument that in Virginia a person could read law and become a lawyer without going to law school, and that the program was still in effect. The record reflects that he was then asked, since he was a native of Virginia, why he didn't follow that practice there, to which he replied: "Sir, what I did, I read law under my father who became deathly ill, and there was some controversy as to whether or not he was in the office enough." He did not say how long he studied in the office.

is simply a contention that Rule XII is invalid and that there is no authority on the part of the court to promulgate a rule which is in conflict with the aforementioned statute, and further, that the rule is unconstitutional. Of course, ordinarily a rule would not supersede a statute, but petitioner overlooks the fact that this rule is the result of constitutional Amendment 28, passed by the people of this state in 1938. The Arkansas Supreme Court refused to make rules until this amendment was passed, the amendment reading as follows:

> Supreme Court — Rule Making Power. — The Supreme Court shall make rules regulating the practice of law and the professional conduct of attorneys at law.

So — the question is not whether a rule supersedes the statute, but rather, whether a provision of the constitution supersedes the statute. Here, there is a conflict insofar as the rule, authorized by Amendment 28, requires graduation from a law school approved by the American Bar Association or the State Board of Law Examiners, while the statute requires no law school training. In *McKenzie* v. *Burris,* supra, we pointed out that statutes in conflict with rules adopted by this court under authority given by Amendment 28 were superseded by such rules. Of course, parts of a statute which do not conflict with a constitutional provision retain their validity.

Petitioner agrees that the amendment gives authority to discipline attorneys, but he argues that this is the entire purpose of the amendment, i.e., that the "regulating" authorizes only the taking of action against attorneys who have violated legal obligations. The wording of the amendment itself reflects the incorrectness of such an interpretation, for it clearly states "regulating the practice of law *and* the professional conduct of attorneys at law." (Our emphasis.) If petitioner's interpretation were correct, there would be no necessity in mentioning both functions.

Certainly, there can be no doubt that regulating the practice of law includes the preparation of rules determining and setting out the qualifications of one who desires to take the bar examination.

Again, in *McKenzie,* this court said:

> Amendment 28 certainly put to rest for all time any possible question about the power of the courts to regulate the practice of law in the state. There can be no doubt that the power of the judicial department, acting through this court, is, in this respect, exclusive and supreme under this amendment, if the power was not already inherent in the courts. This does not mean, however, that adoption of this amendment had the effect of invalidating every act of the General Assembly bearing upon the subject, particularly those passed prior to the effective date of the amendment, if they are not necessarily in irreconcilable conflict with or repugnant to the amendment. An existing statute is superseded by a subsequent constitutional amendment only when there is an irreconcilable conflict or the statute is necessarily repugnant to the new constitutional provision.

Again, in *Weems* v. *Supreme Court Committee on Professional Conduct,* 257 Ark. 673, 523 S.W. 2d 900, we said:

> The acts of the Legislature with regard to regulating and defining the practice of law are to be considered to be in aid of the judicial prerogative and not in derogation thereof. *Arkansas Bar* v. *Union National,* 224 Ark. 48, 273 S.W. 2d 408 (1954).

Likewise, in *Feldman* v. *State Board of Law Examiners,* 438 F. 2d 699 (1971), the Circuit Court of Appeals (in affirming the district court) stated:

> 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. The courts may and frequently do honor implementing legislation, but clearly are not bound so to do.

The language of the Pennsylvania Supreme Court in *Appeal of Murphy,* 393 A. 2d 369 (1978), *cert. denied,* 99 S. Ct. 1204 (Feb., 1979), is pertinent to the matter before us. There,

Murphy had appealed from the refusal of the Board to allow him to sit for the bar examination. The refusal was based on a rule by the Pennsylvania Supreme Court that an applicant must be a graduate of both an accredited college and an accredited law school, the latter accreditation by the American Bar Association. The rule making power concerning the practice of law was granted to the court by Article 5, § 10(c) of the Constitution of Pennsylvania. In holding that Murphy was not qualified to take the examination, the court said:

> The admission of a person to practice law in this state is and always has been a judicial function, exercised now exclusively by the Supreme Court, with the aid of the State Board of Law Examiners. As explained at the outset, we have chosen to make a legal education one of the pre-conditions of seeking admission to our bar whether through the taking of the bar examination or recognition of the five-year practice equivalent in a reciprocating sister state.[5]

Petitioner, in oral argument, stoutly argued that one could just as easily become qualified by studing in a law office, as by attending a law school. Of course, here, the record reflects no such office training on the part of Mr. Pitchford. There is no evidence, nor even allegation, that he has, for any period of time, attended any college, or law school, and the only reference to office training was mentioned in oral argument as reflected in footnote (4) of this opinion. Petitioner mentioned what he deemed the inadequacies of many lawyers, trained in law school, and practicing their profession. The comparison was also extended, although to a lesser degree, to those in the medical profession. Of course, it is true that in pioneer days men practiced law, medicine, dentistry, and engineering with but little, if any, academic training; cer-

[5]It is interesting to note that Murphy was a graduate of Western State University College of Law of Orange County, Fullerton, California, and had taken and passed the California bar examination and been admitted to practice law in that state. Additionally, he had been admitted to practice before the United States District Court of Appeals for the Third District, the United States District Court for the Middle District of Pennsylvania, and the United States District Court for the Northern District of California. The action of the Pennsylvania Supreme Court was taken on the basis of the fact that the Western State University College of Law was not accredited by the American Bar Association.

tainly no one would deny, however, that the great strides of progress made in all of these professions could not have been accomplished except for scholastic and specialized training.

It follows, from what has been said, that we find petitioner's argument to be without merit and accordingly, the petition is denied and dismissed.

It is so Ordered.

BYRD, J., dissents.

CONLEY BYRD, Justice, dissenting. I cannot disagree with the majority's reasons for not setting aside Rule XII. However, I would waive the Rule as to petitioner for him to take the examination on a one time basis as he suggested during his oral presentation. Occasionally people with little formal education surpass their fellowman with outstanding college degrees in the same field. Among such people are Abraham Lincoln, Henry Kaiser and Thomas A. Edison. History tells us that Thomas A. Edison's teacher suggested to his parents that they were wasting their time and money in trying to send him to school.

It may be that petitioner will never become an Abraham Lincoln, but he appears enough of a "Maverick" to me that I would make an exception for the one time examination.

For the reasons stated, I respectfully disagree with the majority.

BIBLER BROTHERS LUMBER COMPANY et al *v.* Jimmy CHISUM

79-51 580 S.W. 2d 958

Opinion delivered May 21, 1979
(In Banc)

Niblock & Odom, for appellants.

Dale W. Finley, for appellee.

GEORGE ROSE SMITH, Justice. This is a claim under the workers' compensation law for compensation incident to a surgical operation for a ruptured appendix suffered by the claimant. Upon conflicting medical testimony the Commission awarded compensation. In its opinion the Commission cited seven out-of-state cases in which it was found, upon conflicting medical testimony, that a blow or strain had caused or contributed to cause appendicitis. That point is not argued here. Instead, it is insisted that Dr. Luker's testimony in favor of the award is so speculative that it cannot be regarded as substantial evidence. We agree with the Com-

mission's decision, which was affirmed by the circuit court.

Chisum was injured at work when a chain saw kicked back, with the handle striking him in the lower right side. Within a few minutes he became too ill to work and was taken to Dr. Luker's office. Dr. Luker thought that he had a contusion, possible strain, or abdominal tear to the musculature. Chisum was sent home to rest, but his condition worsened. Three days later Dr. Luker's associate diagnosed the ruptured appendix, and Dr. Bachman, a surgeon, performed the operation. It was Dr. Bachman's opinion that the claimant's work had nothing to do with his appendicitis.

Dr. Luker, a family practitioner, was of the opposite view. We do not consider his testimony as being too speculative to constitute substantial evidence. He recognized that appendicitis can be caused by a blow. He said that the time interval between the claimant's injury and the development of appendicitis was about right. He also said that the claimant's age made him favor the diagnosis of traumatic appendicitis, adding that "he's the kind that, all other things being constant, is you just wouldn't expect a diagnosis of appendicitis unless there was a trauma." He could not say with certainty that the blow caused the condition, but it was "in the degree of probability." When Dr. Luker's testimony is considered as a whole, his conclusion that the blow from the chain saw probably caused the appendicitis appears to be a reasoned conclusion rather than mere speculation.

Affirmed, with an allowance of a $250.00 attorney's fee to the appellee.

BYRD, J., dissents.

Diarl F. NOLAND *v.* STATE of Arkansas

CR 79-13 580 S.W. 2d 953

Opinion delivered May 21, 1979
(Division I)

Paul Johnson, for appellant.

Steve Clark, Atty. Gen., by: *Robert J. DeGostin Jr.,* Asst. Atty. Gen., for appellee.

JOHN A. FOGLEMAN, Justice. Appellant Noland was charged with theft of property in violation of Ark. Stat. Ann. § 41-2203 (Repl. 1977), found guilty by the court, sitting without a jury, and sentenced to two years' imprisonment. We find no error in the appellant's two points for reversal and affirm.

Appellant first contends that the trial judge erred in refusing to honor an agreement between the deputy prosecuting attorney, Mr. Roddey, and the appellant's counsel, Mr. Rosteck, to dismiss the charge against the appellant if the stolen property, a refrigerator taken from an apartment the appellant and his wife had rented from Ben T. Newby, was returned to the owner.

Noland was arraigned on May 1, 1978, when his case was set for trial, after he had pleaded not guilty and waived jury trial. When the case was called for trial, appellant's attorney filed and presented a letter from Newby, the owner of the stolen property, which stated that he was the prosecuting witness in the case and that, inasmuch as the property involved had previously been returned to him, he desired that the charge against the appellant be dismissed. The deputy prosecuting attorney stated that the state would be willing to dismiss the charge, but that the state was ready for trial and that the matter was up to the court.

After the state presented its evidence in chief and rested, Noland's attorney asked for an opportunity to get "our witness", saying that he had not expected to try the case on the day set because he thought the court would recognize the letter signed by the prosecuting witness. The circuit judge responded that the attorney knew that the court was not in the habit of doing that.

The letter involved was the result of conversations between Rosteck and Roddey and between Rosteck and Newby. We do not agree with appellant's interpretation of

the record. He contends that it shows an outright agreement of the deputy prosecuting attorney to dismiss the charge; however, as indicated by the following colloquy among Roddey, Rosteck and the trial judge, the dismissal of charges was contingent upon the judge's agreeing to the arrangement:

> MR. ROSTECK:
> *** The Prosecutor and I talked about this last week, and this was our agreement that we had between the Prosecutor and I, that I would see to it this man got his refrigerator back, which he did, and, not only that, Mr. Noland had to pay some back rent which he claims was due, which he paid, too, and the man signed a letter that he did not wish to prosecute and I thought the Court would honor that, and I was not prepared to come to trial today. We've got some witnesses here who can say where this defendant was. What I'm trying to tell the Court is, this is confidential.
>
> THE COURT:
> You mean to tell me that the Prosecutor is making an arrangement with you and negotiating a plea and has led you to believe that he is running the Court here and—
>
> MR. ROSTECK:
> (Interposing) No, sir.
>
> THE COURT:
> —and you relied on it?
>
> MR. ROSTECK:
> I didn't rely on anything Judge. What I'm saying—
>
> THE COURT:
> (Interposing) Certainly you've been practicing law long enough to know that the Prosecutor has got his job and the Court has got its job, and they are not the same.
>
> MR. ROSTECK:
> Judge, I'm fully aware of that. I was not prepared to go to trial on this this morning.

THE COURT:
Well, Mr. Rosteck, this case has been set for trial two and a half months, and I don't know why not.

MR. ROSTECK:
It was because of the agreement we had with the Prosecutor and the Prosecutor asked me to call the man up, which I did, and it was satisfactory with the Prosecutor that we handle it in this manner, and we did. I'm sorry that we couldn't get over here Friday, but we couldn't get over here Friday.

THE COURT:
Is that the way it happened?

MR. RODDEY:
He — I told him that if he thought that he wanted to contact the prosecuting witness and see if it would be amenable with the prosecuting witness, that would be fine. And then in the meantime I talked with my division chief and he said that we needed to be ready to go to trial or at least have the man come here, so I told him to have Mr. Noland come here, and I said we would leave it up to you. That is my recollection. I did not — If I am stating it wrong, correct me, but that is my understanding.

MR. ROSTECK:
It was our understanding that this is what we would do, Judge, and I thought it was all right. I could see no objection except the fact that —

THE COURT:
You can't, but I certainly can, Mr. Rosteck. ***

After Rosteck stated that this was the first time in his 25 years of law practice that he had presented a "motion" signed by a prosecuting witness who did not want to prosecute, and prosecution had been "forced", the court offered to continue the trial to permit Rosteck to obtain the attendance of witnesses. On the following day, the defendant did present witnesses and testified himself.

In addition to the fact that the terms of the agreement established that the approval of the trial judge was necessary for the dismissal of the charges against the appellant, Ark. Stat. Ann. § 43-1230 (Repl. 1977) prohibits any prosecuting attorney from entering a nolle prosequi, or in any way discontinuing or abandoning an indictment, without leave of the court in which such indictment is pending. Therefore, it is clear that both the agreement itself and § 43-1230 mandated the approval of the trial judge before charges pending before that judge could be dismissed.

Appellant cites two opinions of this court, *Hammers* v. *State,* 261 Ark. 585, 550 S.W. 2d 432, and the opinion in the same case after remand to the trial court, *Hammers* v. *State,* 263 Ark. 378, 565 S.W. 2d 406, in support of his contention that it was error for the court to refuse to accept the agreement to dismiss the charges. However, we do not feel that the *Hammers* decisions are supportive of this contention.

In *Hammers,* the prosecuting attorney agreed to grant Hammers immunity from prosecution in exchange for her testimony against her codefendant in a murder trial. Prior to trial, the codefendant pleaded guilty to a lesser charge. The prosecutor then brought Hammers to trial on the murder charge. She was convicted and appealed from the denial of her motion to stay the prosecution against her. This court ultimately reversed the appellant's conviction and dismissed the charge, basing that decision on equitable principles, and finding that the state took full advantage of the bargain until the codefendant pleaded guilty and offered to testify against Hammers. In the first opinion, we had said:

> It is only appropriate that an accomplice who, under an agreement with the prosecuting attorney, approved by or made known to the court, that he should be immune from prosecution, testified fully and truthfully as to the whole matter charged, be vested with an equitable right to the entry of a nolle prosequi or appropriate clemency. [Citations omitted.]
>
> Clearly a promise of immunity approved by, or with the consent of, the court, should be upheld. ***

Thus, it is obvious that *Hammers* is not controlling in this case. That case involved a bargain for testimony from a defendant on a promise of immunity, and a refusal to honor the bargain when the circumstances changed. This court held that the trial court erred in holding that Hammers was not entitled to equitable relief by enforcement of the bargain. The prosecuting attorney in the case at bar was not attempting to withdraw from a prior agreement to dismiss the charges against the appellant. Rather, he was willing to honor this agreement, provided the trial judge approved of the nolle prosequi, which was properly a condition of the agreement from the outset, because it is required by statute. This court rejected a claim by a convicted defendant that a charge ought to have been dismissed because a former prosecuting attorney had agreed to dismiss it, by merely saing, "Of course, there is nothing in this contention." See *Dillard* v. *State,* 65 Ark. 404, 46 S.W. 533. *Hammers* does not hold that any and all agreements reached between the defense and the prosecution must be upheld or enforced, regardless of the willingness of the trial judge to allow dismissal of charges. The trial judge is vested with discretion as to the entry of a nolle prosequi of charges pending before him. *Webb* v. *Harrison,* 261 Ark. 279, 547 S.W. 2d 748; Ark. Stat. Ann. §§ 43-806 and 43-1230 (Repl. 1977). Refusal to allow the dismissal of the charges in this case does not constitute an abuse of that discretion. As the circuit judge pointed out, the offense is against the state as well as against the victim.

Appellant contends that the trial judge erred in sentencing him without first making a meaningful inquiry into a presentence report. After hearing all the testimony and the arguments of counsel, and finding appellant guilty, the trial judge, after repeated insistence by Noland and his attorney that Noland was not guilty, reiterated the finding of guilt beyond a reasonable doubt, but, upon the request of Noland's attorney for probation, agreed to "pass the case over for judgment" and provided appellant with an opportunity to take a polygraph examination, but advised Noland that the results would be admitted into evidence, whether "for or against the defendant." Noland's attorney then remarked that he had requested such a test when the case first came up, but when the judge asked why the test had not been given, Noland responded that his lawyer felt like it would not be ad-

visable. Rosteck explained he then had no idea that "they" could recover the refrigerator[1] or that it would be recovered, but when Newby said that all he wanted was his refrigerator back, he saw no sense in having a polygraph test.

The trial judge asked Noland if he wanted to submit to the test and Noland responded that he did and that he wanted "to prove without a shadow of a doubt that I had nothing to do with that refrigerator." After advising Noland that he could not do that because the case had already been tried and that this step was being taken only for the purpose of sentencing, the judge stated:

> Now, you remain in constant contact with your attorney in this case, because when this is set up you had better be there and take this test. Whether you take it or not is up to you, but you will have the opportunity to take it. ***

The conclusion of the investigator who administered the polygraph examination to the appellant was that the appellant did not tell the complete truth during the examination. In the presentence report the probation officer stated that the polygraph examiner had stated, when interviewed, that a guilty knowledge of the crime, with an intent to conceal parties or facts, could result in examination results similar to those of the appellant. The probation officer also reported that Noland said that he thought he could have passed the test if it had been administered upon his arrest, rather than after the trial. The examination results, along with information about the appellant's work history and education and the statements of four character witnesses, comprised the presentence report on the appellant. The presentence report concluded the appellant "has never been in serious trouble before," "has a family to support and is of sufficient age and maturity to be considered a good prospect for a suspended sentence or probation."

[1]Testimony on behalf of appellant indicated that Noland's wife and mother-in-law actually returned the refrigerator. Appellant's wife said that, for some reason, she suspected that Gene Earnhart had taken the refrigerator and that, after he admitted having it and agreed to surrender it, she and her mother picked it up, put it in her mother's truck and returned it to Newby. Noland testified that he knew nothing of this.

Ark. Stat. Ann. § 41-804 (Repl. 1977) details the information to be considered in a presentence investigation and subsection (4) provides:

> Before imposing sentence, the court shall advise the defendant or his counsel of the factual contents and conclusions of any pre-sentence investigation or psychiatric examination and afford fair opportunity, if the defendant so requests, to controvert them. Sources of confidential information need not be disclosed.

Nothing in the statute requires that the trial judge follow the recommendation of the presentence report or that he specify the relative weight he attached to each element contained in the report, before he sentences a defendant. Appellant's attorney was presented ample opportunity to controvert the information in the presentence report, or to request the opportunity to do so, as indicated by the following exchange:

> THE COURT:
> Mr. Rosteck, I have read your letter. I've read the report, which reflects there is no prior record. I've read the polygraph examiner's record which reflects that the defendant, in his opinion, the defendant was not telling the complete truth. It's the judgment and sentence of this Court — Do you have anything else to say?
>
> MR. ROSTECK:
> I don't guess so.
>
> THE COURT:
> It's the judgment and sentence of this Court that the defendant be sentenced to the State Penitentiary for two years.

The appellant cannot now complain that the trial judge or the probation officer who made the presentence investigation should have undertaken an in-depth review of the polygraph examination with appellant, in an effort to determine which questions and answers indicated deception, when the appellant was given an opportunity, prior to sentencing, to comment on the presentence investigation and the polygraph examination. See Ark. Stat. Ann. § 43-2301 (Repl.

1977). No effort was ever made to controvert the report. The only statement ever made was Noland's remark after he was sentenced that the report showed that he did not take the refrigerator. The report does not support this statement. It only states that Noland maintained, and continued to maintain, that his statements were true.

Theft of property with a value of more than $100.00 but less than $2500.00 is a class C felony, with a sentence upon conviction of not less than two (2) years and not more than ten (10) years. Ark. Stat. Ann. §§ 41-901(1)(c) and 41-2203(2)(b) (Repl. 1977). It is within the trial judge's discretion to set the punishment for a defendant anywhere within the statutory range of punishment provided for a particular crime. Ark. Stat. Ann. § 43-2307 (Repl. 1977); *Thornton* v. *State,* 243 Ark. 829, 422 S.W. 2d 852. Perhaps the trial judge chose not to suspend the sentence of the appellant solely because of the unfavorable polygraph report, but opted for the minimum sentence due to the favorable recommendation of the presentence investigator. The record does not disclose the relative weight given to the various factors and, as stated earlier, there is no requirement that the trial judge enumerate the various considerations which made up his decision. In any event, the appellant cannot voluntarily take such an examination and then attempt to avoid unfavorable results by contending that the trial judge should have made further inquiry into the circumstances of the examination. We cannot agree with appellant's suggestion that the fact that he may have answered untruthfully in order to protect someone else should have resulted in a suspension of sentence.

We find no abuse of the trial court's discretion in the sentence imposed on the appellant, and therefore, the judgment is affirmed.

We agree. HARRIS, C.J., GEORGE ROSE SMITH and HICKMAN, JJ.

Michael REDMAN and Milton REDMAN, Jr. *v.* STATE of Arkansas

CR 79-33 580 S.W. 2d 945

Opinion delivered May 21, 1979
(In Banc)

[redacted]

Robert S. Blatt, for appellants.

Steve Clark, Atty. Gen., by: *Ray Hartenstein,* Asst. Atty. Gen., for appellee.

JOHN A. FOGLEMAN, Justice. This appeal comes from a judgment revoking suspension of sentences of appellants imposed upon them in 1974 on charges of burglary and grand larceny and revoking probations granted on a separate charge of burglary. They were sentenced to five years in the Department of Corrections on each of the charges of burglary and grand larceny, but four years of the concurrent sentences were suspended upon condition of their good behavior. On the charge of burglary, they were placed on probation for five years, conditioned upon their good behavior. The petition for revocation was filed by the state on August 31, 1978. It was based upon the allegations that appellants had violated the terms of their probation and of the suspension of their sentences by committing burglary in Sebastian County on August 30, 1978. An amended petition was filed in November, 1978. It added an additional basis for revocation, that is, charges of burglary and theft of property on October 20, 1978, in Crawford County. Both petitions were granted. As a result, appellants were sentenced to terms of 21 years on revocation of their probations. They were sentenced to terms of four years on each count on the original burglary and grand larceny charges. The sentences on the latter charges were to run concurrently, but they were consecutive to the sentences on the revocation of probation. The pleas of appellants on the charges resulting in the original sentences had been nolo contendere. The three points alleged for reversal, as stated by appellants, are:

I

THE TRIAL COURT ERRED IN DENYING DEFENDANT MILTON REDMAN, JR.'S MOTION TO SET ASIDE HIS ORIGINAL PLEAS ON THE GROUND THAT HE DID NOT KNOWINGLY, INTELLIGENTLY, AND VOLUNTARILY ENTER THE PLEAS BECAUSE HE WAS ONLY 13 YEARS OF AGE IN 1974 WHEN THE PLEAS WERE ENTERED.

II

THE TRIAL COURT ERRED IN FINDING THAT THE DEFENDANT, MICHAEL REDMAN, VIOLATED HIS PROBATION AND SUSPENDED SENTENCES BY BEING INVOLVED IN AN ALLEGED BURGLARY IN SEBASTIAN COUNTY, LAVACA, ARKANSAS, BECAUSE THE STATE FAILED TO PROVE THE DEFENDANT'S INVOLVEMENT BY A PREPONDERANCE OF THE EVIDENCE.

III

THE TRIAL COURT ERRED IN ADMITTING INTO EVIDENCE TESTIMONY OF DAVID MATCHETT ABOUT THE OUT-OF-COURT IDENTIFICATION OF A BONE HANDLE HUNTING KNIFE AND A.22 PISTOL CYLINDER PIN FOUND IN THE POSSESSION OF DEFENDANT, MICHAEL REDMAN ALLEGEDLY TAKEN IN A BURGLARY, WITHOUT THE ITEMS BEING OFFERED OR ADMITTED IN EVIDENCE BECAUSE THE EVIDENCE WAS HEARSAY AND VIOLATED THE DEFENDANT'S RIGHT OF CONFRONTATION.

I

Milton Redman, Jr. was 13 years old when the original sentences were imposed. He was represented by the public defender, who conducted plea negotiations with the prosecuting attorney. As a result of these negotiations, the prosecuting attorney agreed to sentencing Milton to the juvenile training school. This sentence was agreeable to the trial judge, but not to Milton, who wanted to serve his sentence at the place to which his older brother was to be committed. Milton now contends that his pleas on the charges, resulting in the probation and suspension of sentence, were not knowingly, intelligently and voluntarily entered.

This ground for reversal is urged on the basis that withdrawal of the pleas should have been permitted to correct

a manifest injustice. A motion for withdrawal of the pleas of nolo contendere was filed by Milton after the first petition for revocation had been filed. Milton's motion is based solely upon the allegation that he was under the age of 15 years and did not have the capacity, because of his age, to enter the pleas of nolo contendere on the original charges. We should say at the outset that we do not consider Ark. Stat. Ann. § 41-617 (Repl. 1977), barring the conviction of a person for an offense if he was less than 15 years of age at the time of its commission, to be a retroactive declaration of the public policy of this state, at the time of Milton's probation and the suspension of his sentences. This was approximately 18 months prior to the effective date of § 41-617. It is argued on appeal that, even though this statute was not in effect at that time, it should have been. Obviously, the General Assembly did not think so, and we are in no position to give the act retroactivity, when the legislative branch did not do so. The presumptions against retroactivity are too great. See *Snuggs* v. *Board of Trustees of Arkansas State Employees Retirement System,* 241 Ark. 402, 407 S.W. 2d 933; *Chism* v. *Phelps,* 228 Ark. 936, 311 S.W. 2d 297, 77 ALR 2d 329.

It is also urged that since, under the common law, one 13 years old was presumed to be incapable of discerning good from evil, it necessarily follows that such a person is incapable of understanding the consequences of a plea of guilty. We do not agree with this argument. Furthermore, we are convinced that this appellant fully understood the effect of his pleas of nolo contendere. The statutory bar against prosecution of one of tender years for a criminal offense, existing at the time of the pleas, applied to one under 12 years of age. See Ark. Stat. Ann. § 41-112 (Repl. 1964). We have never held that one above the age at which there is a want of criminal capacity was incapable of knowingly, intelligently and voluntarily incriminating himself or that the youth of an accused prevented his waiving constitutional rights. See, e.g., *Jackson* v. *State,* 249 Ark. 653, 460 S.W. 2d 319; *Mosley* v. *State,* 246 Ark. 358, 438 S.W. 2d 311; *Curtis* v. *State,* 255 Ark. 428, 500 S.W. 2d 767. The common law presumption that one under the age of 14 years does not have the capacity to comnit a crime is rebuttable and the prosecution can overcome it by clearly establishing the capability of such a youth to appreciate the nature and consequences of his acts and the

mental capacity to know right from wrong in reference to the particular offense charged. The presumption against the capability of distinguishing good and evil is also rebuttable and it prevails only until the contrary is affirmatively shown by the evidence. It is also significant that the strength of the presumption decreases as the age of the youth approaches 14. *Little* v. *State,* 261 Ark. 859, 554 S.W. 2d 312, cert. den. 435 U.S. 957, 98 S. Ct. 1590, 55 L. Ed. 2d 809 (1978). We will be guided by these principles in determining the capacity of one of tender years to enter a plea of guilty or nolo contendere.

It is clear from this record that Milton had sufficient mental capacity to voluntarily, knowingly and intelligently enter his pleas of nolo contendere and that he did so enter them. The record of the proceedings on June 13, 1974, when the pleas of appellants were accepted and they they were sentenced consists of 22 pages. The proceedings were conducted with the meticulous care characteristic of the judge who accepted the pleas. At the outset, Judge Wolfe addressed appellants and the adults accompanying them. This record discloses the following:

> THE COURT: It is important that both of you young men stop and feel free to say, "Judge, what does that mean?" or "What does this say?"
>
> I want to say again to you please don't hesitate to stop me and say, "Now, Judge, let me get this straight." I haven't asked your father or your grandmother. In your judgment do you feel that your sons and grandsons understand these papers?
>
> MR. REDMAN: I believe they do.
>
> MRS. REDMAN: I believe they do.

At the time the pleas were entered, appellants appeared with the public defender, their father and their grandmother. Milton said that his parents had plenty of time to talk to the public defender. He said that he understood that his attorney had told the court that he desired to enter a plea, that plea negotiations had been carried on between the public defender and the prosecuting attorney and that the prosecuting at-

torney's recommendation was not binding on the court. He was able to state and understand the terms of the sentences that his attorney had advised him would be imposed, if the court found the prosecuting attorney's recommendation to be reasonable. He said that he fully understood what would happen to him if he pleaded nolo contendere. He admitted that he had signed a comprehensive "Plea Statement — Nolo Contendere," that he understood that by signing that paper he was telling the court that he understood everything on it and that there were no words on that paper that he didn't understand. He said that he had gone over a paper entitled "Statement of the Court Respecting Statutory Probation" with his attorney, that he understood it and was willing to accept its terms. He also said that he understood the content, and was willing to accept the conditions of a paper entitled "Statement of the Court Respecting a Suspended Sentence." He said that he had no questions about any of those papers and that he had been afforded plenty of time to go over the written "nolo contendere statement." He stated that he understood that the court was accepting the plea and said he had nothing to say before the sentences were pronounced and that he had no other questions about the proceeding. Milton's signatures on the statements mentioned were witnessed by the public defender.

Milton was 14 years of age on November 20, 1974. He was in the eighth grade at school, and was attending school when his pleas were accepted. He had passed the seventh grade and had never been required to repeat a grade. He testified at the revocation hearing about his previous pleas. He recalled having talked with the public defender, his father and his grandparents about the plea. He remembered the questions asked him by the sentencing judge. He acknowledged that he had known what the charges were. In his testimony, the only basis he gave for his pleas being involuntary was that, in retrospect, he knew that he had made an illogical decision in demanding that he be sentenced to the Department of Corrections, rather than the "reform school," against the advice of his attorney, his father and his grandparents, so he could be with his older brother, with whom he was very close. He said that he was asking that the pleas be set aside because they were not "intelligently" entered and because of "the present status of the law in the State of

Arkansas." He said that he had been given only two days to think about the matter after the public defender had told him of the results of the plea negotiations. He did not testify that he had not known what the consequences of his pleas would be or that they were not entered voluntarily.

Don Langston, Sebastian County Public Defender since December, 1971, also testified. He said that he had twice talked with appellants and their family about the plea arrangements. He said that the evidence against appellants had been overwhelming and that he had advised them that going to trial was against their best interests. He did advise both to plead guilty, but did not advise Milton to enter the plea on the sentencing conditions imposed, only because he very strongly advised Milton to accept the negotiated sentence to the Juvenile Training School, where the period of detention would not have been definitely fixed. Langston had explained the parole law to Milton. Langston said that Milton was adamant about the matter and that he had felt that Milton would not enter a plea unless he could "go with his brother." Langston had felt that, even though neither of the appellants was very bright, both were capable of understanding the proceedings and had actually understood their rights and were aware of the sentences they would receive. He stated that Milton voluntarily entered his plea, against Langston's advice. Langston stated that he had fully informed Judge Wolfe about the differences between him and Milton about the sentences and that Judge Wolfe would have been willing to commit Milton to the training school. We are well aware of the fact that this experienced public defender has always been vigorous in the assertion and protection of the rights of the clients he represents.

It is significant that no parent or grandparent of Milton testified at the revocation hearing. Appellant never questioned the lack of wisdom of his plea until after the petition for revocation was filed and, even at the hearing, he questioned only his own judgment in refusing the commitment to the training school, and not the wisdom of his admission of guilt. We cannot say that the trial court erred in denying the motion for withdrawal of the nolo contendere pleas.

II

Michael Redman contends that, not only is the finding that he participated in a burglary in Sebastian County clearly against the preponderance of the evidence, there is no evidence to connect him with that offense. The gist of his argument is that there was no one who could identify him as one of the two people who burglarized the Jones residence, ten miles northeast of Lavaca. It is true that it is only on the basis of circumstantial evidence that one could say that Michael participated in that burglary. He argues, however, that the circumstances can, at best, only arouse a suspicion that he was a participant. We do not agree.

Mrs. Guy Jones testified that two persons came to her residence on August 30, 1978, in a red pickup truck, on the back of which was a white "camper." The truck bore the license No. FKF-116. She identified Milton as one of the two persons. She said that, soon after this vehicle arrived at her house, and someone had knocked at the front door and shaken it, Milton peeked in a picture window and left in the pickup truck. He soon returned and entered a patio door by springing a lock on the storm door. She had seen the truck being driven back to her residence after she had heard someone open the screen door from her patio. She had also heard two persons talking just before Milton entered.

When Milton saw her, he left the house and departed in the pickup truck. She reported to the sheriff's office about 20 minutes later. Her report was delayed while she called her father-in-law and cousin for advice. Two deputy sheriffs were at Rogers Avenue and Massard Road in Ft. Smith, heading toward Lavaca, when they spotted the vehicle Mrs. Jones had described. They stopped the vehicle. It was occupied by appellants. The arrest was made about 25 minutes after Mrs. Jones called the sheriff's office. Although Mrs. Jones could identify Milton, she was unable to identify Michael as the second person who had been at her residence.

The license plate on the vehicle was registered in Milton's name. The same vehicle was seen at the scene of the Crawford County burglary. A deputy sheriff found Michael's wallet, containing his driver's license and other identification,

in the pickup truck after the homeowner in Crawford County had taken the keys from the vehicle, which had been left parked at his house, after a burglar he had caught in the house had taken flight. Someone had been backing the truck toward the door just before the homeowner saw the burglary in the house. Within an hour, Ricky Selph and Michael were arrested by Deputy Sheriff Grill, who had seen two persons in the vehicle on Highway 50, just north of this residence on Highway 59, 45 minutes prior to the burglary. At the time of the arrest, Michael and Selph were in a wooded area on a county road, east of and parallel to Highway 59. Both of them appeared to have been running. Selph fit the description of the person the homeowner saw in his house and later saw running from the scene. The place of arrest was about one mile from the scene.

This circumstantial evidence afforded a very substantial basis for the trial court's finding that Michael had been with Milton and was in the pickup truck when Milton entered the Jones residence.

Under present law, there is no distinction between the criminal responsibility of an accomplice and the person who actually commits the offense. Ark. Stat. Ann. § 41-302, -303 (Repl. 1977); *Parker* v. *State,* 265 Ark. 315, 578 S.W. 2d 206. Presence of an accused in the proximity of a crime, opportunity, and association with a person involved in the crime in a manner suggestive of joint participation are relevant facts in determining the connection of an accomplice with the crime. *Jackson* v. *State,* 256 Ark. 406, 507 S.W. 2d 705. The evidence here is greatly dissimilar to that in *Vaughn* v. *State,* 252 Ark. 505, 479 S.W. 2d 873, and other cases cited by appellant, where the only evidence to connect an accused with a crime is his association with a participant at a time and place remote from the offense. The additional circumstances here afford a basis for finding that Michael was at the scene of the Jones burglary.

III

David Matchett was the owner of the home burglarized in Crawford County. After the burglar took flight from the house, Matchett found some of his guns stacked by a door.

The guns had been kept in a gun cabinet in another room. Upon searching the house, he found a .38 caliber pistol and a .22 caliber pistol missing. About two hours after the officers came to his house in response to his call, Matchett was called to come to the Crawford County Sheriff's Office to view some items.

Grill had testified that he observed a bone-handled hunting knife in Michael's rear pocket when he arrested Michael and Selph. Grill had taken the knife and put it in the property room of the sheriff's office. On the way to the sheriff's office after the arrest, Grill had heard a shuffling noise in the rear of his patrol car, where he had placed the two persons he had arrested. He said that he then looked back and observed Michael take an object from his right front pocket and deposit it on the floor. Grill stated that, upon arrival at the jail, he had immediately opened the rear door near which Michael had been sitting and picked up this object, which he described as a cylinder pin from some kind of pistol.

Among the items Matchett saw were a hunting knife and a cylinder pin from a gun. When Matchett was asked at the hearing to describe the hunting knife he was shown, appellant's attorney objected, unless the hunting knife and pin were brought in, so appellants could see them and the witness could be cross-examined as to marks that might afford a basis of identification. The deputy prosecuting attorney reminded the court that Grill had stated that he had shown the knife and pin to Matchett. Appellant's attorney then objected on the basis that it was improper for the witness to identify items that were not before the court and that appellants would be deprived of the right of cross-examination and that he had never seen such a procedure in a trial. When appellants' attorney stated that he saw no problem in the production of the items, the deputy prosecuting attorney responded that they were being held as evidence in Crawford County. Appellants' attorney then objected that no chain of custody had been established and that the state could not establish a burglary without introducing items taken in the resulting theft. After the trial judge overruled the objection, Matchett testified that when he went to the sheriff's office, he was shown a bone-handled knife about six inches long that had "brown molded into it" and

that it was his knife, but that he had not reported his knife as missing when he reported the incident to the officers who came to his residence. He also testified that he was shown a black metal pin, about three inches long, grooved around the top end "where it slips into a .22 gun." He said that he identified it as his pin and that it regularly fell out when the gun was carried but that he did not know why. Matchett admitted, on cross-examination, that there were no identifying marks or features on either the knife or pin. He said that the pin was like any other pin that came from the particular make and model weapon that he owned, and that the knife he saw was like the knife that he owned. He said that the knife looked like his knife. He said that the .22 caliber gun was at the police department in Van Buren.

The multi-faceted objection of appellants to the testimony of Matchett is somewhat baffling. We might well dispose of this point under the rule adopted in *Dixon* v. *State,* 260 Ark. 857, 545 S.W. 2d 606, because appellants have certainly cited no authority which would support their unconvincing argument. An accused certainly has no right to be confronted with physical evidence under Art. 2, § 10 of the Constitution of Arkansas, or Amendment 6 to the Constitution of the United States. Those constitutional provisions are directed only to an accused's right to be confronted by the witnesses against him.

The hearsay rule has no application to physical objects. It applies to out-of-court statements only. Ark. Stat. Ann. § 28-1001, Rule 801 (c) (Supp. 1977).[1] It would have applied had the state relied upon testimony of Grill that Matchett had identified the items. *Wilkens* v. *State,* 261 Ark. 243, 547 S.W. 2d 116.

The best evidence rule applies only to writings, photographs and recordings. Ark. Stat. Ann. § 28-1001, Rule 1002 (Supp. 1977). It certainly had no application here. The fact that exhibition of such objects would more clearly and

[2]The Uniform Rules of Evidence, except for those with respect to privileges, do not apply in sentencing or probation revocation proceedings. Ark. Stat. Ann. § 28-1001, Rule 1101 (b) (3). Still, a defendant in such proceedings is not entitled to have rules of evidence stricter than those set out in the Uniform Rules applied in such proceedings.

forcefully explain their nature, appearance or condition is not a valid objection to oral evidence concerning them. *Washington* v. *State,* 254 Ark. 121, 491 S.W. 2d 594; *Meyer* v. *State,* 218 Ark. 440, 236 S.W. 2d 996. If any chain of custody was required, it was established by the testimony of Grill.

We find no error in the admission of the testimony pertaining to the knife and connecting pin. Whatever discretion the trial court had in the matter was not abused.

The judgments are affirmed.

PURTLE, J., dissents.

Marlous I. KARLICH *v.*
Huey COPELIN et ux

78-310 280 S.W. 2d 943

Opinion delivered May 21, 1979
(In Banc)

Bob Keeter and *Tompkins, McKenzie, McRae & Vasser,* on the brief, for appellant.

Ben Core, of *Daily, West, Core, Coffman & Canfield,* for appellees.

FRANK HOLT, Justice. This is an action involving an "Agreement for Trade in Equities in Real Estate," and an escrow contract by which the appellant and the appellees swapped properties. The court dismissed appellant's complaint and appellees' counterclaim.

Appellant was the owner of a 38 acre tract of land in Polk County. She negotiated a "trade in equities" with the appellees, contracting to trade her 38 acre tract for property that appellees owned, which in part fronted on a highway just outside the Mena city limits. Appellant allegedly believed that appellees' property contained 6 acres. Sometime after

the trade agreement and escrow contracts were executed, appellant found that the property contained 3.5 acres rather than 6 acres. When appellees would not make an adjustment on the acreage deficiency, appellant brought this suit, alleging that it was of the essence that the tract contain 6 acres and that appellees knew the tract contained less and had misled her as to the acreage. She asked for reformation of the deed so that she would receive 6 acres, or, in the alternative, for damages, rescission, or other relief. Appellees denied that they had represented the tract contained 6 acres or that the acreage was of essence to the contract and counterclaimed, alleging that appellant had defaulted in her payments because she had "received" $17,000 from an escrow account in California and had failed to apply it, as she had agreed, to the indebtedness she had assumed on the acreage which she had purchased from the appellees. Appellees prayed for specific performance and payment of the entire amount due under the contract The chancellor, after hearing the evidence, dismissed appellant's complaint, finding that appellant was not entitled to either reformation or rescission and had not sufficiently proved her damages. The chancellor also dismissed appellee's counterclaim finding that appellant had not "received" the California escrow proceeds and, therefore, was not obligated to pay more than the agreed $150 per month on the local indebtedness.

Appellant first contends that the court erred in not granting an abatement of the purchase price. She argues that the sale was for an exact number of acres (6) which was of the essence to the contract and that the 40% deficiency in acreage was a "gross" mistake. Therefore, as a matter of law, she is entitled to an abatement of the $24,000 purchase price in proportion to the acreage deficiency.

Even if we should agree that appellant is entitled to an abatement, we must agree with the chancellor that her proof as to her damages is insufficient. The court found that the testimony of appellant's appraisal witness was not a sufficient guide from which damages could be determined for the shortage in acreage. Even so, appellant argues that the chancellor did not correctly apply the law inasmuch as the purchase price of $24,000 for the 6 acres was sufficient for the chancellor to compute the damages on an acreage basis. In

other words, the purchase price and acreage were a sufficient basis, without further proof, to proportionately reduce or abate the purchase price. However, it appears that appellant overlooks the fact that the property included a building. The value of that improvement had to be taken into account in arriving at appellant's damages. In *Edwards* v. *Johnson,* 227 Ark. 345, 298 S.W. 2d 336 (1957), we said:

> More is involved than a simple computation of the proportionate damage resulting from a deficiency of nine acres. The dwelling house upon this small parcel of ground unquestionably enhanced its value. There is nothing to indicate that the parties dealt in terms of a fixed price per acre without reference to the improvements. In these circumstances the purchaser's loss is equitably determined by first deducting the value of the improvements from the purchase price and then calculating the damage attributable to the shortage of acreage.

Here there was no testimony to meet these requirements. Therefore, there was no basis for a determination by the chancellor as to the extent appellant was injured by the deficiency in acreage. Appellant urges that since this is an abatement proceeding, it should be remanded for further proceedings as to any deficiency in proof. In *Edwards* v. *Johnson, supra,* we said:

> It is suggested that the cause be remanded for additional proof, but the record discloses no circumstances justifying a piecemeal trial on the issues.

We think that case is controlling here.

Appellees contend on cross-appeal that the court erred in interpreting their trade contract with respect to application of the California escrow funds. The contract reads in pertinent part:

> "[A] collection of an Escrow in the State of California which is about to mature, in the approximate amount of $17,000 will be paid and credited by her [appellant]

> when received upon said indebtedness against the six acre tract. . . .

The court construed the agreement to apply only if a payment of money resulted in an increased cash flow to appellant. Appellees argue that appellant "received" $12,000 from the California escrow contract since these funds were collected there and then applied to reduce her indebtedness on property in California. The persons to whom appellant sold her California property applied the escrow funds, without her consent, to first liens or mortgages on the property which appellant had sold to them. This was allowed under California law. Although they provide us with no Arkansas law on this point, appellees cite several cases from other jurisdictions purporting to stand for the proposition that, in a situation such as here, the funds are considered to be "received" by the party in appellant's position. Those cases, however, deal with the interpretation of receipt of funds for tax purposes and are not controlling here. Words used in a contract are to be given their plain and ordinary meaning. *Miller* v. *Dyer,* 243 Ark. 981, 423 S.W. 2d 275 (1968). To "receive" is to "take possession or delivery of." Webster's Third New International Dictionary. Appellant here never had the California funds in her possession and did not take delivery of them. We hold that the court correctly interpreted the contract. Therefore, the court's finding that she did not default in her contractual obligations is also correct.

Affirmed on direct appeal and cross-appeal.

FIRST AMERICAN NATIONAL BANK of Nashville, Tennessee *v.* McCLURE CONSTRUCTION CO. et al

78-334 551 S.W. 2d 550

Opinion delivered May 21, 1979
(InBanc)
[Rehearing denied June 25, 1979.]

Barrett, Wheatley, Smith & Deacon, by: *Stephen Reasoner,* and *Winchester, Marshall, Huggins, Charlton, Leake & Brown,* by: *Stanley M. Huggins,* for appellant.

Rhine, Rhine & Young, by: *Robert E. Young,* for appellees.

DARRELL HICKMAN, Justice. This is an appeal from a foreclosure action decided by the Greene County Chancery Court. The only issue is usury. The appellant, First American National Bank of Nashville, Tennessee, sought foreclosure on three promissory notes, and accompanying deeds of trusts on Greene County land, it had acquired by assignment. The appellee, McClure Construction Company, had assumed the obligations of the instruments. Other parties were joined in the trial proceedings but are not parties to this appeal.

McClure raised the defense of usury to the appellant's action and the chancellor held the notes usurious. He found his decision was controlled by *Cagle* v. *Boyle Mortgage Co.,* 261 Ark. 437, 549 S.W. 2d 474 (1977).

First American appeals arguing the chancellor was wrong because the charge of interest, admittedly over 10%, was due to a mistake of fact, or a clerical error, and, therefore, was not legally usurious. We agree and reverse the chancellor's decree.

The facts are virtually undisputed. The original lender, Guaranty Mortgage Co. of Nashville, Tennessee, made three construction money loans in August, 1973, to John Watkins and his wife totalling $57,700.00. The three notes on their face showed an interest rate of 10% per annum. First American was assigned the notes in 1976, when Guaranty, their wholly-owned subsidiary, became a division of First American. No payments on principal or interest were ever made on the notes.

Guaranty and First American were primarily Tennessee companies; neither had an office or agent located in Arkansas. There was no evidence either regularly did business in Arkansas.

Gary McClure, the president and principal stockholder of the appellee, had to go to Memphis to assume the notes. He testified:

> . . . I was required to go to Memphis to Guaranty Mortgage Office in Memphis and to cosign these notes. At that time they instructed me that this was a 10% note and they could not charge in excess of 10% in Arkansas. They informed me that they were aware of the law in Arkansas of 10% and this was the most that they could charge, if they charged a penny above that, that it would be usury.
>
> Q. So they did speak to you on the matter of usury?
>
> A. Yes, sir.
>
> Q. And that they were aware of the Arkansas law on the matter?
>
> A. Yes, they were, in fact I inquired about borrowing other monies from them and they were not interested in loaning money in Arkansas because they could not charge more than 10%.

Guaranty billed these accounts using a computer that calculated interest using a 360-day year and quarterly compounding, which is customary for Tennessee loans. It was undisputed that the effective interest rate charged by these statements was 10.531% per annum. There was evidence that neither Guaranty nor First American had a policy of computing interest the same way for any Arkansas loan.

The appellant argues the statements were the result of an honest mistake or clerical error; it was never intended to violate the strict usury provision of the Arkansas constitution, ARK. CONST. Art. 19, § 13.

The appellee relies, as the chancellor did, on our decision in *Cagle* v. *Boyle Mortgage Co., supra,* where we found usury in a similar situation.

The case of *Cagle* v. *Boyle Mortgage Co., supra,* is similar, and a cursory reading of it could lead one to conclude it controls the decision in this case. The similarities are that in both instances the notes were not usurious on their face; computerized statements using a 360-day year to compute in-

terest were mailed and received; interest was compounded monthly in the *Cagle* case, quarterly in this case; the interest charge on the statements exceeded 10% per annum; payments were never made on principal or interest.

However, the similarities end with these facts. In *Cagle,* the Tennessee corporation had an office in Arkansas with a branch manager; the lender regularly did business in Arkansas; the lender regularly used the 360-day year for all notes, whether made in Arkansas or Tennessee; the borrower complained of the excessive charge to the Arkansas manager and he replied he had nothing to do with computing the interest, it all came out of Memphis. Most significantly, the lender *had collected* the illegal interest from Boyle in a companion transaction. We concluded there had been no honest mistake, and there was intent to charge, reserve or collect usurious interest.

In this case the appellant offered proof that neither Guaranty nor First American did business regularly in Arkansas; they knew they could not charge interest using the 360-day year, compounded on an Arkansas loan; and they offered undisputed proof the lender wanted to avoid violating the Arkansas usury law. McClure corroborated this proof, as we have related. There was no evidence offered to refute the appellant's evidence; that leaves only the existence of the statements themselves as evidence of an intent to charge usurious interest. The chancellor did not make a specific finding of intent to make an unlawful charge; instead he simply found the *Cagle* case stands "on all fours with the case at bar. The Court is unable to distinguish any basic facts."

There must be an intent to charge, reserve or receive unlawful interest to constitute usury. *Garvin* v. *Linton,* 62 Ark. 370, 35 S.W. 430 (1896). It is the burden of one offering the defense of usury to prove such intent. *Cox* v. *Darragh Co.,* 227 Ark. 399, 299 S.W. 2d 193 (1957). The intent will not be presumed or imputed. *Davidson* v. *Commercial Credit Equipment Corp.,* 255 Ark. 127, 499 S.W. 2d 68 (1973).

A lender who makes an excessive charge through a mistake or ignorance of the fact it was excessive has no intent to unlawfully charge interest. *Davidson* v. *Commercial Credit Equip-*

ment Corp., supra; Hinton v. *Brown,* 174 Ark. 1025, 298 S.W. 198 (1927).

There is a distinction, although sometimes a fine one, between a mistake of fact and one of law. A lender who makes a mistake of law is not excused as one who makes a mistake of fact. *Brooks* v. *Burgess,* 228 Ark. 150, 306 S.W. 2d 104 (1957); *Ford Motor Co.* v. *Catalani,* 238 Ark. 561, 383 S.W. 2d 99 (1964).

We found the requisite intent to make an unlawful charge in *Cagle* v. *Boyle Mortgage Co., supra,* for the reasons we have enumerated above. Most of those significant facts do not exist in this case and we conclude the preponderance of the evidence is that there was no intent to make an unlawful charge; instead, the unlawful charge was a result of a mistake of fact.

We find no merit to appellees' argument the appellant failed to properly abstract the record according to Rule 9(d), Supreme Court Rules.

We reverse the chancellor's decree and remand the cause for proceedings consistent with this opinion.

Reversed and remanded.

PURTLE, J., concurs.

JOHN I. PURTLE, Justice, concurring. I concur in the results reached by the majority. However, I would state we are overruling *Cagle* v. *Boyle Mortgage Co.,* 261 Ark. 437, 549 S.W. 2d 474 (1977), and other cases along the same line of reasoning. Like the trial judge I cannot distinguish the facts in the present case from those in *Cagle.*

In both cases there was a note and mortgage bearing the stated interest rate of 10%. In each case it was argued that the computer printout containing the schedule of payments was in error in charging an interest rate above 10%.

The fact that in one case it was only done once and the other it had been done on other occasions is not sufficient to

distinguish the cases for me. This is very similar to the argument that one may be just a little bit pregnant. If one of these cases is usurious, so is the other. If one is not usurious, neither is the other. In my opinion we should call a spade a spade and overrule *Cagle,* supra. As it stands, the lawyers and the courts will just have to guess at which case we may decide to follow.

Alan Wayne ROUW *v.* STATE of Arkansas

CR 79-15 581 S.W. 2d 313

Opinion delivered May 21, 1979
(In Banc)

Buford Gardner, for appellant.

Steve Clark, Atty. Gen., by: *E. Alvin Schay,* Asst. Atty. Gen., for appellee.

DARRELL HICKMAN, Justice. Alan Wayne Rouw, a juvenile, was found to be a delinquent, having committed the crime of manslaughter. He was ordered committed to the Arkansas State Training School by the Circuit Court of Carroll County.

On appeal Rouw alleges six errors. We find no merit to any of these arguments except those relating to statements made by Rouw to law enforcement officers. Those statements, we find, were not voluntary as defined by the law and they should not have been admitted into evidence against Rouw. For that reason the judgment of the circuit court is reversed and the cause is remanded.

The tragic incident precipitating the charge was a shooting of Lisa Evans, age thirteen, a neighbor and schoolmate of Rouw's. She was found dead in her living room by her mother on the afternoon of October 13, 1977. The autopsy showed a single gunshot wound to her head.

The sheriff's office conducted an investigation of the incident and questioned Rouw about his whereabouts on that day. He had been seen near the Evans home carrying what appeared to be a rifle. He admitted that he had gone hunting that day in nearby woods but denied that he was at the Evans

home or knew anything about the shooting. The gun that he had carried, a .22 caliber rifle, was shown to the officers.

The next day a deputy sheriff walked with Rouw the route he claimed to have taken when he was hunting. No shells were found where Rouw claimed he had stopped to shoot at some buzzards. A few days later, on the 18th of October, the sheriff ordered Rouw brought in.

A deputy sheriff, C. W. Elrod, picked up Rouw at his home and brought him to the sheriff's office. Elrod later testified that Rouw had made a voluntary statement to him en route to the sheriff's office in which he admitted shooting Lisa Evans. The next day, the 19th of October, the sheriff took a statement from Rouw at about 11:00 a.m. On October 20, an investigator for the Benton County Sheriff's Department took a statement from Rouw. These statements were all admitted into evidence against the objection of the defendant and we agree that they should not have been admitted.

Legally, these statements were confessions and it is a rule of law that in making such a confession, one must voluntarily, knowingly and intelligently waive his right to remain silent before it can be admitted against him. *Miranda* v. *Arizona,* 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966). The test for determining whether such statements are voluntary is that on appeal we examine the totality of the circumstances related to the statements, *Harris* v. *State,* 244 Ark. 314, 425 S.W. 2d 293 (1968), and will affirm the trial court's finding unless it is clearly against the preponderance of the evidence. *Degler* v. *State,* 257 Ark. 388, 517 S.W. 2d 515 (1974).

In this case Rouw was a minor, age 14 years and 11 months at the time the statements were taken. While youth alone is not a circumstance that will prevent a voluntary confession or a knowing waiver of constitutional rights, it is a factor to be considered. *Mosely* v. *State,* 246 Ark. 358, 438 S.W. 2d 311 (1966). Neither parent signed a waiver of rights form or testified they were so advised. The fact that the parents have not been advised of the rights of the child prior to questioning is also a factor to be considered. The statements in question here were taken over a period of three days while

Rouw was in "protective custody." The length of the interrogation is a factor. *Vaughn & Wilkins* v. *State,* 252 Ark. 505, 479 S.W. 2d 873 (1972). The sheriff ordered Rouw in for questioning; his parents were advised that they were holding him for "protective custody." Deception by any official alone will not invalidate an otherwise voluntary confession, but it also is a factor to be considered. *Dewein* v. *State,* 114 Ark. 472, 170 S.W. 582 (1914).

It was not disputed that none of the provisions of the Arkansas Juvenile Code, Ark. Stat. Ann. § 45-501, et seq. (Repl. 1977), were complied with. Rouw remained in the county jail for 20 days. He was not immediately taken before juvenile court; his rights were not explained to him until the day after he was taken into custody when he signed a rights form just prior to giving a statement to the sheriff; and, there was no evidence presented by the State that he was ever served with a copy of a petition or summons regarding the charge. In fact, the circuit court reversed the first hearing on this matter because he had not been served a copy of the petition. Even though we do not agree with appellant's contention that statutory noncompliance is alone grounds for suppression of the statements, we hold that the State's failure to comply with the provisions of the Juvenile Code is another factor to be considered in reviewing the totality of the circumstances.[1]

The sheriff admitted that Rouw became a suspect at the time he accompanied the deputy sheriff to the woods to look for spent shells. It is not disputed that Rouw was not informed that he was a suspect. The sheriff testified he was brought in for "questioning," yet he was not informed of his rights until October 19 immediately before a statement was taken from him. The sheriff admitted that Rouw was scared and broke down once or twice when they were talking to him.

Defense counsel questioned the sheriff about whether Rouw had refused to sign a rights form when he was brought

[1]In some jurisdictions, statements have been held inadmissible solely because they were obtained in violation of similar statutes. See *State* v. *Shaw,* 93 Ariz. 40, 378 P. 2d 487 (1963); *State* v. *Arbeiter,* 408 S.W. 2d 26 (Mo. 1966).

in; his answers to those questions are as follows:

. . .

A. Sir, when he was booked in, it shows where — it shows booked in, the time was 7:15 P.M. I believe. This was probably a little bit earlier than that, that he was brought in.

Q. Alright. Was he booked before or after you had your conversation with him?

A. I don't recall, sir. I would say we were — I probably had a conversation with him, we had a conversation all during the time from the time he came into the S.O., [sheriff's office] so it's hard for me to say.

Q. Did you give him one of those rights forms to fill out that evening?

A. I don't believe so, sir.

Q. Isn't it a fact that he was given a rights form and he refused to sign it?

A. I could not honestly answer that.

Q. You don't recall that either?

A. I'm not positive. He possibly could have. I wouldn't deny it. I don't know, sir, I can't recall.

. . . .

The sheriff's answers to questions about exactly what Rouw was informed of when he was considered a suspect are as follows:

. . .

Q. Alright. Now, when did he become a suspect?

A. I believe, in my opinion when he became a suspect was when — it was probably at the time we walked back with him on his route that he indicated to us that he had went up to the tree where he claimed he shot into a squirrel's nest and of course, along with the other conversations we had had with neighbors down the road.

Q. At the time he became a suspect did you advise him of his rights at that time?

A. He wasn't in custody.

Q. Did you advise him of — my question is: did you advise him of his rights?

A. No, sir.

Q. Alright. You had other conversations with him after that?

A. Yes.

Q. After he had become a suspect you had other conversations with him?

A. Yes.

Q. Did you advise him before those conversations of his rights?

A. No, sir.

. . . .

Deputy Sheriff Elrod testified that after he picked up Rouw at his parents' home, and on the way to the sheriff's office, Rouw told him that he had shot the girl. Elrod did not testify at either of two other hearings in this matter. The deputy sheriff said it was "voluntary." The deputy sheriff admitted that he did not at any time ever advise Rouw of his rights. The day after the first statement taken by the sheriff, which would have been the 20th, Rouw was to have taken a polygraph test to be administered by an investigator for the

Benton County Sheriff's Department. His father signed a form to give permission but he was not advised of his son's rights before taking the polygraph. After Rouw was in the room with the officer, according to the officer, Rouw decided to make a statement at which time he was given a rights form which he signed. Rouw's father was outside the room and was not consulted. A statement was taken from Rouw, and the polygraph was never administered.

It is the burden of the state to prove that a person voluntarily and knowingly waives his constitutional rights. *Miranda* v. *Arizona, supra.*

When all of the circumstances are considered in this case, there is no doubt that the State did not satisfy its burden. His parents were told he would be taken in for protective custody. He was questioned that evening and perhaps the next day before he made a statement which was recorded. At no time that evening or the next morning before 11:00 a.m. was he advised of his rights. This is admitted. There is no written evidence that his parents were advised of his rights. None of the provisions of Arkansas law regarding treatment of juveniles were complied with.

In a similar case where a voluntary statement was made to a policeman in the presence of a third person, it was held that the confession was admissible. *Little* v. *State,* 261 Ark. 859, 554 S.W. 2d 323 (1977). However, in that case the deputy sheriff testified he advised the minor of her rights when she got into the vehicle. Furthermore, the minor was aware that she was a suspect and was charged with a killing. Neither of these circumstances exist in this case.

Here, the sheriff admitted that Rouw was questioned before he was advised of his rights, a clear violation of the spirit of *Miranda.* The only evidence at all that he knew that he was waiving his rights is a form that contained his signature which was signed the next day.

His parents disputed they were ever advised that he would need a lawyer or could make bond. They said they inquired about both of the sheriff but received evasive answers. His mother testified that she had instructed the sheriff not to

pick him up at school or on his way home from school, and that it was her understanding that he was being taken in solely for the purpose of protective custody. Neither of his parents ever acknowledged in writing that they knew he was a suspect or being questioned until after the statements had been taken.

We conclude that the statements taken do not meet the constitutional test as set forth in *Miranda* or other related decisions and, therefore, these statements cannot stand as voluntary confessions and may not be admitted against this defendant.

We find no error in the court's commitment of Rouw to the Arkansas State Training School Department pursuant to Ark. Stat. Ann. § 45-402 (Repl. 1977).

The other errors alleged are without merit or will not likely recur on a new trial; for that reason they are not discussed.

Reversed and remanded.

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

JOHN A. FOGLEMAN, Justice, dissenting. I cannot accept the majority's finding that, in spite of the trial court's holding to the contrary, every statement made by appellant was involuntary. This overextension of the *Miranda* principles is quite unwarranted. In my opinion, the trial court's findings as to some of the statements, at least, are supported by a clear preponderance of the evidence. Perhaps the matter would be in better focus if the facts were viewed chronogically.

On the day Lisa was found dead in her home, Alan Rouw was seen going toward the Evans house at a point approximately halfway between his own home and the Evans house. He was carrying a weapon that looked like a rifle. This was approximately 1-1/2 hours prior to the time she was found dead at 5:30 p.m. Later he was seen going toward his own home, still carrying a rifle. When he arrived at home about 5:00 p.m., he appeared to be upset and hurried to put

his gun away. After Alan got home, the sheriff came to the Rouw house and told the Rouws that Lisa was dead. There was some conversation at that time to the effect that Alan had gone hunting, had passed through an orchard, found a dead cow, made some shots at a buzzard, passed the Smith house (which was half way between the Rouw house and the Evans house) and had then shot at a squirrel's nest. The sheriff and some of his deputies returned the next day and asked if it would be all right for Alan to show them where he had been, without indicating that Alan might have had anything to do with Lisa's death. Alan went along to show the places he had gone. A search was made at the place he said he had fired at a buzzard, but no empty hulls were found. No empty cases were found near a tree where Alan indicated that he had shot into a squirrel's nest. Later that day the sheriff returned to the Rouw house and asked to see the weapon Alan had taken hunting. It was given to him by the boy's father, Marvin Rouw. The officers also obtained some shells and fired a test shot into a car seat. A deputy sheriff had been dispatched through the area to talk to the people who lived there.

An autopsy was performed on October 14th. It disclosed that the death of the little girl was caused by a gunshot wound located behind her left ear. Bullet fragments were removed. The pathologist who performed the autopsy said that the bullet was small caliber. He said that the wound could have been consistent with a larger caliber bullet.

There was no further contact between the officers and the Rouws until October 18th, when Sheriff Jerry Colvin called the Rouw home and told Alan's mother that he wanted to pick Alan up at school and ask him some more questions. Mrs. Rouw said that she preferred that the sheriff not ask Alan questions or pick him up at school. The sheriff then asked if it would be all right to pick Alan up before he got on the school bus. When Mrs. Rouw refused to give her permission, the sheriff asked if it would be all right to pick Alan up when he got off the bus, and Mrs. Rouw said no. She told the sheriff if he was going to pick him up, to pick him up at home. The sheriff sent his deputy, C.W. Elrod, to pick Alan up. Elrod went to the Rouw home and, after sitting down and talking with Mrs. Rouw and one of Alan's sisters, Alan got in the car with Elrod and they started down the road en route to the

sheriff's office. Alan seemed rather quiet. After Elrod had driven a short way, Alan asked Elrod if he knew who killed Lisa. Elrod said, "I believe I do." After Elrod had driven about 300 yards further, Alan asked, "How do you know who killed Lisa?" Elrod responded, "Well, that's part of our job." After Elrod had driven a little further, Alan said, "Well, I got something to tell you. I was at the house and I did shoot her." Elrod said that he told Alan not to say any more and proceeded to the sheriff's office where, upon arrival at approximately 5:30 p.m., he told the sheriff what Alan had said.

There was no interrogation whatever. There has never before been any exclusionary rule that renders evidence of such statements inadmissible and I cannot join in any such unwarranted extension of *Miranda* v. *Arizona,* 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694, 10 ALR 3d 974 (1966). A statement that is spontaneous, voluntary and unsolicited, made by one who is not being interrogated at the time, is admissible. *Steel* v. *State,* 246 Ark. 75, 436 S.W. 2d 800; *Crawford* v. *State,* 254 Ark. 253, 492 S.W. 2d 900; *Reynolds* v. *State,* 254 Ark. 1007, 497 S.W. 2d 275; *Upton* v. *State,* 257 Ark. 424, 516 S.W. 2d 904; *Sanders* v. *State,* 259 Ark. 329, 532 S.W. 2d 752; *Little* v. *State,* 261 Ark. 859, 554 S.W. 2d 312. The exclusionary rule was developed as a deterrent to police coercion, but this is simply not the sort of police conduct which was intended to be inhibited by *Miranda* and its progeny. See *Ouletta* v. *Sarver,* 307 F.S. 1099 (E.D. Ark., 1970), aff'd. 428 F.2d 804 (8th Cir., 1970). Police officers are not required to gag an accused who wants to confess or make incriminating statements. Statements which do not result from in-custody interrogation are not barred. *Johnson* v. *State,* 252 Ark. 1113, 482 S.W. 2d 600. It is just such misapplications of the *Miranda* rule as that being made here that have caused such great dissatisfaction, both public and judicial, with the exclusionary rule. See, e.g., *Bivens* v. *Six Unknown Federal Narcotics Agents,* 403 U.S. 388, 91 S. Ct. 1999, 29 L. Ed. 2d 619 (1971), Burger, C.J., dissenting; *Coolidge* v. *New Hampshire,* 403 U.S. 443, 91 S. Ct. 2022, 29 L. Ed. 2d 564 (1971), Burger, C.J., dissenting.

Elrod reported Alan's statements to Sheriff Colvin. Colvin and Elrod talked with Alan that night for a short while. No significant statement was made by him except for a repetition of what he had said to Elrod. Alan was not warned

about his right to remain silent or right to counsel at that time, and he was certainly in custody. When the officers asked him if he wanted to say anything, he responded to Elrod, "No, not in front of all these people. I don't want to tell anyone but you. You're the only one I trust." Elrod asked if it would be all right for the sheriff to stay and Alan said, "Sure, that would be fine." All the other deputy sheriffs left and Alan repeated what he had told Elrod. The only thing he said that was not virtually identical to his remarks to Elrod was the staement that he had been telling a story about going squirrel hunting. Alan said that he wanted his mother to be there with him and she was called. According to Elrod, while they were awaiting Alan's mother's arrival, Alan stated, without being questioned by anyone, that he shot Lisa.

Mrs. Rouw said that she became suspicious when the phone rang, because the officers had not told her that Alan would be kept in custody. The Rouws went to the sheriff's office after the call was received.

Elrod testified that the officers had received a call from a young man who had stated that his brother was carrying a gun and that he was going to kill the persons that killed Lisa, if he found them. The officers had gone to the school and talked to the caller's brother on the 17th. When Mrs. Rouw arrived at the sheriff's office, she was made aware that threats had been made against the person or persons who killed Lisa. As a result of a discussion of the matter, Alan was held in custody. The officers called it protective custody, but he was "booked in" at 7:15 p.m. on "suspicion of homicide." Sheriff Colvin believed that he had so advised Mrs. Rouw, but he did tell her that Alan was being held in protective custody. Colvin said that the matter of protective custody was discussed at great length. Elrod said that it was discussed at length. Mrs. Rouw confirmed the officers' testimony that it was agreed that Alan be held in custody because of the indications that there had been threats of violence. Although Mrs. Rouw said that Alan told her they had already "taped him," the sheriff said that the officers had not taken any statements down that night, and he could not recall having any tape recorders in the room at that time. No tape recording of these conversations was ever produced or mentioned, except by Mrs. Rouw. The sheriff said that he had none.

On the following day, Alan was interrogated by the officers at 11:00 a.m. in the coffee room at the sheriff's office. The deputy prosecuting attorney and the sheriff were present. Alan was advised of his rights. The sheriff produced a "rights form," said that Alan read it himself, that it was read to him, that he was made aware of his rights, and that he signed it in the presence of the sheriff and the deputy prosecuting attorney. Alan then made a full confession that was recorded on tape and the tape was played at the trial, but the recording was not transcribed in the record. The sheriff said that Alan appeared a little scared, and he expressed the belief that Alan did "break down" once, or possibly twice, during this interview. Mrs. Rouw said that the sheriff told her after this statement had been taken, that they had gotten the statement they needed, with what they had gotten the night before.

On the next day, October 20th, Alan was taken to the Benton County jail for a polygraph examination. His father was present at the place where the test was to be given. Alan had shown some hesitancy about taking the test, and the sheriff tried to explain to the boy and his parents how the polygraph operated. Colvin said that the parents agreed to the examination before Alan, accompanied by his father, was taken to Bentonville. Marvin Rouw confirmed the fact that he agreed to the polygraph examination, but said that no one explained that they would take a statement. Yet, as abstracted by appellant, he testified:

> We went to find out exactly what had happened. The sheriff asked if it would be alright. We were willing to do that because, as far as we were concerned, it was an accident and they just wanted to hear what they wanted to hear, or they wanted to hear the truth. That was up to them.

Even though Marvin Rouw admitted that the officers explained to Alan the manner in which the polygraph examination would be administered, he said that it was not explained to him. Mr. Rouw admitted, however, that he was told that Alan would be asked a series of questions during the polygraph examination, pertaining to school and the death of

Lisa Evans, and that the main purpose was "to determine the truth of the death of Lisa."

Don Rystrom, the polygraph examiner for the Benton County sheriff's office, testified that, before interviewing Alan Rouw, he advised Alan of his rights. Rystrom exhibited a waiver signed by Alan, Colvin, and Rystrom. This instrument contained a statement of rights, which Rystrom said he read to Alan. Rystrom said that he also talked with Alan's father, and that he "agreed with it." Rystrom exhibited "a parent's or guardian's consent for a minor to receive a polygraph test," signed by Marvin Rouw. Sheriff Colvin and Rystrom and Alan also signed a written consent to take the examination. Rystrom said that he advised Alan that he never taped any polygraph examinations. He did not advise Alan's father that he might take a recorded statement from Alan or that the polygraph examination would not be recorded. Rystrom's testimony about the statement taken by him is abstracted, by appellant, as follows:

> After I had explained how it worked, the questions were read to Alan and he indicated to me that he had not told the truth. He wanted to tell me the truth then. He said, "Yes, I have been lying," and I told him I would like to tape a statment and he said, "Fine." I asked if he wanted his father or sheriff Colvin there and he said "no."
>
> After taking the statement I did not feel it was necessary to take the polygraph due to the circumstances in the investigation.
>
> It would have taken me about an hour to administer the test. The statement started at 12:45 and ended at 12:54, it took nine minutes. The purpose of the polygraph was to verify Alan's story as to what he had told the officers or his truthfulness and it was determined that he admitted that he had not told the truth.
>
> I don't know how long we were in the room.
>
> I haven't noticed any conflicts in the statement that Alan gave me. The story that Alan had told me before

was that the shooting was an accident.

The confession then made was the last evidence obtained from Alan. He had been in custody less than two days.

There was no prolonged or extended interrogation at any time. I cannot understand the emphasis the majority places on the twenty day incarceration. The evidence that the Rouws agreed that Alan be held is overwhelming. The sheriff testified that he had several conversations with the Rouws about holding Alan and that he would not have held him if they had not agreed. He said that Alan's right to make bond was discussed with his parents at length over the twenty days he was in jail and that he advised them of the bond required, but he could not remember the amount at the time of trial. Any questions of credibility on this or any other point were certainly a matter for resolution by the trial court, and we are in no position to say that the judge resolved them incorrectly. It is clear that the parents were notified when any important step was contemplated. The sheriff deferred to Mrs. Rouw's wishes in regard to picking Alan up. Marvin Rouw clearly wanted to ascertain the truth about Alan's involvement as much as the officers did. It is incredible that anyone could say that either of the Rouws would not know the charges on which Alan was held or what he was accused of having done. Marvin testified that he knew Alan was being held in relation to the death of Lisa, but didn't know what the charges were. The parents were allowed to visit Alan in jail, according to Marvin, "very frequently." He said they were turned down only one time, but did not indicate that this was at any critical time, so far as the issues here are concerned. Elrod testified that Alan's parents and sister were able to come see him any time they wanted to, and that they never made any complaint, until the first time Alan came to trial.

Appellant relies heavily upon the language of Ark. Stat. Ann. § 45-418 (Repl. 1977), which states that when any juvenile is arrested, the arresting officer *shall* immediately take the juvenile before the juvenile court. We have held identical language to be directory, but not mandatory. *Patrick* v. *State,* 255 Ark. 10, 498 S.W. 2d 337. I am baffled by the majority's reference to the two principal cases cited by appellant in support of his argument in this respect. In *State* v. *Shaw,* 93

Ariz. 40, 378 P. 2d 487 (1963), the court specifically pointed out that voluntary statements, made during transportation from the scene of arrest or during a period of detention when the statute was not being violated, are admissible in accordance with the usual rules of evidence. In *State* v. *White,* 408 S.W. 2d 31 (Mo., 1966), the court was careful to point out that it did not consider the question of spontaneous statements by a juvenile prior to being taken before the juvenile judge. There simply is no authority that would exclude Alan's statements to Elrod when they were en route to the sheriff's office.

Because I see no sound basis for saying that the trial judge's holding was clearly against the preponderance of the evidence, I could not silently record an unsupported dissent.

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

David Lynn MULLINS *v.* STATE of Arkansas

CR 79-35 580 S.W. 2d 941

Opinion delivered May 21, 1979
(Division I)

Jack Holt, Jr. and *Deborah Davies Cross,* for appellant (on appeal only).

Steve Clark, Atty. Gen., by: *Alice Ann Burns,* Asst. Atty. Gen., for appellee.

DARRELL HICKMAN, Justice. David Lynn Mullins was convicted of delivery of cocaine in violation of Ark. Stat. Ann. § 82-2617, as amended, and sentenced to 5 years imprisonment.

On appeal he raises two issues, both related to the defense of entrapment. We find no error and affirm his conviction.

The State called two witnesses to prove its case, an undercover narcotics officer with the North Little Rock Police Department, Rick Finley, and a chemist. Finley testified he bought some cocaine from Mullins and paid him $100.00. The chemist estimated the cocaine weighed about 1/2 gram.

Mullins' defense was entrapment, that is, he was unlawfully induced to commit the offense by Beverly Wigginton, a "confidential informant" of the North Little Rock Police Department.

Mullins called four witnesses in his defense, Ms. Wigginton, Carol Brewer, who lived with Mullins, his employment supervisor as a character witness, and himself.

Ms. Wigginton was arrested for selling heroin and cocaine to Officer Finley in April, 1977. Finley used her as a confidential informant to make drug "buys." She had made "buys" resulting in six or seven arrests. Both Finley and Wigginton denied she was promised anything or paid anything except nominal expenses. Both testified she did expect to receive consideration in her case for her activities. According to her, the police had recommended to the prosecuting attorney that she receive a suspended sentence and a fine. Her case, a year and a half old, had not come to trial when she testified.

She and Mullins had known each other since high school. She said Rick Davis, an acquaintance, had told her Mullins had cocaine. They went to Mullins' home in September, 1977, and she inquired of the possibilities of getting some cocaine for a friend. Mullins replied he had none but might have some the next week.

Later, she said she called Mullins "twice at most" trying to buy some cocaine. She left her phone number and later Mullins called her. She went to his home with Officer Finley. Finley had testified that he went to Mullins' home with Wigginton, and Mullins sold him what was supposed to be a gram of cocaine for $100.00.

Mullins admitted he had known Ms. Wigginton since high school and had, in fact, purchased marijuana from her husband. He admitted he had sold drugs only once (crystal methamphetamines) to a policeman in 1972. He admitted he had purchased cocaine every month or so, perhaps 10 times, from a man named Brad, who lives in southwest Little Rock. However, he denied ever selling drugs except in the one instance.

He recalled Wigginton's visit to his home with Rick Davis. Several days later, he said, Wigginton called him trying to buy some cocaine and he put her off. He said she called him five or six times and he told her he wouldn't, and in one

instance couldn't, sell her any. Finally, as a favor and to "get her off my back" he agreed to sell her some he acquired for his own use, at his cost. He said he called Wigginton informing her he had some.

Mullins testified that Wigginton came to his home with a man he did not recognize. They went into his kitchen, talked about it and he delivered some cocaine to the man and the man paid him $100.00. He said the man asked about getting some more later, and Mullins said, ". . . I told him I didn't think I could, that maybe later on, I didn't know if I could or not. Just have to wait and see." Mullins said the man was not Finley, the undercover officer who testified for the State. Also, he said both the man and Wigginton snorted the drug in his kitchen. This was all denied by Finley and Wigginton.

Carol Brewer corroborated Mullins' testimony.

Entrapment is a defense authorized by Ark. Stat, Ann. § 41-209 (Repl. 1977), which reads:

> Entrapment. — (1) It is an affirmative defense that the defendant was entrapped into committing an offense.
>
> (2) Entrapment occurs when a law enforcement officer or any person acting in cooperation with him, induces the commission of an offense by using persuasion or other means likely to cause normally law-abiding persons to commit the offense. Conduct merely affording a person an opportunity to commit an offense does not constitute entrapment.

In determining whether entrapment exists, the primary focus is upon the conduct of the law enforcement officer or person acting in cooperation with him. *Spears* v. *State,* 264 Ark. 83, 568 S.W. 2d 492 (1978). See also, Commentary to Ark. Stat. Ann. § 41-209.

Mullins argues that entrapment existed as a matter of law and the trial court should have directed a verdict of acquittal. We disagree. It was a fact question which the trial

court properly submitted to the jury. *Campbell* v. *State,* 265 Ark. 77, 576 S.W. 2d 938 (1979).

There was testimony, if believed, which would indicate that Mullins was not unlawfully induced to make the delivery. Wigginton said she only called twice. Mullins said she called five or six times. Both testified Mullins called her and said he had some cocaine. The weight and the credibility of that testimony was for the jury to determine, not us. *Lunon* v. *State,* 264 Ark. 188, 569 S.W. 2d 663 (1978).

Mullins' conduct in delivering cocaine to a total stranger, and taking from him $100.00, is not consistent with his story he did it only to get Ms. Wigginton "off his back."

On appeal we do not disturb a jury verdict if it is supported by substantial evidence. *Williams* v. *State,* 257 Ark. 8, 513 S.W. 2d 793 (1974). There is substantial evidence to support the jury's findings.

Other arguments raised on appeal relate to the court's instructions. There were no objections made to the court's instructions by Mullins, nor did he offer any. We do not consider issues raised for the first time on appeal. *Golden* v. *State,* 265 Ark. 99, 576 S.W. 2d 955 (1979).

Affirmed.

We agree. HARRIS, C.J., and GEORGE ROSE SMITH and BYRD, JJ.

Joe Bill WALLACE and Ruby
WALLACE *v.* Noland TOLIVER, et al

78-327 580 S.W. 2d 939

Opinion delivered May 21, 1979

Joe D. Villines, Jr., for appellants.

Dale Shoup, for appellees.

JOHN I. PURTLE, Justice. Appellants own a tract of land in Marion County between appellees' property and Highway 125 South. It is undisputed that in years past a public road crossed the appellants' property and was maintained by the county. The road started in the Peel community and crossed Coon Creek and ended up in the county seat at Yellville. When Bull Shoals Lake was constructed about 1953 it backed Coon Creek up and inundated this Peel-Yellville road. However, some use was made of the road by the public up until the last few years and this is a disputed fact. It is undisputed that the public made very little use of the road after impoundment of Bull Shoals Lake. The Tolivers purchased their property after appellants purchased their property in 1971. The Bonhams acquired their property in 1969. Soon after they acquired their property, appellants fenced it in and in the process placed a portion of the fence across the old road in question.

Appellees filed suit on April 7, 1978, seeking to restrain

appellants from maintaining the fence and requesting they be ordered to restore the road to its former condition and for damages. The court heard the case on August 15, 1978, and entered a decree finding the road was a public road and the public did not cease to use the road until the appellants placed a fence across it and that the fence had not been up for a period of seven years. The decree declared the appellees were entitled to use the road and ordered appellants to remove the fence which prevented its use by them. From the decree appellants bring this appeal alleging the decree is contrary to the law in this case.

Apparently appellants do not dispute the facts as found by the court. Since the findings of fact are not contested, we consider the law as stated in the decree. Since appellants also admit the road was at one time a public road, we look at the only other statement of law contained in the decree. It recited that the law says that roads may be abandoned if the public ceases to use them or if appropriated by individuals.

We agree with this statement of the law but add that the public must abandon the roads or the individual must appropriate them for a period of seven years or more. The decree made it clear that this was the court's understanding of the law although it was not fully stated.

Appellants contend we have held to two different versions of the law in prior decisions. They argue we hold in one line of cases, anchored on the theory expressed in *Nelms* v. *Steelhammer,* 225 Ark. 429, 283 S.W. 2d 118 (1955), that a public roadway is lost to public use by erection of a gate or gap for a period of seven years. The second line of cases, according to appellants, is exemplified in *McLain* v. *Keel,* 135 Ark. 496, 205 S.W. 894 (1918), wherein it was held that the singular fact of nonuse by the public for a period of seven years will defeat the public's right to the use of a road. Appellants then contend we confused the issues in *Weir* v. *Trucks,* 255 Ark. 494, 500 S.W. 2d 923 (1973), by combining the two previously distinguishable theories. We are urged to reclarify the law in the present case.

We have reviewed the cases cited by appellants and are unable to find the distinction as stated by appellants. In

Nelms, supra, we held that public acquiescence of gates across a road for seven years amounted to abandonment of the public use. In *McLain,* supra, we held the facts in the case showed the public had abandoned the road for a period of seven years. One of the circumstances considered was that the road had not been worked by the county for more than seven years. The absence of gaps or gates did not prevent the public from abandoning the road. In *Weir,* supra, we again stated the principle set out in *Nelms.*

We hold that the public may abandon its claim to the use of a public road by simply abandoning it through nonuse for a period of seven years or it may lose its right of public use by acquiescing or tolerating gaps or gates without protest for a period of seven years. We have never required that there must be both nonuse for seven years plus the toleration of obstruction for the same period of time.

There were no fences, gaps or gates across the road here in controversy for a period of seven years. The court also found as a matter of fact that the public had not abandoned the use of the road for a period of seven years.

We believe the chancellor correctly stated the law relating to abandonment of public road by nonuser and therefore affirm the decree.

Affirmed.

We agree. HARRIS, C.J., FOGLEMAN and HOLT, JJ.

William McCUEN, County Judge *v.*
Glenn JACKSON

78-268 581 S.W. 2d 326

Opinion delivered May 29, 1979
(Division I)

Walter G. Wright, for appellant.

Robert D. Ridgeway, P.A., for appellee.

GEORGE ROSE SMITH, Justice. The appellant is the county judge of Garland county. The appellee had been a county employee for some 17 years when he was discharged and almost immediately re-employed in another department, the county road department. A disagreement arose between the two men about Jackson's rate of pay as a county employee and about the length of vacation he was entitled to. After Jackson brought this action for a writ of mandamus the parties reached an agreement with respect to Jackson's vacation. This is an appeal from a judgment treating the complaint as one for a declaratory judgment and finding that Jackson is entitled to longevity pay of 10%. The appellant does not argue the merits of the case, but instead presents what we regard as essentially two procedural points.

First, it is contended that the trial court should not have treated an action for mandamus as one for a declaratory judgment. We have recognized that course as being proper. *Culp* v. *Scurlock,* 225 Ark. 749, 284 S.W. 2d 851 (1955). There we said that an action for a declaratory judgment is a remedy peculiarly appropriate to controversies between private citizens and public officials about the meaning of statutes. Here the dispute seems to be about the appellee's right to longevity pay under the provisions of a county ordinance which has not been abstracted and is not before us. In *Andres* v. *First Ark. Development Finance Corp.,* 230 Ark. 594, 324 S.W. 2d 97 (1959), we enumerated the four conditions which the courts generally hold must exist as prerequisites to declaratory relief:

> (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.

All four conditions appear to be present in the case at bar; so the complaint was properly treated as one for declaratory relief.

Second, the appellant argues that there is a defect of parties. He does not say who should be the defendant in the case, but apparently he means either the county or the quorum court.

We find no merit in this argument. Under Section 3 of Amendment 55 to the Constitution the county judge is given power to "hire county employees, except those persons employed by other elected officials of the county." The enabling statute for Amendment 55 contains this pertinent language:

> (B) The General Assembly further determines that the executive powers of the County Judge as enumerated in Section 3 of Amendment 55 are to be performed by him in an executive capacity, and not by order of the county court.
>
> In the exercise of the executive powers of the County Judge as hereinabove enumerated, the County Judge shall follow the procedures established below:
>
> * * * * *
>
> (5) Hire county employees except those persons employed by other elected officials of the county. The County Judge, as the chief executive officer of the county, shall be responsible for the employment of the necessary personnel or for the purchase of labor or services performed by individuals or firms employed by the county or an agency thereof, for salaries, wages, or other forms of compensation. [Ark. Stat. Ann. § 17-3901 (Repl. 1977).]

Thus the appellant, as an executive officer of the county, is vested with responsibility with respect to hiring county employees and with respect to salaries, wages, and other forms of compensation. The present dispute centers upon the appellee's proper compensation as a county employee. The

appellee's claim, as plaintiff, is being asserted, in the language of the *Andres* case, *supra,* "against one who has an interest in contesting it." The trial court's declaratory judgment has settled the controversy. In the circumstances we find no defect of parties.

Affirmed.

We agree. HARRIS, C.J., and BYRD and HICKMAN, JJ.

Billy Bert TYLER *v.* STATE of Arkansas

CR 79-30 581 S.W. 2d 328

Opinion delivered May 29, 1979
(In Banc)

[redacted]

Ronald P. Kincade, of *Kincade & Cunningham,* and *Robert A. Newcomb,* for appellant.

Steve Clark, Atty. Gen., by: *Ray Hartenstein,* Asst. Atty. Gen., for appellee.

JOHN A. FOGLEMAN, Justice. Appellant was found guilty of theft of an automobile and sentenced to three years in the Arkansas Department of Correction. He seeks reversal of his conviction on the grounds that he was denied his right to counsel guaranteed by the Sixth Amendment to the Constitution of the United States, that he was denied due process of law by the trial court's failure to instruct the jury on the re-

quirement of corroboration of the testimony of an accomplice, and that the evidence was insufficient to support the jury's verdict. We find no reversible error and affirm.

Tyler was charged with theft by taking unauthorized control of a 1976 Chevrolet automobile belonging to Lefler Chevrolet Company. The information, filed May 11, 1978, charged that the offense occurred on January 27, 1977. The case was originally set for trial on October 11, 1978. Fred C. Kirkpatrick, the attorney employed by Tyler, had filed a motion for discovery, to which the state responded on October 12, 1978. The motion had been filed on June 28, 1978, so the state moved for a continuance in order to comply with the motion for discovery and to better prepare for trial. There was no objection on the part of appellant. The continuance was granted and the case set for trial on November 8, 1978. According to the prosecuting attorney, whose statement is not controverted, he was informed by Kirkpatrick, ten days before the trial date, and before the issuance of any subpoenas for the state's witnesses, that Kirkpatrick knew of no reason the subpoenas should not be issued. On Friday, however, before the case was to be tried on Wednesday, the prosecuting attorney was given some indication that appellant was not going to trial on the date set. Appellant filed no motion for continuance and no affidavit stating any ground for a continuance.

When this case was called for trial, Kirkpatrick announced that the defense was not ready and that Tyler had discharged him. He stated that, as an officer of the court, he felt obliged to state that the sole and only reason he was discharged was "because defendant wants a continuance." Kirkpatrick added that, as a result of his being discharged, he had not been able to get appellant's witnesses together and that he had not been paid anything to represent Tyler. There was no indication that this attorney was withdrawing from the case because he had not been paid. Tyler responded immediately, but did not deny Kirkpatrick's statement in any respect. He simply stated that he did not have another attorney and had not contacted one, that he had not gotten his witnesses together and that he could not get a lawyer until after the first of the year.

The trial judge then stated that he was not going to reset the case and remarked that, lately, it seemed a ploy by people in Searcy County to show up in court on the day of trial without a lawyer in order to get a continuance. The judge said that he would make a concession, by trying another case that had been set for trial on that date, so Tyler could get an attorney and his witnesses while that trial was in progress, but that Tyler's case would be tried as soon as that case was concluded. The trial judge also stated that Kirkpatrick would be required to remain in the courtroom throughout the trial to assist Tyler, if Tyler desired such assistance.

When the trial judge said that he would require Kirkpatrick to be present in the courtroom, Tyler said that he did not want Kirkpatrick for a lawyer, and that "[w]e might as well go ahead with this case first then. It don't matter to me." When the judge remarked that Tyler had no intention of calling his witnesses, even if given some time, Tyler replied that there was no way he could get them, that they were working, and that he could not find them on the job. When the judge responded that it might be the next day before Tyler's case was started, and asked if Tyler desired the additional time, Tyler answered that there was not enough time to prepare a lawyer. The trial then proceeded.

During an in camera hearing on another matter, the judge admonished Tyler that he could not be required to testify but that if he wanted to, he would be given an opportunity to do so. The judge also reminded Tyler that Kirkpatrick was present and was sitting beside him in the courtroom ready to assist him in any way Tyler wanted. Tyler responded, "Me and him come to a disagreement on some other matters." Tyler continued saying, "This is a legitimate thing, really, because I didn't get my witnesses together. I had full intentions of waiting until after the first of the year to try my case on account of the election and everything. I felt if I waited until after the first of the year, things would be better organized and I would all around get a better trial and everything." At the conclusion of the in camera session, Tyler stated, "I would say that finances and everything to do with lawyers would be a reasonable cause for postponement."

Appellant concedes that the matter of a continuance is within the discretion of the trial court and that not every denial of a request for a continuance violates due process, even if the party is compelled to defend without counsel. See *Ungar* v. *Sarafite,* 376 U.S. 575, 84 S. Ct. 841, 11 L. Ed. 2d 921 (1964). Appellant, however, relies upon language in the *Ungar* opinion in arguing that "myopic insistence upon expeditiousness in the face of a justifiable request for delay can render the right to defend with counsel an empty formality." In our view, the trial judge's insistence upon expeditiousness was far from myopic and the request for delay was farther from being justifiable. As pointed out in *Ungar,* the answer must be found in the circumstances of the case and particularly in the reasons presented to the trial judge at the time. The fact that the motion for continuance was not made until the day set for trial was there recognized as one important circumstance.

Appellant also relies upon the holding in *Chandler* v. *Fretag,* 348 U.S. 3, 75 S. Ct. 1, 99 L. Ed. 4 (1954), that, unless a defendant is given an opportunity to employ and consult with counsel, the right to be heard by counsel would be of little worth. We subscribe to that statement, but, in this case, Tyler had ample opportunity to employ, and did employ, counsel, but discharged him on the eve of trial. An important element in *Tollett* v. *U.S.,* 444 F. 2d 622 (8 Cir., 1971), also relied upon by appellant, was the fact that the trial court did not inquire of defendant as to the circumstances of the termination of his attorney's employment, and did not know whether the attorney had resigned or been discharged. That element makes *Tollett* distinguishable, because in this case, the judge was adequately informed as to the cause of termination and there was a rational basis for finding that the discharge of Tyler's attorney, on the eve of trial, was because that attorney recognized that Tyler had no grounds for a continuance and that, by one means or another, appellant was endeavoring to postpone his trial until after the first of the year and that the discharge of the attorney was a part of that effort. The fact that Tyler did not show that he had made any effort to employ another attorney was an important circumstance, since it was reasonable to infer that the discharge of Kirkpatrick had taken place five days before the trial was

to commence. The court that decided *Tollett* pointed out that questions such as this must necessarily be decided on an ad hoc basis, having pointed out that the United States Supreme Court had consistently maintained its "case by case" approach and that the Eighth Circuit had followed that rule. *Wolfs* v. *Britton,* 509 F. 2d 304 (8 Cir., 1975), also relied upon by appellant. The defendant in *Wolfs* was blameless in finding himself without counsel on the eve of trial. He was deprived of counsel when a conflict of interest arose between him and a codefendant, who decided to turn state's evidence.

The same court has held, in *U.S.* v. *White,* 529 F. 2d 1390 (8 Cir., 1976), that the right to counsel is a shield, not a sword, and that a defendant has no right to manipulate his right for the purpose of delaying the trial. See also, *Relerford* v. *U.S.,* 309 F. 2d 706 (9 Cir., 1962). It is significant here that, as in *White,* where the court said the evidence was insufficient to show intentional manipulation, the appellant made no showing that he was unable to obtain counsel, did not request the appointment of counsel, and declined the opportunity afforded to obtain other counsel. But unlike this case, the reason for the discharge of previously retained counsel in *White* was never disclosed or investigated. And in *Patton* v. *State of North Carolina,* 315 F. 2d 643 (4 Cir., 1963), also relied upon by appellant, there was evidence indicating that the defendant had just cause for discharging his employed counsel on the eve of trial and had made some effort to obtain substitute counsel.

It is widely recognized that the right to choose counsel may not be manipulated or subverted to obstruct the orderly procedures of the court or to interfere with the fair, efficient and effective administration of justice, particularly when a change of choice is made on the eve of trial, primarily for the purpose of delay, and without making any effort to obtain substitute counsel. *U.S.* v. *Bentvena,* 319 F. 2d 916 (2 Cir., 1963), cert. den. 375 U.S. 940, 84 S. Ct. 345, 11 L. Ed. 2d 271 (1963); *U.S.* v. *Merriweather,* 376 F.S. 944 (E.D. Penn., 1974); *U.S.* v. *Morrissey,* 461 F. 2d 666 (2 Cir., 1972); *Gandy* v. *State of Alabama,* 569 F. 2d 1318 (5 Cir., 1978); *U.S.* v. *McMann,* 386 F. 2d 611 (2 Cir., 1967), cert. den. 390 U.S. 958, 88 S. Ct. 1049, 19 L. Ed. 2d 1153 (1968); *U.S.* v. *Llanes,* 374 F. 2d 712 (2 Cir., 1967), cert. den., 388 U.S. 917, 87 S. Ct. 2132, 18 L.

Ed. 2d 1358 (1967); *U.S.* v. *Abbamonte*, 348 F. 2d 700 (2 Cir., 1965), cert. den. 382 U.S. 982, 86 S. Ct. 557, 15 L. Ed. 2d 472 (1966). It has been appropriately said that the right to counsel cannot be used to play a "cat and mouse game with the court," and held that, when it is, there is a waiver of the right and the court does not abuse its discretion in denying a continuance to permit employment of a new lawyer. *Leino* v. *U.S.*, 338 F. 2d 154 (10 Cir., 1964); *Relerford* v. *U.S.*, supra.

When the evidence had been completed, the circuit judge, in order to ascertain whether there were any objections to the instructions he proposed to give the jury, asked Kirkpatrick to go over them with Tyler. Kirkpatrick stated that there were no objections. No request for any additional instructions was made. Appellant now complains because the judge did not give an instruction, based upon Ark. Stat. Ann. § 43-2116 (Repl. 1977), that there must be corroboration of the testimony of an accomplice before an accused can be convicted of a felony. He contends that, under the evidence in this case, Coy White was an accomplice. He had the burden of showing that White was an accomplice, before such an instruction was appropriate. *McIntosh* v. *State,* 262 Ark. 7, 552 S.W. 2d 649. Appellant relies upon White's refusal to testify without having been given use immunity and White's admission that he had received the engine and transmission from the stolen car.

It is appellant's contention that, if White was guilty of receiving stolen property, he and the thief were accomplices, citing *Murphy* v. *State,* 130 Ark. 353, 197 S.W. 585 and *McCabe* v. *State,* 245 Ark. 769, 434 S.W. 2d 277. On this argument, we cannot give any weight to the granting of immunity because it does not appear from the record that White's claim of immunity was based upon a fear of prosecution for receiving the property. As a matter of fact, the record does not disclose the basis of White's refusal to testify without immunity. It was granted when White invoked his right against self-incrimination, after having been asked when he first saw the automobile. There was some evidence, particularly in the testimony of Tyler, that White might have been the thief. Tyler denied any connection with the stolen automobile except for having driven it out of the mud and to White's house, after coming upon the scene where the vehicle was stuck.

Tyler said that he was an employee of White at that time. White admitted that he had seen the vehicle stuck in the mud at St. Joe. It appears that White may have been seeking immunity from prosecution as the thief, rather than as the receiver. Under neither Tyler's version nor White's, does it appear that Tyler and White were accomplices, unless White was an accomplice as the receiver of stolen property.

We have held that the receiver of stolen property was an accomplice of the thief since *Murphy* v. *State,* supra, cited by appellant. That holding was based upon our previous holding that an accessory after the fact is an accomplice. See *Polk* v. *State,* 36 Ark. 117; *Stevens* v. *State,* 111 Ark. 299, 163 S.W. 778. In *Murphy,* we found that at least one jurisdiction considered the receiver as an accomplice within the rule requiring corroboration, even though he could not be convicted as an accessory after the fact. But we adopted our view solely on the basis that an accessory after the fact is an accomplice. *Sweatt* v. *State,* 251 Ark. 650, 473 S.W. 2d 913. The more generally accepted view is that an accessory after the fact is not an accomplice. 23 CJS 3, Criminal Law § 786 (1). It is clear that the decided weight of authority is that a receiver of stolen property, who did not aid, abet, assist or induce the theft, or join in a prearranged plan whereby the thief steals the property and the receiver buys it, is not an accomplice of the thief. 23 CJS 38, Criminal Law § 798 (19); Annot, 74 ALR 3d 560, 565, 567. Our view of the matter in other cases is that, under the statute on which appellant relies, an accomplice is one who could be convicted of the offense with which the defendant is charged. *Henderson* v. *State,* 255 Ark. 870, 503 S.W. 2d 889. See also, *Ferguson* v. *State,* 255 Ark. 917, 503 S.W. 2d 907. This view is in accord with the weight of authority.

At the time *Murphy* was decided, an accessory before the fact was defined as one who stands by, aids, abets or assists, or who, not being present, had advised and encouraged the perpetration of the crime. Ark. Stat. Ann. § 41-119 (Repl. 1964). The present criminal code treats the concept of accessories in an entirely different manner, which is consistent with the weight of authority. Under present law, an accessory before the fact is an accomplice. Ark. Stat. Ann. § 41-303 (Repl. 1977). One who was formerly an accessory after the fact is now guilty of a separate crime, i.e., hindering apprehension and prosecution. Cf. Ark. Stat. Ann. § 41-2805

(Repl. 1977) and Ark. Stat. Ann. § 41-120 (Repl. 1964). One who knowingly receives stolen property for the purpose of safeguarding or securing the proceeds of the offense or converting the proceeds into negotiable funds might now be guilty of aiding the consummation of an offense under Ark. Stat. Ann. § 41-2806 (Repl. 1977). Cf. *Hester* v. *State,* 149 Ark. 625, 233 S.W. 774. But he is not an accomplice in the sense of Ark. Stat. Ann. § 41-303 in that he aids the thief in planning or committing the crime. It also makes no difference that the receiver might be charged with another offense under the same statute as that defining the offense with which Tyler was charged. *Sweatt* v. *State,* supra. Our present law is compatible both with the view we have generally taken where other crimes are concerned and with the weight of authority. Thus, it appears that appellant was not entitled to the instruction as to corroboration of an accomplice.

We should also say that we do not agree with appellant that the trial judge had a duty to give an instruction on the necessity for corroboration of an accomplice without any request for it having been made, whatever duty he may have had to define the elements of the offense charged and the burden of the state to prove them beyond a reasonable doubt, in this case where the accused had only stand-by counsel. The court is not required to give a specific instruction applicable to the case, unless a motion has been made by a party. Ark. Stat. Ann. § 43-2134 (Repl. 1977). It is not required to give instructions when none are requested. *Roberts* v. *State,* 254 Ark. 39, 491 S.W. 2d 390. We have made an exception to this rule in a case where a jury imposed the death penalty without having been instructed that it (and only it) had the discretion to reduce the punishment to life imprisonment. *Webb* v. *State,* 154 Ark. 67, 242 S.W. 380.

We have held that one who fails to request an instruction defining what constitutes an accomplice is not entitled to complain of the court's failure to do so. *Carroll* v. *State,* 45 Ark. 539. See also, *Roberts* v. *State,* supra. Even in a jurisdiction where the court is required to instruct the jury on questions of law arising in the case which are necessary for the jury's information in giving their verdict, without any request by the defendant, it is not bound to instruct the jury as to the nature and effect to be given to the testimony of an accomplice on its

own initiative, because the matter is collateral to the main issue. *State* v. *Mahan,* 226 S.W. 2d 593 (Mo., 1950). Failure to instruct on subsidiary matters does not amount to a denial of due process. *Ballew* v. *Sarver,* 320 F.S. 1233 (E.D. Ark., 1970).

We deem the testimony, even though it is circumstantial, to present substantial evidence that appellant stole the automobile. Charles Dennis Reeves testified that on January 27, 1977, he stopped in Clinton, on his way to Searcy. He stopped the red Camaro he was driving at Lefler Chevrolet Company, where he and Tyler test drove the 1976 Monte Carlo. Tyler drove the car around in a circle at a Dairy Queen, while Reeves was out of the car. Reeves said that later the same night Tyler said that he had some keys for the Monte Carlo and talked about stealing it. Reeves said that upon the return trip he let Tyler out of the car in Clinton. Later, he said, he saw the Monte Carlo pass him when he was near Marshall, on his way to Harrison, and the driver, whom he believed to be Tyler, waved to him. Still later, he said, he heard Tyler discussing a price for a Monte Carlo with someone, and on another occasion, Tyler and another person spoke to him about the vehicle's having been kept at St. Joe and that it was to be stripped of parts and sold.

Dicky Lefler, part owner of Lefler Chevrolet Company, said that on January 27, 1977, two men arrived at his lot in a red car and test drove the 1976 Monte Carlo, which he found missing the next day. He said that he had last seen the car at 5:00 p.m., after the two men had returned it. L. D. Vincent, an employee of Lefler Chevrolet, also said that two men arrived at the place of business on that date, having come there in a red Camaro and that, after talking with Lefler, they drove off in a 1976 Monte Carlo. Neither Lefler nor Vincent could describe the two men. Coy White testified that the first time he saw the Monte Carlo it was stuck in the mud and Tyler asked him if he knew some way to get the car pulled out. He said that he did not see the car after Tom Wyatt pulled it out of the mud, until later, when he saw it in the woods in the National Park. It had then been stripped of its front end and doors and parts had been removed from it. White said that, at that time, Tyler gave him the engine and transmission in satisfaction of a debt Tyler owed him. Wyatt recalled pulling a car out of the mud in the presence of Tyler and White.

Wyatt did not recall who asked him to do so. He said about four people walked up to him and asked him to pull the vehicle out.

This evidence was certainly sufficient to support the verdict.

The judgment is affirmed.

PURTLE, J., dissents.

JOHN I. PURTLE, Justice, dissenting. Appellant and his employed counsel severed their relationship shortly before the case was scheduled for trial. When the case was called, appellant's counsel informed the court he had been discharged and was not ready for trial. The court determined appellant desired a continuance and the implication is that his attorney did not request one because he saw no reason for it. Whatever the reason, the court offered a one-day delay as there was another trial ready to commence at the time. Appellant rejected the offer as not giving sufficient time for preparation of his defense and proceeded to trial representing himself. One reason the court gave for rejecting the request for a continuance was it was part of a "ploy" by people in Searcy County to obtain a continuance. No other reasons were given in support of this statement which would indicate appellant was part of such scheme.

The former attorney was ordered to sit at the defense table with appellant for the purpose of assisting him "if so requested." The attorney was not requested to assist the appellant if he observed errors or the like. He sat there until the court was ready to give instructions to the jury at which time the discharged attorney was handed the court's instructions. No objection was made even though there was no instruction relating to an accomplice. The trial court had not at any time warned appellant of the dangers involved in going to trial without counsel. The record further reveals appellant had not been granted a previous continuance although the state had been granted one. The case had been pending less than 6 months.

The fact that appellant discharged his attorney on the

eve of trial does not waive the requirements of the Sixth Amendment that an accused has the right to the assistance of counsel. He was not even offered such assistance nor was his solvency questioned. This violates the rule in *Chandler* v. *Fretag,* 348 U.S. 3 (1954) and, specifically, *Tollett* v. *U.S.,* 444 F. 2d 622 (8 Cir. 1971). Such warning is required by *Adams* v. *U.S.,* 317 U.S. 269 (1942).

I also feel the instruction on accomplice should have been given on the volition of the court when an accused is not represented by counsel. Clearly, the evidence was sufficient to show Coy White was an accomplice. Therefore, I would reverse and remand.

Charles H. BAHIL et al *v.*
Calvin T. SCRIBNER

79-3 581 S.W. 2d 334

Opinion delivered May 29, 1979
(In Banc)

[redacted]

Catlett & Henderson, by: *Leon B. Catlett;* and *Wilson, Dougherty & Mills, P.A.,* by: *Mike Wilson,* for appellants.

Solloway & Jackson, P.A., by: *Cliff Jackson,* for appellee.

FRANK HOLT, Justice. These seven appellants were, at various times, appointed as delinquent tax collectors in Pulaski County. As compensation until January 1, 1977, they received certain fees based upon a percentage of the penalty imposed for delinquent taxes. Act 342 of 1941 (Ark. Stat. Ann. §§ 84-1006 — 84-1010 [Repl. 1960]). In April, 1977, appellee brought this taxpayers' action contending that the compensation received by appellants from November 4, 1974, until December 31, 1976, was prohibited under Amendment 55 to the Arkansas Constitution. This Amendment was approved on November 4, 1974. Appellee sought an accounting and restitution of $442,450.00 as tax funds to Pulaski County. Appellants' demurrer was overruled; they answered, and the chancellor, after a hearing on the merits, held that the facts preponderated in favor of holding that the apppellants were "officers or employees" of the county within the meaning of Amendment 55, which prohibited the further payment of fees as compensation for those appellants. The court, however, held that Amendment 55 was not self-executing and, therefore, appellants were not prohibited from receiving fees as compensation from November 4, 1974, (date of adoption) to January 1, 1975. Effective the latter date, enabling legislation was enacted, Act 127 of 1975 (Ark. Stat. Ann. § 12-1740 [Supp. 1977]), which prohibited the receipts of fees by county officials as compensation after January 1, 1975. Consequently, the court ordered appellants to account for the fees received by them from January 1, 1975, until December 31, 1976, and to make restitution for those fees after taking credit for their expenses. The chancellor, however, allowed them com-

pensation for this period of time based on 1/12 of their net compensation for the calendar year 1974, citing Act 131 of 1975. The judgments against appellants varied individually and totalled $97,363.95.

Appellants first assert that the chancellor erred in holding that they were, as a matter of fact and law, officers or employees of Pulaski County. The appointment of delinquent tax collectors was authorized in Act 342 of 1941 as amended. § 1 of that Act provides in part:

> The County Judge, the Mayor of the municipality that is the county seat . . . and the Chief County School Officer of each of the counties of this State are hereby constituted a Board to be known as the 'Delinquent Tax Board.' It shall be the duty of said Board to appoint . . . collectors, of delinquent personal taxes for its respective county, and to supervise and direct the . . . collectors, appointed by them.

§ 5 provides that the delinquent tax collectors are entitled to certain fees as compensation for the delinquent taxes collected by them.

Amendment 55 to the State Constitution, approved on November 4, 1974, provides in pertinent part:

> §5: Fees of the office shall not be the basis of compensation for officers or employees of county offices.

Appellants argue that they have never been employees or officers of the county but are, rather, appointees of the Delinquent Tax Board, citing Act 342 of 1941, *supra*. As noted by the chancellor, the constitutionality of this Act, providing for the appointment of delinquent tax collectors, was tested in *Newton* v. *Edwards,* 203 Ark. 18, 155 S.W. 2d 591 (1941). The statute was upheld. There we said:

> Apparently the purpose of Act 342 is to collect taxes that are due and cannot be collected in the ordinary way . . . The legislature evidently thought that if a separate collector was appointed for the sole purpose of

> collecting delinquent personal taxes, much more money would be derived than under the present system.

Here, in relying on that case, the chancellor held:

> The opinion in the Newton County Judge case, supra, is based upon the premise that a delinquent tax collector is an officer of the county under the provision of Article 7, Section 46. This legal precedent has not been questioned since 1941.

Also, the chancellor observed that the mutual relationship of county offices becomes apparent when the collection scheme is examined:

> The delinquent tax collectors are appointed by the Board for 'its respective county' (Ark. Stat. Ann. § 84-1006 and see also Ark. Stat. Ann. § 84-1007). After the taxes have been levied and assessed the county collector adds 10% penalty to the taxes of the delinquent taxpayer (Ark. Stat. Ann. § 84-1001). The county collector then gives to the county clerk the list of delinquents. The county clerk then causes a notice to be run in a newspaper having a general circulation in the county (Ark. Stat. Ann. § 84-1003). The county clerk then gives to the delinquent tax collectors a list of the delinquent taxes with the delinquent tax fees added. (Ark. Stat. Ann. § 84-1008). The delinquent tax collectors then collect taxes within the county and make weekly settlements to the county clerk and pay to the County Treasurer all funds collected less the collectors' fees (Ark. Stat. Ann. § 84-1011).

As to the facts, the chancellor found:

> The facts in this case preponderate in favor of holding that defendants are county officers or employees. The defendants conducted their operations out of the county courthouse. The county supplied their office space and utilities. Their bonds were payable to the county. The county paid the employer's part of their social security payments, and the county paid the employer's part of their State retirement payments. It is

> inconsistent for the defendants now to argue they are not employees or officers of the county, as they have received benefits as employees.

Here we cannot say the chancellor's finding is against the preponderance of the evidence, nor contrary to the law, that appellants are county officers or employees within the meaning of Amendment 55.

Appellants further contend that the court erred in finding that Act 342 of 1941 was impliedly repealed by Act 127 of 1975. Act 127 of 1975 provides, in pertinent part:

> Section 1. (a) From and after January 1, 1975, fees of the office shall not be the basis of compensation for officers or employees of county offices.
>
> Section 6. All laws . . . in conflict with the provisions of this Act are hereby repealed to the extent of such conflict.

Act 342 provided that county delinquent tax collectors were to be paid from the fees they collected in their official capacity. Act 127, enabling legislation to Amendment 55, provides that no county officers or employees shall be compensated through such a system. Act 342 and Act 127 are plainly in direct conflict. The chancellor was correct in finding that Act 127 repealed Act 342.

Appellants also assert that they acted in good faith in collecting an aggregate of $1,819,203.32 in delinquent taxes and, relying upon *Martindale* v. *Honey,* 261 Ark. 708, 551 S.W. 2d 202 (1977), argue that they should not be required to make restitution from their fee compensation, even if its payment was illegal. In response, appellee relies upon *Tedford* v. *Mears,* 258 Ark. 450, 526 S.W. 2d 1 (1975), and *Mackey* v. *McDonald,* 255 Ark. 978, 504 S.W. 2d 726 (1974), arguing that those cases were not overruled by *Martindale, supra,* and can be distinguished. We agree. *Martindale* distinguished the two earlier cases, noting that *Tedford* dealt with a "specific constitutional prohibition against an officer receiving emoluments of his office in excess of a stated sum per annum." The prohibition in *Martindale* only prevented a

member of the General Assembly from being lawfully appointed to or elected to a civil office while he serves in the legislature. *Tedford* is more similar to the situation here, which involves a specific constitutional prohibition against receiving any fees of the office as compensation. Accordingly, appellants' assertion of good faith does not provide a sufficient ground to avoid making restitution, as ordered by the chancellor. In addition, the chancellor made no finding as to good faith.

Appellee, on cross-appeal, contends that the chancellor erred in holding that restitution should not be made for the period from November 4, 1974, the date of Amendment 55's adoption, through December 31, 1974. He argues that the Amendment should be interpreted to have mandated the legislature to adopt legislation abolishing the fee system retroactively to the date of the Amendment's adoption. The chancellor held that Amendment 55 was not self-executing and did not abolish the fee system until enabling legislation was enacted, citing *Griffin* v. *Rhoton,* 85 Ark. 89, 107 S.W. 380 (1907). There it was noted that a constitutional provision is not self-executing if it merely "indicates principles, without laying down rules by means of which those principles may be given the force of law." Here, as to Amendment 55, the chancellor noted:

> Section 5 'provided, however, during the interim, from the date of adoption of this Amendment until the first day of the next succeeding month following the date of approval of salaries by the Quorum Court, *salaries of county officials shall be determined by law.* Fees of the office shall not be the basis of compensation.'

Pursuant to this mandate, the legislature enacted Act 127 of 1975, which abolished the fee system as compensation for county officers or employees as of January 1, 1975. It repealed any conflicting acts. Also enacted was Act 131 of 1975 which provides an interim method of no greater than 1/12 per month of 1974 compensation for payment of salaries of county officials until the authority of the quorum courts became effective on January 1, 1977. Act 897 of 1975, Section 4, specifically provides for the salary of the delinquent tax collector after January 1, 1977, as does Section 1 of Act 495 of

1977. As the chancellor found, there was no intent to abolish the office of deliqnuent tax collector, rather only an intent to abolish the fee compensation system. We agree that Amendment 55 was not self-executing since the legislature was empowered by Section 5 to determine interim salaries for county officials. Thus, the chancellor appropriately refused to order restitution for the 2 month period prior to the passage of enabling legislation.

Appellee asserts, for his second point on cross-appeal, that the court erred in applying its method of accounting and restitution. Appellee argues that the chancellor's allowing appellants "1/12 per month of their 1974 fees not only gives them a windfall, but also indirectly continues the fee system for 1975 and 1976." Appellee insists that there should be a repayment of those fees received by appellants in excess of the reasonable value of the benefit and services conferred on Pulaski County. Appellee admits it is within the juridiary's powers of equity to set a fair, reasonable and appropriate level of compensation for these appellants for that period of time. We certainly cannot say that the chancellor's method of accounting and restitution is not fair and reasonable in view of the enabling legislation providing for interim salaries and especially in view of the fact that, through the efforts of these appellants, $1,819,203.32 was collected by them in delinquent taxes.

Finally, appellee contends that he should have been awarded costs and attorney's fees pursuant to Ark. Stat. Ann. § 25-301 (Repl. 1962) and Ark. Stat. Ann. § 84-4601 (Supp. 1977). § 84-4601 provides that the court may award attorney's fees in cases in which the court orders "any county, city or town to refund or return to the taxpayers monies illegally exacted by the county, city or town . . . " Although appellee argues that a refund here to the county treasurer is, in essence, a refund to the taxpayers themselves, the statute clearly applies only to suits brought against counties, cities or towns. It is inapplicable here. Neither is § 25-301 applicable, since it deals with compensation of attorneys by contract between the attorney and client and liens for fees owed.

Affirmed on direct and cross-appeal.

HARRIS, C.J., and BYRD and PURTLE, JJ., would reverse and dismiss.

JOHN I. PURTLE, Justice, dissenting. The appellants had been employed by the Delinquent Tax Board of Pulaski County for several years before the present suit was filed. The Delinquent Tax Board consists of the county judge, the mayor of Little Rock, and a representative from the schools of Pulaski County. The appellants retain a fee from the funds collected and remit the balance to the county treasurer.

The chancellor did an outstanding job in determining the facts and the law in this complicated case. He correctly interpreted the law and applied the facts as they relate to officers or employees of county officers. My disagreement is only as to whether the laws cited apply to appellants. I think not.

It is my feeling that appellants are employees of the cities and towns and various school districts and the county. The county has only a one-third voice in employing or discharging them and the other two-thirds lie with the cities and school districts.

Even if we were to hold appellants were officers or employees of Pulaski County it would not alter my opinion. Admittedly, Amendment 55 is the key to the solution in this matter. Had Amendment 55 not been enacted no problem would exist. However, Amendment 55 required enabling legislation as it was not self-executing. Therefore, the General Assembly was required to enact legislation for execution of the amendment.

Act 127 of 1975, implementing § 5 of Amendment 55, applies to county officers and employees. It specifically applied to certain officers and employees. However, it did not mention the Delinquent Tax Board or delinquent tax collectors. The chancellor held Act 127 included appellants by implication and thereby repealed Ark. Stat. Ann. §§ 84-1006 — 1010 which is Act 342 of 1941.

Following Act 127 of 1975, the General Assembly passed

Act 131 of 1975 which set the manner and method of payment of county officers and their employees until January 1, 1977. The same reasons apply as to whether appellants were included in this act as those set out above for Act 127.

The General Assembly passed Act 897 of 1975 which provides for the salaries of delinquent tax collectors commencing in 1977. This was the first time the General Assembly had made provisions for delinquent tax collectors. The last time the General Assembly had addressed the subject of delinquent tax collectors was Act 342 of 1941 as amended.

Since the General Assembly enacted legislation in 1975 requiring the quorum court to deal with delinquent tax collectors, we know they were aware of the fee arrangement in 1975 and did not see fit to make any change until January 1, 1977, through the process of Act 897 of 1975. We must also presume they were aware of the prior enactment and existence of Act 342 of 1941 as amended.

We have never favored repeal by implication and will not so treat a statute if it can be reconciled with the existing statutes. *Polk* v. *Booker,* 112 Ark. 101, 165 S.W. 262 (1914). It is also well established that statutes existing prior to constitutional amendment will be repealed by implication only if there is irreconcilable conflict or where the statute is repugnant to the constitutional amendment. Repeal by implication, whether by the General Assembly or constitutional amendment, is not favored by the law unless the two provisions simply cannot stand together. *McKenzie* v. *Burris,* 255 Ark. 330, 500 S.W. 2d 357 (1973). We have many times held that an act of the General Assembly is presumed constitutional and therefore will not be held unconstitutional unless there is clear incompatibility between them. In such case, all doubt must be resolved in favor of the legality of the act. *Jones* v. *Mears,* 256 Ark. 825, 510 S.W. 2d 857 (1974). The General Assembly's power is limited only by the constitution. Of course, their actions are subject to the processes of referendum if exercised by the people. We have stated that it is our duty to construe an act as constitutional if it is possible to do so. *Stone* v. *State,* 254 Ark. 1011, 498 S.W. 2d 634 (1973). It seems clear to me that the General Assembly was fully aware

of the existence of Ark. Stat. Ann. §§ 84-1006 — 1010 at all times while they were passing enabling statutes pursuant to Amendment 55. At no time did they address the delinquent tax collectors until the enactment of Act 495 of 1977. However, as previously stated, the quorum court was authorized through Act 897 of 1975 to establish salaries of delinquent tax collectors commencing on January 1, 1977. As I see it, the acts of the General Assembly and the provisions of Amendment 55 are not at all irreconcilable when viewed in the light stated herein. In fact, it seems obvious to me that the General Assembly consciously intended to leave the delinquent tax collectors' salaries as they were until such time as they could address it properly.

Roger MEARS, County Judge,
Pulaski County, Arkansas *v.* ARKANSAS
STATE HOSPITAL

79-5 581 S.W. 2d 339

Opinion delivered May 29, 1979
(Division II)

Wilbur C. "Dub" Bentley, Pros. Atty., by: *John Wesley Hall,* Deputy. Pros. Atty., for appellant.

Hall, Tucker, Lovell & Alsobrook, for appellee.

FRANK HOLT, Justice. The issue on this appeal is the interpretation of Ark. Crim. Code § 41-605 (9) (1976). Before its amendment in 1977, it read in pertinent part: "The compensation of persons making or assisting in the examination . . . . shall be paid by the state." This statute was in effect between January, 1976, and June, 1977. During this time the appellee hospital billed Pulaski County for the "necessary maintenance costs of room and board" for 54 criminal defendants committed to it for mental examinations. The county refused to remit payment. The trial court held that the claims should be paid by the county, and we agree.

For reversal appellant argues that this statute should be interpreted to require the state and not the county to pay these costs for these criminal commitments. He argues that § 41-605 (9) is ambiguous and, therefore, should be construed as requiring the state to pay all costs of the commitments rather than merely the compensation of the persons who made or assisted in the examinations. A statute must be given its usual and ordinary meaning. *City of North Little Rock* v. *Montgomery,* 261 Ark. 16, 546 S.W. 2d 154 (1977). We have no authority to construe a statute to mean other than what it says, if it is unambiguous. *Weston* v. *State,* 258 Ark. 707, 528 S.W. 2d 412 (1975). The commentary to a statute does not control its plain meaning. *Britt* v. *State,* 261 Ark. 488, 549 S.W. 2d 84 (1977). Here the statute requires only that the state pay for the "persons making or assisting in the examination." It says nothing about the maintenance costs of room and board. In our view the statute is plain and unambiguous as to the extent of the state's responsibility.

Neither do we think that the enactment of § 41-605 (9) impliedly repealed the provisions of Ark. Stat. Ann. § 43-1301 (Repl. 1977) and Ark. Stat. Ann. § 59-404 (Repl. 1971), which provide that the county is to bear the costs of mental examinations of criminal defendants. Implied repeals are not favored. *Selig* v. *Powell,* 253 Ark. 555, 489 S.W. 2d 484 (1972). To ascertain the intent of the legislature, we examine the statute historically, as well as the contemporaneous conditions at the time of its enactment, consequences of interpretation, and other matters of common knowledge within the limits of our jurisdiction. *Prewitt* v. *Warfield,* 203 Ark. 137, 156 S.W. 2d 238 (1941). Counties historically have borne the costs of mental examinations when criminal defendants are committed for observation. §§ 43-1301 and 59-404. Also *Campbell, County Judge* v. *Arkansas State Hospital,* 228 Ark. 205, 306 S.W. 2d 313 (1957). Counties are obligated to pay for costs of the administration of justice where required to do so by the legislature. *Mears* v. *Hall,* 263 Ark. 827, 569 S.W. 2d 91 (1978). The legislature, by enacting § 41-605 (9), as evidenced by the commentary, sought to "minimize" those costs to the county as a factor influencing the decision by a trial judge to commit a criminal defendant for a mental examination. It did not eliminate payments by the county of all cost factors. Here, as indicated, we interpret § 41-605 (9), as originally

enacted, as mandating the state to pay only the costs of personnel making or assisting in the mental examination. That leaves the unassigned costs to the county for payment. Consequently, if the legislature intended for § 41-605 (9) to be a complete substitute for §§ 43-1301 and 59-404, then there would be no provision for the assignment of responsibility for the remainder of the costs of examination; i.e., the "necessary maintenance costs of room and board" as sought here. This would be an impractical result which we think the legislature did not intend. The court was correct in its interpretation of the statutes involved.

Affirmed.

We agree: HARRIS, C.J., and FOGLEMAN and PURTLE, JJ.

Dan ROSELL *v.* PULASKI BANK & TRUST CO.

79-9 582 S.W. 2d 1

Opinion delivered May 29, 1979
(Division I)

Moses, McClellan, Owen & McDermott, by: *Harry E. McDermott, Jr.,* for appellant.

Cearley, Gitchell, Bogard, Mitchell & Bryant, P.A., by: *Michael W. Mitchell,* for appellee.

DARRELL HICKMAN, Justice. Dan Rosell, the appellant, sued the Pulaski Bank and Trust Company for $10,000 actual, and $50,000 punitive damages. The theory of Rosell's suit was that the bank had allowed a third party, Larry Coulter, to cash a $10,000 certificate of deposit that was being held by the bank for the benefit of Rosell. The chancellor held there was insufficient evidence of a valid escrow agreement or trust relationship between the bank and Rosell, and denied any relief to the appellant.

The facts of this case, mainly the actions of a bank

employee, Mrs. Mary Terry, bound the bank to honor the agreement between Rosell and Coulter, and the bank is estopped to deny liability. We reverse the chancellor's decree.

Rosell sold his rental business to Coulter in February, 1975, for $57,600.00. It was sold according to a written agreement and one of the terms of the agreement was that a $10,000 certificate of deposit issued by the appellee bank would be assigned as security to Rosell for four years. The assignment and a copy of the contract were delivered to Mrs. Terry, a branch manager for the bank. The assignment is reproduced:

ASSIGNMENT OF BANK DEPOSIT

FOR VALUE RECEIVED the undersigned hereby conditionally assigns a $10,000.00 savings account in the Pulaski Heights Bank, being Account No. CD #41. The conditions of this assignment are that in the event the undersigned fails to make payments or defaults under the contract dated February 1, 1975, a copy of which is attached hereto, during the first four years of the contract, the $10,000.00 shall be paid to the assignee, Dan Rosell, to be applied against the purchase price.

If there is no default for a period of four years, the $10,000.00 and interest earned shall be the sole property of the undersigned. Undersigned further agrees that the $10,000.00 balance will be maintained and without any encumbrance, assignment, or lien except to Dan Rosell.

Undersigned agrees to execute any additional assignment that may be necessary to effectuate this assignment.

WITNESS my hand and seal this ___ day of February, 1975.

Larry C. Coulter

LARRY C. COULTER

STATE OF ARKANSAS)
)
COUNTY OF PULASKI)

SUBSCRIBED AND SWORN to before me this 1st day of February, 1975.

Notary Public

My Commission Expires:

2-15-77

Mrs. Terry received the assignment and a copy of the contract with a cover letter which reads:

Pulaski Bank & Trust Co.
Attn: Mrs. Terry
Grant at Kavanaugh
Little Rock, Arkansas 72207

Re: Certificate of Deposit #A1
Larry C. Coulter

Gentlemen:

Enclosed is an Assignment executed by Larry C. Coulter concerning a Certificate of Deposit at your bank. Please place this Assignment in Mr. Coulter's file.

If you have any questions, please do not hesitate to call me.

Yours very truly,

HARRY E. McDERMOTT, JR.

Several months later, without any notice to Rosell, Mrs. Terry released the certificate of deposit to Coulter; Coulter defaulted on the contract with Rosell and there is no evidence of his whereabouts in the record.

Although Mrs. Terry testified she told Coulter the bank would not be a party to an assignment of a certificate of deposit between two individuals, her actions are totally inconsistent with that testimony. For example, part of her testimony is as follows:

. . .

Q. Well, then what happened?

A. Well, let's see. Let's see, Larry [Coulter] brought me in — it was two legal sized pages, some sort of an agreement between Mr. Rosell and Mr. Coulter, two legal sized typed pages that did require, you know, an officer of the bank's signature.

And I had been advised at the bank, *don't sign anything*. Do not acknowledge an assignment because we are not going to get involved.

So before I signed it, I read through it and all the legal jargon, you know, meant nothing to me. So I showed it to my boss George Loftus and he read through it. And he said, "It's okay, Lulu, they're not asking us to do anything. You can sign it. *So I did*. . . . [Emphasis added.]

First, she admitted receiving the assignment and contract. She knew it provided the certificate of deposit was to be held as security for the benefit of Rosell. Although she said she was instructed not to agree to act as an escrow agent or be a party to the agreement, she said she signed some instruments. In fact, she wrote the number of the certificate on the assignment. She said she did these acts after being assured by her superiors the bank was not bound. She placed the certificate of deposit in Larry Coulter's file, in an envelope with the other papers of Coulter, including the assignment and contract. She said she did this as a favor to Coulter after she had told him he should place it in a safety deposit box at the main branch.

She testified she was told not to acknowledge the receipt of the assignment in writing because it might bind the bank.

It is undisputed the bank never notified any party in writing it would not honor the assignment after it was received. The lawyer was never notified the assignment would not be recognized.

The appellee argues the appellant tried to make it an escrow agent without its consent. All of the disclaimers testified to by bank employees are inconsistent with the actions of Mrs. Terry. It is a classic case of equitable estoppel. Equitable estoppel, as it applies to this case, was defined in the case of *First National Bank* v. *Godbey & Sons,* 181 Ark. 1004, 29 S.W. 2d 272 (1930).

> While mere silence may operate as an estoppel in equity, in order to constitute such silence as an estoppel, there must be both the opportunity and the duty to speak, and the action of the person asserting the estoppel must be the natural result of the silence, and the party maintaining the silence must have been in a situation to know that some one was relying thereon to his injury.

All the bank had to do was to return the assignment and reject it. Instead, it kept it, filled in a blank space, and received the benefits of the certificate of deposit. But, more than that, it caused the certificate to be placed in Larry Coulter's file, with the assignment, thereby acknowledging the validity of the assignment. For these reasons, the bank is liable for later releasing the certificate to Coulter.

The decree of the chancellor is reversed and the cause is remanded with instructions to enter judgment in favor of Rosell for $10,000.00.

Reversed and remanded.

We agree. HARRIS, C.J., and GEORGE ROSE SMITH and BYRD, JJ.

Johnny Wayne KIRKENDALL *v.* STATE of Arkansas

CR 78-181 581 S.W. 2d 341

Opinion delivered May 29, 1979
(In Banc)

Roy E. Danuser and *Hardin, Jesson & Dawson*, for appellant.

Steve Clark, Atty. Gen., by: *Alice Ann Burns*, Asst. Atty. Gen., for appellee.

JOHN I. PURTLE, Justice. Appellant was charged with Manslaughter, Ark. Stat. Ann. § 41-1504 (Repl. 1977), and Failure to Stop and Render Aid, Ark. Stat. Ann. § 75-901 (Repl. 1957), as a result of the death of Gale Wayne Stahl in an automobile accident on February 25, 1978, in Marion County. The deceased was riding in an automobile with appellant when it left the highway and crashed. A jury trial in the Marion Circuit Court resulted in appellant's conviction on both charges. The jury fixed punishment on the manslaughter conviction at 5 years and 30 days for failure to stop and render aid. The court suspended two-and-a-half years of the felony conviction and further provided the misdemeanor conviction would run concurrently with the other sentence. Appellant appeals from both convictions.

Four grounds for reversal are alleged on appeal.

I.

THE CIRCUIT COURT ERRED IN FAILING TO

GRANT APPELLANT'S MOTION FOR CHANGE OF VENUE.

Appellant bases his motion for a change of venue upon Ark. Stat. Ann. § 43-1501 (Repl. 1977) which reads as follows:

> Any criminal cause pending in any circuit court may be removed by the order of such court, or by the judge thereof in vacation, to the circuit court of another county, whenever it shall appear, in the manner hereinafter provided, that the minds of the inhabitants of the county in which the cause is pending are so prejudiced against the defendant that a fair and impartial trial cannot be had therein.

The burden of proof is upon the appellant on a motion to change the venue. *Maxwell* v. *State,* 236 Ark. 694, 370 S.W. 2d 113 (1963). The decision of the trial court will be upheld unless it is shown there was an abuse of discretion in denying the motion. *Wood* v. *State,* 248 Ark. 109, 450 S.W. 2d 537 (1970).

The trial court conducted a hearing on appellant's motion for a change of venue and denied it. Two affidavits were offered in support of the motion and the affiants testified personally before the court. They testified that in their opinion appellant could not receive a fair trial in Marion County. Evidence of a pending wet-dry election was presented with the allegation that the public was aroused about the use of intoxicating beverages and since the evidence would show appellant had been drinking the wet-dry issue would prevent the appellant from receiving a fair and impartial trial. On the other hand, the state introduced six affidavits that the appellant would, in their opinion, receive a fair trial. These affiants did not appear to testify in person at the hearing. Appellant contends more weight should be given his witnesses because they appeared in person.

It was not necessary for the affiants to appear and testify at the hearing. *DuBois* v. *State,* 258 Ark. 459, 527 S.W. 2d 595 (1975). If every accused who moved for a change of venue were granted his request because he offered affidavits and

testimony to support the motion, few cases would be held in the county where the alleged criminal act occurred. No doubt every accused could muster some support for a change of venue. A change of venue should be granted only when it is clearly shown that a fair trial is likely not to be had in the county. For these reasons such matters are left to the sound discretion of the trial court who is in a much better position to evaluate the situation than we are. We have carefully examined the record and are unable to say the trial court abused its discretion in this case.

II.

THE STATEMENT GIVEN BY THE APPELLANT TO THE STATE TROOPER IN THE EARLY MORNING HOURS FOLLOWING THE ACCIDENT SHOULD NOT HAVE BEEN ADMITTED INTO EVIDENCE.

The supreme court is required to make an independent examination regarding the voluntariness of a confession when it is questioned. *Degler* v. *State,* 257 Ark. 388, 517 S.W. 2d 515 (1974); *Davis* v. *North Carolina,* 384 U.S. 737 (1966). The trial court conducted the required hearing and determined the inculpatory statement was voluntary. *Harris* v. *State,* 244 Ark. 314, 425 S.W. 2d 293 (1968); *Payne* v. *State,* 231 Ark. 727, 332 S.W. 2d 233 (1960). The supreme court's decision must be based upon the totality of the circumstances. *Degler,* supra. The Denno hearing was held on April 21, 1978, and the trial was held on June 20, 1978. Apparently this is the reason appellant did not abstract the separate hearing. However, the appellee has supplemented this portion of the record and it reveals the court heard the testimony of officers Harvey George, Herbert Hinsley and George Mann, as well as witnesses for appellant. Without setting out the details of this testimony, we find that the state met its burden of proof on voluntariness. The evidence included a waiver of rights form signed by appellant. We cannot say the finding of the court was clearly erroneous and therefore find no error.

III.

THE VERDICT OF THE JURY BELOW IS NOT SUPPORTED BY ANY SUBSTANTIAL EVIDENCE

AND THEREFORE MUST BE REVERSED

Ark. Stat. Ann. § 41-1504 (Repl. 1977) states a person commits manslaughter if he recklessly causes the death of another person. "Recklessly" is defined in Ark. Stat. Ann. § 41-203(3) (Repl. 1977) as follows:

. . .

> (3) "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.

. . .

Ark. Stat. Ann. § 75-901 (Repl. 1957) provides:

. . .

> (a) The driver of any vehicle involved in an accident resulting in injury to or death of any person shall immediately stop such vehicle at the scene of such accident or as close thereto as possible but shall then forthwith return to and in every event shall remain at the scene of the accident until he has fulfilled the requirements of section 38 (§ 75-903). Every such stop shall be made without obstructing traffic more than is necessary.
>
> (b) Any person failing to stop or to comply with said requirements under such circumstances shall upon conviction be punished by imprisonment for not less than 30 days nor more than 1 year or by fine of not less than $100 nor more than $5,000, or by both such fine and imprisonment.

. . .

The evidence presented at the trial was to the effect that

appellant was so intoxicated that his friends called Wayne Stahl to drive appellant home because they thought appellant was unable to drive. It was testified that appellant and two others consumed a case of beer between 8:00 a.m. and 4:00 p.m. on the date of the accident and further that appellant helped several others drink another case or two of beer and some wine after 5:30 p.m. on the same day. One witness testified appellant drank two six-packs of beer that night and was fairly intoxicated. Others testified he was unable to walk straight before he was sent home. Two witnesses testified appellant drove the fatal vehicle away with Stahl as a passenger shortly before the accident. One witness testified she heard a noise near her house about 8:30 p.m. on the date of the accident and went outside and discovered her mailbox had been knocked down. Witnesses testified appellant left the Walters' mobile home about 8:30 p.m. The mailbox which had been knocked down was about a quarter-mile from the Walters' place. About 11:30 p.m. the wrecked automobile and the body of Stahl were found in the yard of the house where the mailbox had been knocked down. Appellant had not reported the accident although the accident occurred within a few feet of the home of one of the witnesses who had heard the crash about 8:30 p.m. It was testified appellant went to the house of Ron Mintzel about 9:30 p.m. and told Mintzel he had "flipped" his car. Mintzel further testified appellant was staggering and could hardly walk and he could smell alcohol on his breath.

Viewing the evidence most favorably on behalf of appellee, we must state that the evidence was sufficient to support the verdict and judgment.

IV.

THE MOTION BY THE APPELLANT FOR NEW TRIAL IN THE CIRCUIT COURT BELOW SHOULD HAVE BEEN GRANTED. IN REFUSING NEW TRIAL, THE CIRCUIT COURT ABUSED ITS DISCRETION, AND THIS COURT SHOULD THEREFORE REVERSE THE CONVICTION OF THE APPELLANT.

Appellant contends a new trial should have been granted on grounds (6) and (7) of Ark. Stat. Ann. § 43-2203 (Repl.

1977). The newly discovered evidence was that one of the witnesses allegedly gave perjured testimony at the trial. Also, an affidavit by appellant's trial attorney stated the perjured testimony of the state's witness was not discovered until after the trial and that it was not possible to discover it until the trial was over.

The court conducted a hearing and took testimony on the motion for a new trial. The state's witness who allegedly gave false testimony at the trial was called to testify at the hearing on the motion for a new trial. Other witnesses also testified at this time. All of this testimony related to the defective condition of the brakes or steering on the automobile involved in the fatality. After hearing all the evidence the court denied the motion for a new trial. No evidence was presented which tended to show the accident was caused by defective brakes or steering.

A new trial is left to the sound discretion of the trial court when newly discovered evidence is argued. *Treat* v. *State,* 253 Ark. 367, 486 S.W. 2d 16 (1972). Newly discovered evidence is one of the least favored grounds for a new trial. *Williams* v. *State,* 252 Ark. 1289, 482 S.W. 2d 810 (1972). The trial court gave appellant every opportunity he requested to present evidence and offer testimony. The trial court heard the witness, and others, at the trial and at the motion for a new trial, and was of the opinion a new trial was not required under the circumstances. Had there been any evidence that the brakes and/or steering contributed to the cause of the accident, which occurred on a straight stretch of the road, appellant's argument would have been more persuasive. However, we do not find the trial court abused its discretion in denying a new trial.

After a review of all four points advanced for reversal and examining the entire record, we are unable to find any reversible error. Therefore, the verdict and judgment are affirmed.

Affirmed.

HARRIS, C.J., concurs in result.

ARKADELPHIA FEDERAL SAVINGS & LOAN ASSOCIATION and ARKANSAS SAVINGS & LOAN ASSOCIATION BOARD *v.* MID-SOUTH SAVINGS & LOAN ASSOCIATION

78-126 581 S.W. 2d 345

Opinion delivered May 29, 1979
(In Banc)

[redacted]

Lookadoo, Gooch & Ashby, by: *James T. Gooch; Friday, Eldredge & Clark*, by: *Hermann Ivester;* and *Roger Giles*, for appellants.

Crouch, Blair, Cypert & Walters, by: *James B. Blair* and *William M. Clark, Jr.*, for appellee.

HERMAN L. HAMILTON, JR., Special Justice. Appellants, Arkadelphia Federal Savings & Loan Association and Arkansas Savings & Loan Association Board, appeal from the Clark Circuit Court order directing issuance of a charter to Mid-South Savings & Loan Association for a new savings and loan in Arkadelphia, Arkansas. The Circuit Court reversed the Arkansas Savings & Loan Association Board decision denying the application. In its decision the Board stated:

> "There is not a public need for the proposed association and the volume of business in the area in which the

> proposed association would conduct its business is not such as to indicate a successful operation."

The Board also stated in its decision 45 underlying findings of fact as it viewed the record, and which it found to support denial of the application.

Appellee, Mid-South Savings & Loan Association, had applied for a charter to establish a state savings and loan association in Arkadelphia. Appellant, Arkadelphia Federal had opposed the charter. The voluminous record of proceedings included economic reports, population growth charts, depositions of numerous witnesses for the applicant and for Arkadelphia Federal and proof presented at the Board hearing. Testimony was also presented at the Board hearing by a number of witnesses.

In reviewing an application for charter as in this case, the Arkansas Savings & Loan Association Board is required by Ark. Stat. Ann. § 67-1824 (Supp. 1977) to make certain enumerated findings before approving the application. Among those required findings are, "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". Ark. Stat. Ann. § 67-1824 (3), *supra*. Additional affirmative findings are required, and the statute provides "The Board shall not approve any charter unless the incorporators establish and the board shall have affirmatively found . . . . " all those elements to exist. Thus, the Board's failure to make any of the required affirmative findings prohibits its approval of a charter. The Board expressly found that there was not a public need in the proposed service area and denied the charter as required by Ark. Stat. Ann. § 67-1824 (3), *supra*. Having found against the existence of one of the required elements of the statute, the charter could not be granted.

In reviewing the actions of the Board, in approving or denying a charter, we adopted the "substantial evidence rule", reviewing the record as a whole, as set forth in *Universal Camera Corp.* v. *National L.R. Bd.*, 340 U.S. 474, 71 S. Ct. 456 (1950). See *Ark. Savings & Loan Board et al* v. *Central Arkansas Savings & Loan Assn.*, 260 Ark. 58, 538 S.W. 2d 505 (1976);

White County Guaranty Savings & Loan Assn. et al v. *Farmers & Merchants Bank of Des Arc,* 262 Ark. 894, 562 S.W. 2d 582 (1978).

In reviewing this record, the Circuit Court correctly stated the rule that the reviewing Court cannot substitute its judgment for that of the Board and must affirm the Board unless it finds no substantial evidence to support the Board. See *Ark. Savings & Loan Board* v. *Sutherland,* 256 Ark. 445, 508 S.W. 2d 326 (1974); *Northwest Savings and Loan Assn. et al* v. *Fayetteville Savings & Loan Assn. et al,* 262 Ark. 840, 562 S.W. 2d 49 (1978).

We recently applied the substantial evidence rule in reviewing Board action relating to an application for a branch office for an existing savings institution. *Independence Savings & Loan Assn.* v. *Citizens Federal Savings & Loan Assn. et al,* 265 Ark. 203, 577 S.W. 2d 390 (1979).

A review of the record in this case indicates that there was substantial evidence to support the decision of the Board, though we might have reached a different result. It would serve no useful purpose to review all of the evidence in this record, however, some of the factors which the Board could have considered as substantial evidence against granting this charter, reflected in the record, were as follows:

(a) That Mid-South was not representative of the black community, having no black officers or directors and a minimum of black depositors and deposits pledged;

(b) That Arkadelphia Federal was operating for a number of years on a slim profit margin and that its profit picture on that margin only resulted from the substantial size of its overall operations;

(c) That evidence of substandard housing in the proposed service area was not proof of Arkadelphia Federal's failure to meet the public need;

(d) That interest rates paid by Arkadelphia Federal to depositors and interest rates charged by Arkadelphia Federal

to borrowers did not materially differ from other institutions of comparable size;

(e) That the population growth in Clark County and the proposed service area was not up to the State average and did not indicate substantial future growth;

(f) That banking and savings institutions in the proposed service area had a surplus of savings deposits over the long term real estate loan requirements.

We also note that the credibility and weight to be accorded to the witnesses is also the prerogative of the Board and not that of the reviewing Court.

We are, therefore, unable to hold that the Board's decision was not supported by substantial evidence in the record. The question of whether the Board's action was arbitrary and capricious is a narrow one, more restrictive than the "substantial evidence" test, and is only applicable where the Board decision is not supported on any rational basis. To set aside a Board decision on that basis, it must be wilful and unreasoning and in disregard of the facts and circumstances of the case. *White County Guaranty Savings & Loan Assn. et al* v. *Farmers & Merchants Bank of Des Arc, supra; Independence Savings & Loan Assn.* v. *Citizens Federal Savings & Loan Assn., supra.* In view of the fact that the Board decision in this instance was supported by substantial evidence, we need not address that issue further.

The Circuit Court judgment is therefore REVERSED.

HICKMAN, J., not participating.

Don FINK *v.* STATE of Arkansas

CR 79-37 582 S.W. 2d 3

Opinion delivered June 4, 1979
(Division I)
[Rehearing denied July 9, 1979.]

James E. Davis, for appellant.

Steve Clark, Atty. Gen., by: *Catherine Anderson,* Asst. Atty. Gen., for appellee.

GEORGE ROSE SMITH, Justice. The Criminal Code definition of rape includes deviate sexual activity, which encompasses the penetration of the anus of one person by the penis of another. Ark. Stat. Ann. §§ 41-1801 (1) and 41-1803 (Repl. 1977). In this prosecution of the appellant for the crime of rape the State's proof showed that he had engaged for some months in such deviate sexual activity with his son and daughter, aged 13 and 11 at the time of trial. The jury

returned a verdict of guilty and sentenced the appellant to life imprisonment.

The only argument for reversal is that the State failed to prove the required element of forcible compulsion, which is defined to include physical force or an express or implied threat of physical injury. § 41-1801 (2). Physical injury means the impairment of physical condition or the infliction of substantial pain. § 41-115 (14).

Here one or both of the children testified that the conduct occurred a number of times, that they did not want to engage in it, that they were afraid of their father, that he would threaten to whip them with a belt, and that if they didn't "mess around" with him he would give them a whipping. A physician testified that the rectum of each child was stretched and inflamed and that in his opinion the conditions had been caused by the insertion of an adult penis many times. Thus there was an abundance of substantial evidence from which the jury could conclude that the accused had achieved his purpose by forcible compulsion.

Affirmed.

We agree. HARRIS, C.J., and BYRD, HOLT, and HICKMAN, JJ.

Jeff Edward HIGNITE *v.* STATE of Arkansas

CR 79-41 581 S.W. 2d 552

Opinion delivered June 4, 1979
(Division I)

W. R. Riddell, for appellant.

Steve Clark, Atty. Gen., by: *Ray Hartenstein,* Asst. Atty. Gen., for appellee.

GEORGE ROSE SMITH, Justice. Hignite was convicted of rape and was sentenced to imprisonment for 22 years. His three points for reversal all relate to the voluntariness of his statements to the investigating officers.

At a *Denno* hearing outside the presence of the jury three officers testified. Their testimony was to the effect that Hignite's Miranda rights were explained to him, that he appeared to understand the explanations, and that no force or threats were used during the interrogation. There was also a written statement by a State Hospital psychiatrist to the effect that Hignite had been examined and found to be without psychosis, to have mild mental retardation, and to

have the mental capacity to understand the proceedings against him and to assist effectively in his own defense. On the other hand Dr. Tuft, a psychologist testifying for the accused, was of the opinion that Hignite could understand the proceedings against him, but owing to his mental retardation did not have the capacity to understand his Miranda rights to the extent of being able to protect his own interest (as by refusing to make a statement or by requesting the assistance of counsel).

At the end of the *Denno* hearing the trial judge found the accused's statements to the officers to have been voluntary. When trial before the jury was resumed, there was additional testimony that might have a bearing upon whether the statements were voluntary. Hignite himself testified that in school he had been moved along up to the seventh grade, but he actually made all F's and never passed any grade. He said he can read only words of two or three letters. He said that he did not understand his rights when the officers explained them, adding "I do know what it means now." The State, in rebuttal, called a State Hospital psychiatrist, who testified that despite Hignite's mild mental retardation he could understand his rights and assist his counsel.

First, it is argued that in reviewing the trial judge's *Denno* determination that the statements were voluntary we should not consider the rebuttal testimony of the State psychiatrist, because it was not introduced at the *Denno* hearing. We have held, however, that in reviewing the voluntariness of a statement or confession we make an independent determination based upon our consideration of "the entire record." *Tucker* v. *State,* 261 Ark. 505, 549 S.W. 2d 285 (1977); *Watson* v. *State,* 255 Ark. 631, 501 S.W. 2d 609 (1973). That rule is sound. At the *Denno* hearing the State's burden is to make a prima facie showing that the statements were voluntarily made, but the whole case need not be tried in chambers, even though other testimony may also be relevant to the question of voluntariness. See *Kagebein* v. *State,* 254 Ark. 904, 496 S.W. 2d 534 (1973). On appeal, however, we review the entire record. If we then find, for example, that later testimony before the jury shows that the statements were not voluntary, and the point was properly raised below, we rule them to be inadmissible, even though the trial judge found to the contrary at the *Denno*

hearing. On the other hand, if the later testimony shows beyond question that the statements were voluntary, any error in the trial judge's original ruling would not be prejudicial; so we would not order a new trial, since the confession heard by the jury was actually admissible.

The appellant's second and third arguments are that the statements made by him should be held to be involuntary both upon the record made at the *Denno* hearing and upon the entire record in the case. We do not agree with either contention. At the *Denno* hearing the court had before it the written findings made at the State Hospital and the testimony of three officers, who explained that the statements were voluntarily made. We cannot say that Dr. Tuft's opinion outweighs the proof introduced by the State; so the trial judge's finding tha the statements were admissible is not clearly against the preponderance of the evidence. We reach the same conclusion in reviewing the entire record, because much of the substance of Hignite's own testimony had already been given in Dr. Tuft's testimony.

Affirmed.

We agree. HARRIS, C.J., and BYRD and HICKMAN, JJ.

Jimmy D. BAUGHMAN *v.* STATE of Arkansas

CR 79-1 582 S.W. 2d 4

Opinion delivered June 4, 1979
(Division II)
[Rehearing denied July 9, 1979.]

Jeff Duty, for appellant.

Steve Clark, Atty. Gen., by: *Alice Ann Burns,* Asst. Atty. Gen., for appellee.

JOHN A. FOGLEMAN, Justice. As a result of a search of his motel room on April 24, 1978, Jimmy D. Baughman was

charged with possession of LSD, a schedule I controlled substance [Ark. Stat. Ann. § 82-2605 (Repl. 1976)] and possession of marijuana, a schedule VI controlled substance [Ark. Stat. Ann. § 82-2614 (Repl. 1976)], both in violation of Ark. Stat. Ann. § 82-2617 (Repl. 1976). Appellant was found guilty in a jury trial held on September 18, 1978, fined $250 on the misdemeanor charge and sentenced to five years (three of which were suspended) on the felony on October 6, 1978. We find no error in respect to either of appellant's two points for reversal and therefore affirm the judgment.

Appellant first contends that the prosecution did not establish a sufficient chain of custody to allow introduction of the state's exhibits numbers 2, 3 and 4, which are, respectively, a piece of blotter paper containing LSD, a plastic prescription bottle and a plastic film can, both containing marijuana. The LSD was found in the appellant's wallet and one of the containers of marijuana was found on a nightstand in the room while the remainder of the marijuana was found in a jacket in the room. Detective Robert Post of the Harrison Police Department testified that he participated in the search of the appellant's motel room and that the evidence was turned over to him as evidence custodian. Post placed each item in a plastic envelope and attached an evidence marker to each of the three envelopes. This marker tape contained the initials of both Post and Detective Hamilton, another member of the Harrison Police Department, and the date the items were seized, April 24, 1978. Each item was given a number by Post, the blotter paper being #E6, the prescription bottle being #E2 and the film can being #E3. Post placed the three items in the "evidence locker," a locked room at police headquarters, where they remained until April 27, 1978, when he personally delivered the evidence to James Speeker, who at that time was employed as a chemist by the Arkansas State Crime Laboratory.

Speeker testified that he received the samples from Post and completed his analysis on the same day. After analysis, Speeker placed the items in an envelope which he secured with a seal bearing his signature. The envelope was then placed in a locked evidence room, to which only the chemists employed by the State Crime Laboratory have access, and remained there until the items were removed for introduction

at appellant's trial. A certified copy of a "Record of Drug Analysis," signed by Speeker, was also introduced into evidence. It verified the circumstances related by Post and Speeker concerning the marking of the items and the date and method of delivery of the items to Speeker. This document indicated that LSD and marijuana were found in the sample.

The main thrust of the appellant's argument relating to the chain of custody is based on the fact that James Speeker was not employed by the State Crime Laboratory at the time he testified at the appellant's trial. Speeker's testimony revealed that he had terminated his employment with the State Crime Laboratory in May or June of 1978, three to four months before appellant's trial. Appellant is apparently contending that the fact that Speeker was not employed by the State Crime Laboratory during the entire interval between the analyses of the samples and the appellant's trial in and of itself makes the chain of custody inadequate to allow introduction of the evidence. In establishing a chain of custody prior to the introduction of evidence at trial, it is not necessary to eliminate every conceivable possibility that the evidence has been tampered with; it is only necessary that the trial judge be satisfied that the evidence is genuine and, in reasonable probability, has not been tampered with. See *Munnerlyn* v. *State*, 264 Ark. 928, 576 S.W. 2d 714 (1979), and cases cited therein.

Speeker testified that the evidence was sealed in an envelope as soon as the analysis was complete. The envelope was then placed under lock and key, where it remained until the appellant's trial. Only chemists employed by the State Crime Laboratory had access to the area where the envelope was kept and the seal Speeker placed on the envelope was intact at the time the evidence was offered for introduction at the trial. Speeker estimated that, in the seven to eight months he had been employed by the crime lab prior to April 27, 1978, he had conducted tests on about five hundred samples submitted by various law enforcement agencies. It would be unreasonable to require each chemist to maintain exclusive possession of, and control over, each and every sample he or she has analyzed, until its introduction into evidence or its return to the submitting agency. Under the procedure

adopted by the State Crime Laboratory, all of the tested samples are placed in a storage room, with access restricted to the chemists who are employed there. The prospective evidence remains in this locked area until the chemist who tested it retrieves it for final disposition. Under such a system, we are not persuaded by the argument that the termination of the employment of the examining chemist necessarily increases the possibility that a particular sample has been tampered with. The sample would be accessible to the same people regardless of the employment status of the chemist who performed the analysis. The termination of the employment of Speeker did not destroy the chain of evidence in this case and the trial judge did not err in allowing state's exhibits numbers 2, 3, and 4 to be introduced into evidence.

Appellant also contends that it was error for the trial judge to give the state's requested instruction number three, over the appellant's objection. The instruction read as follows:

> Voluntary or self-induced intoxication is no defense to the commission of a crime.
>
> Self-induced intoxication means intoxication caused by a substance which the actor knowingly introduces into his body, the tendency of which to cause intoxication he knows or ought to know.

This instruction was apparently requested in response to the issue of voluntary intoxication repeatedly raised by the appellant's attorney, not only by cross-examination of the officers who participated in the search of the appellant's motel room, but by examination of appellant when he testified.

Through appellant's testimony it was shown that he had spent the day at Lead Hill Lake and had taken a supply of beer and whiskey. Appellant said that he had "passed out" when the officers came to his room, and that he did not remember very much until he awakened the next morning. When asked about his knowledge of the white blotter paper in his billfold, Baughman said that he was drunk and didn't know how it got there and that, because of his drunken condition, he wouldn't have remembered seeing the "roach clip,"

hemostat and scissors picked up by the officers, if he had actually seen them. Each of the officers testified, on cross-examination, that Baughman was drunk, "passed out," or comatose when they entered his room. One of them admitted that, from appearances, there had been a real drinking party in the room.

After such deliberate accentuation of the appellant's intoxication, it is now argued that it was error to give the instruction because intent was not an element of the possession charges and that to so instruct the jury foreclosed the jury's consideration of the possibility that the appellant was in fact so intoxicated that he was not aware that someone placed the blotter paper in his wallet and the film canister in his room. (Appellant admitted possession of the prescription bottle containing marijuana, but denied possession of the other two items.) This instruction appears to have been a proper statement of the law relating to voluntary intoxication. See *Varnedare* v. *State,* 264 Ark. 596, 573 S.W. 2d 57 (1978). Appellant does not contend that it was not. We cannot agree that it had the effect appellant contends it had. Rather, the effect of an instruction such as the state's requested instruction number three was to inform the jury that the appellant was not relieved of criminal responsibility for the possession of controlled substances simply because he was intoxicated at the time the contraband was found in his possession, and it was appropriate in view of the proper trial tactics of appellant's attorney. The jury was free to find, in light of the other instructions given by the trial judge, that the appellant was not in possession of the controlled substances and was, because of his intoxication, unaware of the presence of the substances. If the jury should have been instructed further on the subject, it was incumbent upon appellant to request an appropriate instruction. *Murphy* v. *State,* 248 Ark. 794, 454 S.W. 2d 302.

Additionally, it appears from the record that the appellant's attorney did not object to the state's requested instruction number three until after all of the instructions had been given and the jury had been charged, and even then, only made a general objection, not specifying the reasons for his objection. An objection to an instruction must specify the grounds for the objection and afford the trial judge an oppor-

tunity to properly instruct the jury, and a general objection will not suffice, even if the instruction is inherently erroneous. Rule 13, Uniform Rules for Circuit and Chancery Courts, Ark. Stat. Ann. Vol. 3A (Supp. 1977), 251 Ark. 1117; *Cassidy* v. *State,* 254 Ark. 814, 496 S.W. 2d 376; *Rogers* v. *State,* 258 Ark. 314, 524 S.W. 2d 227, cert. den. 423 U.S. 995, 96 S. Ct. 423, 46 L. Ed. 2d 369 (1975).

The judgment is affirmed.

We agree. HARRIS, C.J., and HOLT and PURTLE, JJ.

Paul RUIZ and Earl VAN DENTON *v.*
STATE of Arkansas

CR 78-193 582 S.W. 2d 915

Opinion delivered June 4, 1979
(In Banc)

[redacted]

[redacted]

Don Langston and *Robert S. Blatt,* for appellants.

Steve Clark, Atty. Gen., by: *Catherine Anderson,* Asst. Atty. Gen., for appellee.

JOHN I. PURTLE, Justice. On November 18, 1977, the

appellants, Paul Ruiz and Earl Van Denton, were charged by information with the offense of capital murder of Marvin Ritchie and Opal James and that they also robbed and kidnapped the victims. The trial commenced on April 17, 1978, and after four days of voir dire examination 13 jurors were selected. The trial lasted until April 27, 1978, at which time the jury found the appellants guilty of capital murder and sentenced them to death by electrocution.

Appellants had moved for a change of venue prior to the trial, alleging that pretrial publicity and ill feelings toward them made it impossible for them to receive a fair and impartial trial in Logan County. A two-day hearing was held on this motion after which it was overruled by the trial court. The motion for change of venue was renewed several times up through the actual trial of the case.

Appellants argue 16 points for reversal. Many of the points are rather long and will be condensed to state the essential error claimed in each point. The points are:

I.

THE TRIAL COURT ERRED IN DENYING A CHANGE OF VENUE.

II.

THE TRIAL COURT ERRED IN DENYING A MOTION TO QUASH A SUBPOENA DUCES TECUM FOR THE ASSOCIATED PRESS.

III.

THE COURT ERRED IN OVERRULING APPELLANTS' OBJECTION TO JURORS FOR CAUSE.

IV.

THE COURT ERRED IN EXCUSING A JUROR WHO OPPOSED THE DEATH PENALTY.

V.

THE COURT ERRED IN REFUSING TO REDUCE THE CHARGE.

VI.

THE COURT ERRED IN NOT HOLDING THE DEATH PENALTY, BY ELECTROCUTION, AS CRUEL AND UNUSUAL PUNISHMENT.

VII.

THE COURT ERRED IN REFUSING TO ORDER PAYMENT OF FEES AND EXPENSES OF EXPERT WITNESSES FOR APPELLANTS.

VIII.

THE COURT ERRED IN ADMITTING CERTAIN EXHIBITS INTO EVIDENCE.

IX.

THE COURT ERRED IN FAILING TO DIRECT A VERDICT FOR THE APPELLANTS.

X.

THE COURT ERRED IN OVERRULING APPELLANTS' OBJECTION TO INSTRUCTION NO. 7A.

XI.

THE COURT ERRED IN OVERRULING APPELLANTS' OBJECTION TO INSTRUCTION NOS. 8 AND 9.

XII.

THE COURT ERRED IN OVERRULING

APPELLANTS' OBJECTION TO INSTRUCTION NO. 10.

XIII.

THE COURT ERRED IN OVERRULING APPELLANTS' OBJECTION TO THE STATE'S CLOSING ARGUMENT DURING THE PENALTY PHASE OF THE TRIAL.

XIV.

THE COURT ERRED IN REFUSING TO GIVE APPELLANTS' OFFERED INSTRUCTION NO. 1.

XV.

THE COURT ERRED IN OVERRULING APPELLANTS' OBJECTION TO THE INSTRUCTION WHICH PERMITTED THE JURY TO FIND THE APPELLANTS COMMITTED THE CAPITAL MURDER FOR PECUNIARY GAIN.

XVI.

THE COURT ERRED IN REFUSING TO GIVE APPELLANTS' REQUESTED INSTRUCTION ON MITIGATING CIRCUMSTANCES.

Each of appellants' contentions will be taken up separately although more than one may be considered during a particular phase of this opinion.

I.

The United States has survived as a nation through the centuries primarily because it is a nation of laws. From the beginning we have recognized that in order to maintain law and order we must be guided by principles of law which are expressly stated. The First Amendment to the Constitution of the United States requires that Congress shall make no laws prohibiting the exercise of free speech and free press. The Sixth Amendment requires that in all criminal prosecutions the

accused shall have the right to an "impartial" jury trial. The Fourteenth Amendment to the United States Constitution states:

> . . . No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Art. 2, § 6, of the Constitution of Arkansas states that the liberty of the press shall forever remain inviolate and that the free communication of thoughts and opinion is one of the individual rights of man and further that all persons may freely write and publish their sentiments on all subjects, being responsible for the abuse of such right. Art. 2, § 8, provides that no person shall be deprived of life, liberty, or property, without *due process of law*. Art. 2, § 10, states:

> In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by impartial jury of the county in which the crime shall have been committed; provided that the venue may be changed to any other county of the judicial district in which the indictment is found, upon the application of the accused, in such manner as now is, or may be, prescribed by law; . . .

In order that these principles may be maintained as intended from their inception it is necessary that the application of these provisions, and the laws pursuant thereto, be pursued in a manner which shows no partiality to any person regardless of the nature of the offense or his station in life. It is not within the province of this Court to decide whether there should be exceptions to the constitutional requirements set out above. Therefore, regardless of the appearance of the guilt or innocence of an accused, we must abide by the spirit and intent of these principles of law. Neither this Court nor any other court is permitted to abridge the guarantees set out in the constitution to the citizens of the State of Arkansas and the United States. Even in an unpopular situation we must adhere strictly to the constitution and laws and not pay mere lip service to these guiding and controlling principles. It is

our duty and responsibility to the people of this state and nation to apply the laws with an even hand and see to it that the rights of all citizens are fully protected. We cannot give way to expediency in order to achieve what we perceive as justice if in the process we deprive any individual of his guaranteed rights. With this understanding we will continue the examination of the trial record in this case to see whether or not the appellants have been deprived of any rights guaranteed to them by the Constitution, or laws, of the State of Arkansas or the United States.

A hearing was held on November 17 and 18, 1977, on the motion for a change of venue. The following evidence was presented:

1. Affidavits of 7 citizens of Logan County stating the appellants could not receive a fair trial in the county.

2. Testimony of these same witnesses to the same effect.

3. Hundreds of newspaper articles concerning the case printed in the Southwest Times Record, Arkansas Gazette, Arkansas Democrat and the Booneville Democrat. All of these publications had extensive circulation in Logan County.

4. News reel coverages from KFSM-TV and KFPW-TV, Fort Smith, KARK-TV, KTHV and KATV, Little Rock, plus many written scripts of telecast.

5. Radio logs showing coverage by KCCL, Paris, KARV, Russellville, KWHN, KFPW, KTCS, KFSA, Fort Smith.

6. November, 1977, issue of Inside Detective Magazine.

7. Testimony of 10 witnesses for the state who stated that in their opinion the appellants could receive a fair trial in Logan County.

Perhaps no episode in the history of Arkansas received

more publicity than the one involved in this case. The Associated Press released between 250 and 300 stories which went out to more than 100 newspapers. Practically all of the media stories included information that the appellants were escapees from the Oklahoma State Penitentiary at McAlester; that they were suspected of killing two people in Louisiana; that they had probably killed a taxi driver in Oklahoma; and that they were captured in Portland, Oregon. No person testified either at the change of venue hearing or during the jury selection that he had no knowledge concerning at least part of the alleged crimes attributed to the appellants. With one possible exception, no one had heard anyone state he believed the appellants were not guilty. As will be shown later, all of the jury panel was aware of most of this information. Much of the evidence received at the motion for a change of venue was in the form of news stories, some of which covered the entire front page of a paper, and were of an inflammatory nature. The various articles described the alleged escape, homicide, man hunt, apprehension, and even showed that the appellants were originally in the Oklahoma penitentiary after one being convicted of robbery and the other of murder.

The problem presented here is that of the right to a fair trial and the freedom of the press. Both are guaranteed by the Constitution of the United States and the State of Arkansas. The press has obviously rendered an invaluable service to the community, the state, and the nation in alerting the public to the situation which existed at the time. It is not inconceivable that the media may have in fact aided in the apprehension of the appellants. Certainly the court could not if it so desired, which it does not, curb the privilege of the free press. We are then left with the proposition of whether we can protect the right of a fair and impartial trial guaranteed to appellants by the constitutions. It is necessary for us to examine other cases which have dealt with this situation. The United States Supreme Court held in *Irvin* v. *Dowd,* 366 U.S. 717 (1961), that in some cases publicity may be so widespread that courts can presume actual malice. The court also dealt with this situation in *Bloeth* v. *Denno,* 313 F. 2d 364, cert. denied 372 U.S. 978 (1963). There it was held that the issue of a jury's impartiality must be determined from a review of the entire voir dire and must include the extent and nature of publicity

covering the crime. In *Denno* it was held that the jury could not honestly be found to be impartial in spite of the fact that the jurors gave assurance of impartiality. The decision went on to say that the failure to provide an unbiased trier of facts in the criminal prosecution constituted lack of "due process." In the case of *Shephard* v. *Maxwell,* 384 U.S. 333 (1966), the court stated that when a high proportion of the prospective jurors believed the defendant guilty or the voir dire examination suggested a pattern of prejudice actual bias may be presumed. It was held in *Murphy* v. *Florida,* 421 U.S. 794 (1975) that among persons who had learned from the media of the defendant's prior criminal record there was a presumption of prejudice. We believe that this Court has dealt with essentially the same situation in the case of *Swindler* v. *State,* 264 Ark. 107, 569 S.W. 2d 120 (1978). We granted the change of venue in *Swindler* when the matter was reviewed on appeal. There we stated:

> . . . The proof showed, without contradiction, that the news media had saturated the public with the fact that appellant had been released from Leavenworth prison just a week before killing Officer Basnett and that at the time of the killing he was wanted in South Carolina for the recent murder of two teenagers. The fact that appellant had been interviewed by the South Carolina authorities was also given widespread publicity. In addition to the publicity involving the killing and subsequent funeral of Officer Basnett, the Concerned Policemen's Wives Organization, some 45 strong, circulated petitions requesting two policemen to each patrol car. This organization wearing black arm bands collected between nine and ten thousand signatures. The people who signed the petition mentioned the policeman that was killed by appellant, and were told that the black arm band was worn in mourning and respect of the fallen officer.

On the motion for a change of venue in *Swindler,* supra, the trial court heard 6 witnesses state on behalf of the appellant that he could not get a fair trial and 24 witnesses for the state who stated that he could get a fair trial. In the present case we have 7 witnesses testifying that appellants could not get a fair trial in Logan County and 9 witnesses testifying

that they would be able to get a fair trial. Additionally, the evidence in *Swindler* showed that he was an escaped convict, was thought to have committed murders in another state, and many other facts almost identical with those in the case before us. The facts are so strikingly similar between *Swindler* and the present case that we are unable to distinguish between them insofar as the change of venue question is concerned.

We fully recognize that the burden of proof is on the movant when a change of venue is requested and need not cite cases in support of this statement. Such a motion is directed to the sound discretion of the trial court and is not subject to reversal except for an abuse of that discretion. *Rush* v. *State,* 238 Ark. 149, 379 S.W. 2d 29 (1964).

This judicial district is composed of three counties. The site of the trial could have been changed to any courthouse in the district and would have been more distant from the actual scene of the crime and the center of the publicity and the resentment which naturally built around this case than the site where the trial was held. Therefore, we are of the opinion that the appellants would have been more likely to have received a more fair and impartial trial had the change of venue been granted. We recognize the trial court did the best possible job that could have been done under the circumstances before him. However, the patience of Job, or the wisdom of Solomon, would have not been sufficient to erase the predetermined facts and opinions of these people who included friends or acquaintances of one or both of the murdered men.

Therefore, we hold that in this situation the trial court abused its discretion in refusing to grant the motion for a change of venue and that it constituted prejudicial error.

II.

We see no error in the court granting the motion to quash the subpoena for the Associated Press. The evidence shows the AP issued between 250 and 300 stories. All of the news sources in circulation in Logan County were subpoenaed and responded and revealed the coverage they had

given this episode. If AP released stories to other sections of the state, it would have no bearing in this case and should properly have been denied. Additionally, it was testified that it would take at least 40 hours to gather the material requested in the subpoena. This we feel is too much of a burden to place upon a witness. At any rate, it would have only been repetitious and of no real value to the court or the jury. Therefore, we do not believe the court erred in quashing the subpoena.

III.

The appellants were guaranteed the right of an impartial jury at their trial if they were entitled to full benefits of the Constitutions of Arkansas and the United States. It cannot be said that they were not entitled to these constitutional guarantees. We must now examine the record to determine, to the best of our ability, whether they did in fact receive a trial by a completely impartial jury. Unquestionably, the prospective jurors in Logan County are as intelligent and informed as any to be found at any other place in the country. However, human minds are subject to being impressed with information which cannot be completely eradicated. It is important that in this decision we consider each juror who was selected to try this case.

Juror No. 1 was informed about this episode, as he said, "Well, I had read like everybody else that they had escaped from McAlester." He also had read accounts, viewed television, listened to radio, and talked to members of the community about these appellants having been involved in the incident of a taxi driver in Oklahoma and that they were apprehended in Oregon. He stated he had wondered about the situation and could not help but wonder if they were not guilty. He later stated that he could set aside any opinion he had formed and judge the matter on a fair and impartial basis.

Juror No. 2 expressed an opinion that she had formed from discussing the matter with friends, neighbors, and acquaintances that they had expressed an opinion that the appellants were guilty. She stated that she had not formed a definite opinion but that the appellants would have to offer proof of their innocence. She was aware that they had es-

caped from the Oklahoma State Penitentiary, that they were supposed to have killed two people in Louisiana, and that they were apprehended in Oregon. She eventually stated that she could lay aside any opinion she had already formed and give the appellants a fair and impartial trial.

Juror No. 3 was one of two on the entire panel who had not heard much about the case and had formed no particular opinion. She also stated she could give the appellants a fair and impartial trial. Neither side objected to this juror. Therefore, there is no question concerning her eligibility or qualifications.

Juror No. 4 thought the appellants left Arkansas and "got a cab driver in Oklahoma." The juror thought they had been in the penitentiary at McAlester but was unaware of the Louisiana episode. Finally, the juror stated the appellants would be afforded a fair and impartial trial.

Juror No. 5 had heard and seen quite a lot concerning this case. She was aware that they had escaped from the Oklahoma prison where she understood they were serving life sentences for robbery and murder. Also, she knew they went to Louisiana and understood they killed two people before they came back to Arkansas. She thought they had killed a taxi driver in Oklahoma and stole a vehicle. She stated the appellants would have to be proven guilty or innocent and that it was up to someone to prove their innocence. Eventually, she also stated she could give a fair and impartial trial based upon the evidence presented.

Juror No. 6 was accepted by both parties without objection and will not be discussed further.

Juror No. 7 stated that some people she had talked to thought appellants did not deserve a fair trial. She also possessed the same type of information which other jurors had expressed. Again, her final statement was that she could lay aside any preconceived ideas and grant appellants a fair and impartial trial.

Juror No. 8 had been subjected to the same type of media coverage as the others. He was aware that they had es-

caped from the Oklahoma penitentiary, that they had abducted two fishermen in Louisiana, and that they were involved in the disappearance and death of a cab driver in Purcell, Oklahoma. He had heard a lot of people say they were guilty beyond question. He stated he could give a fair and impartial trial.

Juror No. 9 had served on a jury the previous year. Both sides attempted to waive this disqualification. At this time we should note that Ark. Stat. Ann. § 39-103 (Supp. 1977) states:

> Any person who is sworn as a member of a grand or petit jury shall be ineligible to serve on another grand or petit jury in the same county for a period of two (2) years from the date such person is excused from further jury service by the Court or by operation of law.

She was also aware of the escape from Oklahoma, the Louisiana fishermen, and the Oklahoma taxi driver, who she understood was murdered. She was a Sunday school teacher and one of the victim's daughters was a member of the Sunday school class which she taught at the time. Like the others, she stated she could disregard this information and give appellants a fair and impartial trial.

Juror No. 10 had heard that they had killed two people in Louisiana, and had previously escaped from the Oklahoma penitentiary. He was aware that they had been back in Oklahoma and that a taxi driver was killed there, allegedly by appellants. On direct examination he would definitely have required the appellants to prove their innocence. He, too, finally stated he could put all of this out of his mind and give the appellants a fair and impartial trial.

Juror No. 11 had been exposed to the same type publicity the others had revealed. He had heard people express the opinion that the appellants were guilty. He was aware that they allegedly killed the taxi driver in Oklahoma. He also would be able to give a fair and impartial trial to the appellants.

Juror No. 12 had formed an opinion at least in a slight

degree. He stated he had no hard core opinion and that the state would be required to prove beyond a reasonable doubt that the appellants were guilty. He thought he was like any normal average person who had been exposed to the same information and would have some opinion, however slight. He possessed the same knowledge of other criminal incidents, including the missing fishermen in Louisiana and the killing of the taxi driver in Oklahoma. He worked at the same place with two nephews of one of the victims. The victim's nephews had told this juror that if they were in his shoes they would try to get out of serving on this jury. The nephews had visited in the juror's home and he had visited in the home of one of them. He eventually stated he could serve in the manner required of an impartial juror.

The original jury panel consisted of 179 names. 121 appeared at the beginning of the trial. 66 jurors actually were subjected to voir dire examination. All of them but two were challenged for cause by appellants. After the eighth juror was selected appellants had exhausted their pre-emptory challenges. Although the court excused 37 for cause during the voir dire, appellants still were forced to use 10 jurors whom they had challenged for cause but were seated over their objections. We do not mention the alternate juror because he was never used.

The discussion under appellants' Point No. I is necessarily interwoven with this point. Therefore, the matters stated under Point No. I are equally applicable to the present case. It is true that all of the jurors who served stated they believed they could give the appellants a fair and impartial trial. Nevertheless, 10 of those 12 had been subjected to extensive media coverage and several of them had formed an opinion that the appellants were guilty or would require proof of their innocence. We realize that the jurors were being honest when they stated they thought they could give the appellants a fair and impartial trial. However, due to the deep and prolonged exposure to frontpage newspaper stories and lead stories by the radio and television, giving saturation point coverage to the other alleged crimes, it would be almost impossible for any person to completely remove these materials from his mind while serving as a juror in this case. The material presented during the hearing on the motion for

a change of venue and during the voir dire examination revealed that there were wide spread beliefs in the community that the appellants were guilty before the trial actually started. There seems to be a pattern of ill feeling toward the appellants in the community and under these circumstances we believe bias or prejudice may be presumed. Although the exact question was not put, no juror stated that he was 100% sure that he could lay aside his previous impressions or opinions. This case is very much like *Irvin* v. *Dowd,* 366 U.S. 717 (1961), which held that where there was a pattern of deep and bitter prejudice shown to be present throughout the community, which was clearly reflected in the sum total of the voir dire examination of the jurors, wherein the court held that a fair trial was not had. The facts are also quite similar to those in the *Denno* case wherein it was held that a jury at the first degree murder prosecution did not meet standards of impartiality required by the Fourteenth Amendment where publicity was highly inflammatory, of great volume and universally accessible and entered consciences of overwhelming majority of the average talesman. *Denno* also held that the jurors giving assurances of fairness and impartiality was insufficient to overcome the presumption that under the circumstances the appellant could not receive a fair and impartial trial.

Considering the totality of the circumstances, including the voluminous adverse publicity and the general feeling in Logan County concerning the guilt of the appellants, we are of the opinion that the trial jury, as selected, did not meet the requirements of the Fourteenth Amendment to the Constitution of the United States nor the provisions of Art. 2, § 10, of the Constitution of Arkansas.

We have no right to disregard these basic requirements, regardless of the circumstances, and hold that the seating of this jury constituted reversible error.

IV.

We agree with the trial court in excusing this juror for cause for the reason that he stated he could not under any circumstances render the death penalty. We do not believe that

Witherspoon v. *Illinois,* 391 U.S. 510 (1968), is controlling in this case. We think that *Witherspoon* would not prohibit the excusal of a venireman who stated unequivocally that he could not vote for the death penalty under any circumstances.

V.

We have held the death penalty to be constitutional as the statute is now written. *Collins* v. *State,* 261 Ark. 195, 548 S.W. 2d 106 (1977), and *Swindler* v. *State,* 264 Ark. 107, 569 S.W. 2d 120 (1978). Therefore, this point is not considered valid and will not be discussed further except as it appears under other points later herein.

VI.

We realize that the appellants desired the presence and testimony of a witness who would have testified that he thought that death by electrocution was cruel and unusual punishment. However, the court did allow the expert witness's testimony, given in another case, to be introduced and considered by the court. Aside from the fact that we do not feel the state is under any obligation to bring in an expert witness, at its expense, on behalf of the appellants, we feel that the request of the appellants was essentially complied with in this case. Death in any manner may be considered cruel and unusual by some people. Certainly a death caused by disease or accident can be very cruel. The State of Arkansas, through the General Assembly, which represents the people, has elected to use the electric chair in death sentences. If a death sentence is constitutional at all, and we have held that it is, the method of enforcing the sentence must be left to the people, acting through the General Assembly. Some method must be used and the appellants have not offered one which they consider suitable. In view of our ruling on prior points, we do not deem it necessary to discuss this point further.

VII.

This matter was discussed under Point No. VI. We think the appellants have no standing to argue this point in view of the fact that their expert witness's testimony in another case

was at least partially accepted into the record by the court. We do not construe Ark. Stat. Ann. § 41-1301, et seq., (Repl. 1977), to require the state to furnish such expert testimony as requested in this case. We refer to our prior situations holding the death penalty as imposed is not cruel and unusual punishment. See also *Pickens* v. *State,* 261 Ark. 756, 551 S.W. 2d 212 (1977); *Neal* v. *State,* 261 Ark. 336, 548 S.W. 2d 135 (1977); and *Giles* v. *State,* 261 Ark. 413, 549 S.W. 2d 479 (1977). These cases were decided subsequent to *Gregg* v. *Georgia,* 428 U.S. 153 (1976).

VIII.

We do not feel the trial court erred in admitting into evidence the exhibits which were objected to by appellants. The bullet from David Small's arm was fired into him while he lay handcuffed to Marvin Ritchie in the trunk of an automobile. It was fired about the same time that Marvin Ritchie was killed. State's Exhibit No. 2 was a picture of the body of Marvin Ritchie in the trunk of the vehicle where he was murdered. It is true that David Small had been unhandcuffed from Ritchie's body before the picture was made. However, that does not change the circumstances sufficiently to render the photograph inadmissible as not depicting the scene and the circumstances as they existed when discovered. This was explained to the jury and the photograph may have been some help to them in reaching a decision in this matter. It is noted that the photograph is not one which would be calculated to arouse the passion of the jury. State's Exhibit No. 10 was a closeup picture of the bullet wound in the body of Marvin Ritchie. Again, this photograph does not appear one which would inflame the passion of the jurors any more than a statement of the fact that he had been murdered. The location of this wound on the body of the victim, coupled with the testimony of David Small, certainly could have been of some assistance to the jury in their deliberations. Admittedly, it is of little probative value. Nevertheless, we cannot say it was prejudicial. So far as the statement of the prosecuting attorney that he was "merely getting at the truth" is concerned, we feel that any error caused by such statement was cured by the court's instruction to the jury in telling them to disregard the remark made by the prosecuting attorney. We do not think the court erred in overruling the appellants' motions

and objections concerning the testimony and exhibits relating to the death of Opal James. Although the death of James was a day later and in another county, it, nevertheless, was a part of the continuing episode in which these appellants were engaged at the time.

We do not agree that it was error for the court to admit into evidence State's Exhibit No. 24 which was a copper jacket of a bullet found at the scene of the body of Opal James. It was testified that the jacket was fired from the same weapon which was taken from the appellants. It was apparently the same gun which fired at least some of the bullets at the time Ritchie and Small were shot. Certainly there is evidence to connect the jacket with a gun found in the possession of the appellants.

Neither do we agree that the testimony of the ballistics expert was inadmissible. The weakest part of his testimony was that he could not identify a bullet as having been fired from the pistol found in appellants' vehicle when they were arrested. However, he did testify that it was from the same type of weapon which was found in appellants' vehicle. We think this is corroborative of other testimony and it was proper for the court to allow the jury to hear it. Again, it may be of little probative value but, nevertheless, it was not improper to allow it to be considered by the jury.

IX.

We fail to understand why appellants would seriously ask us to declare that the evidence in this case was insufficient to support the verdict rendered by the jury. The fact that Marvin Ritchie was killed on the morning of June 29, 1977, and that Opal James was killed 13 to 14 hours later, in Montgomery County or Scott County, does not prove that these two men were not killed in the same criminal episode. Even if we were to consider the two homicides as separate crimes, it would not change the results as each was involved in both. We must consider all of the circumstances and in so doing we cannot say that there was not evidence to show this was part of one continuing criminal episode. The fact that the victims were robbed during the time they were held captive does not prove that robbery was not the motive for the entire

episode. This fact is a matter that is clearly within the domain of the jury when considering all the evidence. The information itself stated that Paul Ruiz and Earl Van Denton were charged with the premeditated and deliberated murder of Marvin Ritchie and Opal James and with the crimes of robbery and kidnapping. From the beginning the state contended this was one continuing episode. We must consider the matter in the light most favorable to the state and we hold that all of the evidence objected to was properly admitted. See *Grigsby* v. *State,* 260 Ark. 499, 542 S.W. 2d 275 (1976).

X.

Instruction No. 7A was given over the objection of appellants. The instruction is simply a standard instruction on circumstantial evidence. It is the contention of appellants that the only evidence properly admitted was direct. We disagree. Practically all of the evidence relating to the Opal James portion of this episode was circumstantial. It is obvious that both direct and circumstantial evidence were presented during the course of the trial. In the case of *Murray* v. *State,* 249 Ark. 887, 462 S.W. 2d 438 (1971), cited by appellant, we stated:

> . . . Of course, the direct evidence from the state's witnesses, and even of appellant himself, established that Morgan was killed during the perpetration of the robbery. In other words, it was not necessary to show that Murray actually fired the shots that killed Morgan. For that matter, we have held that the refusal to give instructions on circumstantial evidence even where the case depends wholly upon such evidence, is not error if the court has already fully and correctly instructed the jury upon the credibility of witnesses, the weight of the evidence, the presumption of innocence, and reasonable doubt. *Ridenhour* v. *State,* 184 Ark. 475, 43 S.W. 2d 60. . .

The request in *Murray* was for the instruction on circumstantial evidence. In the present case there is an objection to the instruction. In *Covey* v. *State,* 232 Ark. 79, 334 S.W. 2d 648 (1960), and quoted with approval in *Harris* v. *State,* 239 Ark. 771, 394 S.W. 2d 135 (1965), we stated that such instruction

was correct in a situation such as we have here. Certainly both men could not have driven the vehicle at the same time and neither could both men have fired the same weapon at the same time. It does not make any difference in the final result whether they were accomplices or principals because the punishment is the same for either.

XI.

Since the effective date of the Arkansas Criminal Code in 1976, we have essentially done away with the distinction of an accomplice. Under the Code we find no essential difference in an accomplice and the principal. Each participant in a crime is liable for his own conduct but he cannot disclaim responsibility for all of the conduct in a particular episode because he did not personally take part in every act which it took to accomplish the crime.

In *Andrews & Goodman* v. *State,* 262 Ark. 190, 555 S.W. 2d 224 (1977), in discussing accomplice we stated:

> . . . The word "accomplice" does not imply (as "accessory" once did) that either is subordinate to the other. It is simply a shorthand way of saying that both are responsible. That point is made clear by § 301 of the Code, which reads:
>
> "A person may commit an offense either by his own conduct or that of another person." Ark. Stat. Ann. § 41-301. Thus each participant is criminally liable, ultimately, only for his own conduct, but he cannot disclaim responsibility merely because he did not personally take part in every act that went to make up the crime as a whole.

There is no distinction between principals on the one hand and accomplices on the other hand, insofar as criminal liability is concerned. Ark. Stat. Ann. § 41-301 and § 41-303 (Repl. 1977). In *Parker* v. *State,* 265 Ark. 315, 578 S.W. 2d 206 (1979), we discussed the propriety of charging one as a principal and subsequently giving an instruction on accomplice. The prosecuting attorney had informed the trial court during the voir dire that the state would request an instruction to the

jury on accomplice's liability although the information had charged the accused as a principal. In *Parker* we stated:

> At the conclusion of all the evidence, the trial judge gave a correct instruction stating that a person is criminally liable for the conduct of another, when he is an accomplice to the other in the commission of a crime and defining an accomplice in the language of Ark. Stat. Ann. § 41-303 (Repl. 1977). This definition includes one who solicits another to commit an offense, or who aids or attempts to aid another in planning or committing it. This instruction was given over the objection of appellant on the grounds heretofore stated and on the ground that the instruction did not require that it be shown that the defendant must have received something of value before he could be found guilty as an accomplice.

Appellants attempt to distinguish between *Andrews & Goodman* v. *State,* supra, and the present case. We are unable to find such a distinction that would prevent the court from properly giving the instruction concerning an accomplice. Therefore, it was not error for the court to give Instruction Nos. 8 and 9 concerning an accomplice.

XII.

Both appellants and appellee treated this instruction under the argument in Point No. XI. We do likewise and hold it was proper to give Instruction No. 10 for the reasons stated in *Andrews & Goodman* v. *State,* supra.

XIII.

Counsel for appellants first argued to the jury the issue of what 'life without parole' means. In reply the prosecuting attorney stated:

> Life can be commuted sometimes, and generally is. But that is not a hard and fast law. They were serving life sentences, ladies and gentlemen, at the penitentiary which is built just as good as ours is, and they sure

> weren't there on the 29th, or two days later when they were busy killing off our local citizens around here. . . .

There is no question that the clemency remarks by the prosecuting attorney would have been improper had the matter not been invited by appellants. Appellants opened up this subject and we cannot say under the particular circumstances that this was reversible error in this case. We have stated that it is permissible for the state, in its concluding argument, to comment upon the matters which were discussed or invited by appellants preceding closing argument. *Rooks* v. *State,* 250 Ark. 561, 466 S.W. 2d 478 (1971). Upon retrial this situation is not likely to arise.

XIV.

This argument has been at least partially considered in prior points of this opinion. However, we will discuss it a little further at this time. Appellants' Instruction No. 1 would have made it a fact question for the jury to determine whether the death penalty by electrocution was cruel and unusual punishment. The court properly rejected this instruction because it is not a fact issue for the jury to determine.

Appellants contend that this Court held in *Collins* v. *State,* 259 Ark. 8, 531 S.W. 2d 13 (1975), that the absence of evidence in the record about the cruel nature of electrocution prevented this Court from ruling on the matter. We do not agree with this argument. In *Collins* we stated:

> In a related point for reversal the appellant argues that death by electrocution is unconstitutionally cruel. Counsel concedes that the Supreme Court has upheld this method of capital punishment. *Louisiana ex rel. Francis* v. *Resweber,* 329 U.S. 459 (1947); *In re Kimmler,* 136 U.S. 436 (1890). It is insisted, however, on the basis of books or articles having to do with capital punishment, that death by electrocution is not necessarily instantaneous and may subject the condemned person to extreme pain.
>
> We are not convinced by this argument. As the court indicated in *Kimmler,* supra, the constitution prohibits

> punishments involving torture and other *unnecessary* cruelty. It is doubtless true that some pain may attend any form of execution, whether by electrocution, hanging, the gas chamber, or the firing squad. But the record contains no proof on the subject, as it did in *Kimmler,* and we certainly cannot take judicial notice that electrocution is needlessly cruel.

We did state that the record in *Collins,* supra, did not contain evidence concerning death by electrocution and the effects thereof on the person being electrocuted. However, in the present case evidence relating to the physical reaction of death by electrocution has been considered by the trial court. The court obviously ruled that this type of execution is not cruel and unusual. We agree with the ruling by the court. There is no satisfactory method of putting a person to death. No method yet devised guarantees there will be no pain or discomfort during the process of execution. Since the United States Supreme Court has ruled that death by electrocution is not prohibited by the constitution, we must hold that the trial court was correct. See *Pickens* v. *State,* supra; *Neal* v. *State,* supra; *Giles* v. *State,* supra; and *Gregg* v. *Georgia,* supra.

XV.

The aggravating circumstances presented on form A as instruction F were taken directly from the Arkansas statute. It is a proper statement of the law. The evidence in this case shows that appellants held Opal James and David Small at gunpoint and ordered them to hand over their wallets. Nothing could more clearly indicate robbery than this action. No one argues that robbery is not ordinarily committed for pecuniary gain. Appellants contend that the robbery was committed for the purpose of keeping their location hidden. There is no reason to believe that the money or wallets would have revealed anything concerning the location of the appellants. We cannot accept the argument that the robberies were just committed for no particular reasons. It has been held that where the robbery and the murder are so closely connected in point of time, place and continuity of action, as to constitute one continuous episode, it is proper to consider them as a single transaction and that the homicide is a part of the res gestae of the robbery. *Bizup* v. *People,* 150 Col.

214, 371 Pa. 2d 786, cert. denied, 371 U.S. 873 (1962). Opal James was killed subsequent to the robbery and the jury could well have found that it was for the purpose of keeping him from telling about the robbery. We see no reversible error by giving this instruction in view of the circumstances which were presented to the jury. *Grigsby* v. *State,* supra.

XVI.

We agree with the appellants that if there was any evidence in the record to support the giving of requested mitigating instructions A, C and D that such instructions should have been given. However, it stretches one's imagination to believe that an accused is entitled to an instruction on mental or emotional disturbance based upon their escape from the Oklahoma penitentiary or the fact that they were accused of murdering people in Louisiana and Oklahoma in addition to those for which they were being tried. This evidence, if it sheds any light at all on the subject, would indicate that there certainly was a lack of mental or emotional pressure. In fact, it shows a lack of conscience of any kind. We do not agree that the evidence justifies a mitigating instruction concerning extreme mental and emotional disturbance. We also consider the fact that appellants were given a psychiatric evaluation and determined to be without psychosis. The record does not reveal any evidence of intoxication at all concerning the period of time in which this episode occurred. The fact that beer cans were found around an area where they had stopped in Arkansas and that alcoholic beverages, and empty containers, were found in their vehicle many days later when they were apprehended in Oregon does not rise to the level of evidence at all.

As far as the third request, requested instruction D, the appellants admit that they were 27 and 29 years of age, respectively. It would stretch one's imagination indeed to treat these appellants as youthful offenders. Appellants rely on *Collins,* supra, to support their claim for instruction on the youth of the appellants. Collins was 20 years old when he was convicted. We held that Collins was entitled to this instruction because of his age but stated he was entitled to very little consideration. However, we do not agree that appellants

were entitled to such instruction and it, therefore, was not error to refuse to give it.

Reversed and remanded.

STEBBINS & ROBERTS, INC.
v. John T. HALSEY

79-22 582 S.W. 2d 266

Opinion delivered June 11, 1979
(Division I)
[Rehearing denied July 9, 1979.]

Spitzberg, Mitchell & Hays, for appellant.

Hamilton, O'Hara & Hays, P.A., by: *James F. O'Hara*, for appellee.

George Rose Smith, Justice. Ever since the decision in *Lumley* v. *Gye*, 2 El. & Bl. 216, 118 Eng. Rep. 749 (1853), the courts have recognized as a tort wrongful interference with a contractual relationship between third persons. In this case the appellee, John T. Halsey, seeks redress for that tort. His complaint alleges that he was employed by PPG Industries, Inc., and lost his job as a result of wrongful conduct by the appellant, his former employer. The verdict and judgment awarded Halsey $30,000 in damages. For reversal the appellant contends primarily that it was entitled to a directed verdict.

In the fall of 1976 PPG and the appellant Stebbins & Roberts were rival paint companies in Little Rock. Halsey had worked as a paint salesman for the appellant for more

than a year. His written contract of employment provided that if he ceased to be an employee of Stebbins & Roberts, he would not for a period of one year compete with the company by selling paint products as an employee of a competitor within any territory he had worked for Stebbins & Roberts during one year before his termination. Halsey, in working for Stebbins & Roberts, had been assigned as his "territory" a list of 165 substantial paint customers such as contractors, apartments, and factories.

Halsey decided to leave Stebbins & Roberts and go to work for PPG. On November 1 he submitted a letter of resignation, to be effective in 30 days. The company made no objection to his leaving, but preferred to accept his resignation immediately. Halsey went to work for PPG on November 2.

Within a day or so Thomas J. Bonner, the president of Stebbins & Roberts, telephoned Larry Bixler, the manager of PPG. Bonner had a law degree and had practiced law for 24 years. The jury could have found, from somewhat conflicting testimony, that Bonner told Bixler that Halsey had a contract with Stebbins & Roberts and could not legally work for PPG. Bonner did not threaten to sue PPG, but he said that he was going to have to make an example of Halsey. Another witness, who had been working at the time for Stebbins & Roberts in a management capacity, quoted Bonner as having said with reference to Halsey: "I'll teach him and the other salesmen a lesson. I'll sue the little bastard and I will name the company that he goes with."

Bixler discussed the matter with his superiors. It was decided that if Halsey could not legally work for PPG in the territory he would have to be terminated. Halsey was given two weeks in which to settle the matter; but Bonner refused to release him from the Stebbins & Roberts contract, and Halsey lost his job with PPG.

The appellant, in arguing that it was entitled to a directed verdict, presents what is really a twofold contention: First, Halsey failed to prove that Bonner's interference was wrongful; and second, Bonner, simply because the appellant

had the employment contract with Halsey, was entitled to make the statements that he did in his conversation with Bixler.

Prosser's discussion of the applicable principles of law is applicable to both the appellant's contentions:

> Given the intention to interfere with the contract, liability usually will turn upon the ultimate purpose or object which the defendant is seeking to advance. The early cases, with their emphasis upon "malice," regarded proof of an improper motive as an essential part of the plaintiff's cause of action. As the tort became more firmly established, there was a gradual shift of emphasis, until today it is generally agreed that an intentional interference with the existing contractual relations of another is prima facie sufficient for liability, and that the burden of proving that it is "justified" rests upon the defendant. Otherwise stated, and perhaps more accurately, the defendant may show that the interference is privileged by reason of the interests furthered by his conduct, but the burden rests upon him to do so.
>
> * * *
>
> Where the defendant acts to further his own advantage, other distinctions have been made. If he has a present, existing economic interest to protect, such as the ownership or condition of property, or a prior contract of his own, or a financial interest in the affairs of the person persuaded, he is privileged to prevent performance of the contract of another which threatens it.
>
> * * *
>
> But where his interest is merely one of prospective advantage, not yet realized, he has no such privilege. The typical case is that of business competition. The courts have held that the sanctity of the existing contract relation takes precedence over any interest in unrestricted competition, and have enforced as law the

> ethical precept that one competitor must keep his hands off the contracts of another. This is true of contracts of employment, where workmen are hired away from an employer, as well as competitive business dealings in general.

Prosser, Torts, § 129 (4th ed., 1971).

Thus Halsey made a prima facie case when he proved that he had a contract of employment with PPG, that the appellant intentionally interfered with that contract, and that Halsey suffered damages as a result of that interference. (That theory of liability was embodied in the court's instructions to the jury.) The burden, as Prosser points out, then passed to Stebbins & Roberts to show that its interference was justified.

An effort might have been made by Stebbins & Roberts to rely upon the restrictive clause in Halsey's contract as giving rise to a *valid* economic interest which the company was entitled to protect, but no such theory was asserted below or has been argued here. To the contrary, all the witnesses who touched upon the point said that, although there may be secrets in the manufacture of paint, there are none in the selling of it. All potential customers are known throughout the trade. The price lists of competitors are readily obtainable.

Instead, Stebbins & Roberts argues that the mere existence of its contract with Halsey, despite its apparent invalidity, created a privilege that justified Bonner's statements to PPG. The authorities cited, however, consist merely of generalizations, such as a statement that "it is not an actionable wrong for one in good faith to make plain to whomsoever he will that it is his purpose to insist upon what he believes to be his legal rights, even though he may misconceive what those rights are." *Kaplan* v. *Helenhart Novelty Corp.*, 182 F. 2d 311 (2d Cir., 1950). But here Bonner went far beyond an academic statement of what he thought his company's rights to be. The jury was justified in believing that he called Bixler for the express purpose of seeing that Halsey was discharged, an attitude that was confirmed by Bonner's refusal to release Halsey from the obligation of an apparently void promise. It

cannot be said that the appellant's attempted justification for its interference with the Halsey-PPG contract was established by undisputed proof; so a directed verdict was not proper.

It is also argued that the trial court's principal instruction was erroneous, but the only objection made was that the defendant had a right or privilege to interfere with the plaintiff's contract. We have already discussed that point. The other defects that are now asserted were not supported by a specific objection below, as required by Rule 13 of the Uniform Rules For Circuit and Chancery Courts.

Affirmed.

We agree. HARRIS, C.J., and BYRD and HICKMAN, JJ.

ROACH MANUFACTURING COMPANY
et al *v.* Willadean COLE

79-50 582 S.W. 2d 268

Opinion delivered June 11, 1979
(In Banc)

[redacted]

Laser, Sharp, Haley, Young & Huckabay, P.A., for appellants.

Gardner & Steinsiek, for appellee.

GEORGE ROSE SMITH, Justice. In 1976 the General Assembly amended the workers' compensation law to provide that death benefits are payable to persons who were "actually" dependent upon the deceased employee. Ark. Stat. Ann. § 81-1315 (c) (Repl. 1976). In the present case the Commission, construing the amendatory language, held that the appellee, as the widow of her deceased husband, Glenn Cole, was not entitled to death benefits for herself, because she was not actually dependent upon him at the time of his death, but she was entitled to recover benefits for the couple's 10-year-old daughter, Sherri Lyn Cole, because she was actually dependent upon her father at the time of his death. The circuit court affirmed the Commission's decision. An appeal and cross appeal bring both points to this court for review.

The basic facts are not in dispute. Glenn and Willadean Cole were married in 1965. Their daughter was born in 1966. In June, 1975, while the family was living in Rector, Arkansas, Glenn left his wife and child and moved to Memphis, Tennessee, where he married another woman without having divorced his wife. Willadean knew that her husband was in Memphis, but she supported herself and her daughter as best she could and made no attempt to obtain anything from her husband. Glenn was accidentally killed in the course of his employment on May 18, 1976.

The statute defines a widow as "the decedent's legal wife, living with or dependent for support upon him at the time of his death." It defines widower as "the decedent's legal husband who, at the time of her death, was living with and dependent upon her for support and was incapacitated to support himself." It defines a child as "a natural child, a posthumous child, a child legally adopted prior to injury of the employee, a stepchild, 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." § 81-1302.

Before the 1976 amendment to the statute death benefits were payable to persons who were "wholly dependent" upon the deceased employee. In quoting the 1976 amendment we have italicized the words that were added by the General Assembly:

> Subject to the limitations as set out in Section 10 of this Act, compensation for death of an employee shall be paid to those persons who were wholly *and actually* 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 percent (35%), and such compensation shall be paid until her death or remarriage. *Provided, however, the widow shall establish, in fact, some dependency upon the deceased employee before she will be entitled to benefits as provided herein.*
>
> To the widower, if there is no child, thirty-five percent (35%), and such compensation shall be paid during the continuance of his incapacity or until remarriage. *Provided, however, the widower shall establish, in fact, some dependency upon the deceased employee before he will be entitled to benefits as provided herein.*
>
> Second. To the widow or widower if there is a child, the compensation payable under the First above, and fifteen percent (15%) on account of each child.
>
> Third. To one child, if there is no widow or widower, fifty percent (50%). If more than one child, and there is no widow or widower, fifteen percent (15%) for each child, and in addition thereto, thirty-five percent (35%) to the children as a class, to be divided equally among them. [§ 81-1315 (c).]

As we have said, the statute formerly referred to persons

who were "wholly dependent" upon the decedent, but we did not construe those words literally. The decisive case, which has been followed, is *Chicago Mill & Lumber Co.* v. *Smith*, 228 Ark. 876, 310 S.W. 2d 803 (1958). There the husband, at the time of his death, was not contributing to the support of his wife or children. The Commission disallowed the widow's claim, on the ground that she was not a dependent, but allowed the claim of the children. We held that both the widow and the children were "wholly dependent," upon this reasoning:

> It would be possible to construe this provision of the Act as depriving a widow or child of any compensation when, as here, the husband and father was completely void of any sense of 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.

We assume — under our settled law we must assume — that the legislature, in deciding to amend the statute, knew the meaning that we had attributed to "wholly dependent." *Williams* v. *Edmondson*, 257 Ark. 837, 250 S.W. 2d 260 (1975). It unavoidably follows that the addition of the word "actually" was intended to change what amounted to a conclusive presumption of dependency under our prior cases. It follows at least that when, as here, the widow and child were not living with the employee at the time of his death, there must be some showing of actual dependency.

We have said, where there is no presumption of dependency, that dependency is a fact question to be determined in the light of surrounding circumstances. *Smith* v. *Farm Service Cooperative,* 244 Ark. 119, 424 S.W. 2d 147 (1968). The fact of dependency is to be determined in the light of prior events and not to be controlled by an unusual temporary situation. *Nolen* v. *Wortz Biscuit Co.*, 210 Ark. 446, 196 S.W. 2d 899 (1946). Larson summarizes the rule applicable under statutes requiring actual dependency: "Proof of bare legal obligation to support, unaccompanied by either actual

support or reasonable expectation of support, is ordinarily not enough to satisfy the requirement of actual dependency." Larson, Workmen's Compensation Law, § 63 (1976).

It was of course the responsibility of the Commission to decide the two issues of fact, as to the wife and as to the child. We find that both the Commission's conclusions are supported by substantial evidence. The question, as we have frequently said, is whether the proof supports the finding that was made, not whether it would have supported the contrary conclusion. *Mosley* v. *El Dorado Sch. Dist.*, 254 Ark. 326, 493 S.W. 2d 427 (1973).

With respect to the wife, she elected to attempt to support herself and made no effort during her husband's 11-month absence preceding his death to enforce whatever legal right to support she may have had. Thus the Commission could find that she failed, in the language of the amended statute, to "establish in fact some dependency" upon her husband at the time of his death. On the other hand, the Commission could also find, with respect to a 10-year-old child who was being supported by her mother, that the same lapse of 11 months without legal action on the mother's part did not demonstrate, in Larson's language, that there was no longer any "reasonable expectation of support" on the part of the father. The child was not able to act for herself. Her necessary expenses would naturally increase as she grew older, with the concurrent possibility that her mother would not be able to maintain the child in "her accustomed mode of living," as we expressed it in *Smith* v. *Farm Service Cooperative*, *supra*. Thus a reasonable expectation of future support could be found.

Affirmed.

Carl Dee GORDON et ux *v.*
Barbara R. WELLMAN

79-140 582 S.W. 2d 22

Opinion delivered June 11, 1979
(Division II)

Charles Mott, Jr. and *J. Fred Jones,* for appellants.

Gannaway, Darrow & Hanshaw, by: *Lance L. Hanshaw,* for appellee.

JOHN A. FOGLEMAN, Justice. It is with some reluctance that we find it necessary to reverse the decree in favor of appellee and dismiss this action she brought for partition, based on her claim to a 1/3 interest in a tract of land which was owned by her former father-in-law, C. A. Wellman, who died testate in 1941. Under the terms of his will, the tract, consisting of 5.23 acres, descended to his three children — his son, Harry, and his daughters, Helen and Carmelita (Novara) — as tenants in common. Helen, a registered nurse, had lived with and cared for her father during the last year of his life. He had lived in a house on the property. She continued to live in the house situated on that tract until her death in June, 1975. There was evidence tending to show that she had made improvements on the property and had paid the taxes on it. In 1950, Helen caused quitclaim deeds to be prepared and sent to her brother and sister for signature. The deeds were executed by them and returned to her, and both of them were filed for record on February 27, 1951. Appellee,

Barbara Wellman, was then the wife of Harry Wellman, having been married to him for over 20 years. Barbara did not sign that deed or relinquish her dower right in the property. It was executed by Harry on November 20, 1950. These deeds to Helen contained an error in the description of the land. Only the beginning point of a purported metes and bounds description was correct. The major error in the description was the omission of the first course and distance from what would have been a correct description. As a result, the courses described do not close and these deeds were obviously void for indefiniteness. *Bailey* v. *Martin,* 218 Ark. 513, 237 S.W. 2d 16.

Harry and Barbara were divorced by decree entered October 6, 1952. Barbara was represented by attorney Ward Martin and Harry by E. H. Bostic. A settlement in lieu of alimony was reached and Martin prepared two warranty deeds which Harry executed on that date, to carry the agreement into effect. One of them was a conveyance of Harry's undivided 1/3 interest in the 5.23 acre tract to Barbara. The tract was correctly described in that deed. The deeds were recorded on the day the decree was entered and Harry was married to someone else on that same date. The decree recited that the deeds were given in lieu of alimony.

In May, 1953, Harry and Carmelita again executed quitclaim deeds to Helen. These deeds correctly described the property and contained a recitation that they were correction deeds. The deed drafted for execution by Harry was drawn for execution by the husband and wife as grantors and contained a clause for relinquishment of dower. Barbara did not sign this deed, and, if Harry's wife to whom he was then married signed it, that fact is not disclosed by the record.

On July 28, 1953, Helen secured a $2,000 loan by executing a mortgage on the property to National Equity Life Insurance Company. There is testimony indicating that this loan was for improving the property. She continued in possession of the property until she sold all of it, except the house and the small lot on which it sat, to appellants, Carl Dee and Mary Frances Gordon, husband and wife, by warranty deed dated July 21, 1958. The part retained by Helen passed by will to her sister Carmelita and Carmelita's husband. When

the sale was made to the Gordons, the title was approved by their attorney who examined an abstract which erroneously showed that appellee had executed the correction deed with Harry and had thereby relinquished her dower. The Gordons took possession of the tract and commenced placing dirt on it.

This suit for partition was filed on September 9, 1958, by Ward Martin, as attorney for Barbara Wellman. Helen Wellman and the Gordons were defendants. The petition contained allegations that Barbara owned an undivided 1/3 interest in the 5.23 acre tract, that Helen and the Gordons owned an undivided 2/3 interest, and that Helen had been in possession since October 6, 1952. The prayer was that the property be sold and the proceeds divided, and that Barbara have judgment against Helen for $1,000, as one-third the rental value of the property. Helen Wellman filed an answer through her attorney O. D. Longstreth. This answer included a general denial and pleas of laches, adverse possession, and the statute of limitations specifically relating to the bar of a dower interest. The Gordons, through their attorney Shelby Blackmon, answered by general denial, but did not plead the other defenses set out in Helen's answer. They also cross-complained against Helen Wellman on her warranty of title and requested that the abstract company be made a party defendant.

After some sort of hearing before Chancellor Williams, of which no record was ever made, the litigation remained in virtual hibernation until August 31, 1971, when the Gordons filed a motion to dismiss for want of prosecution. Barbara's attorney, Ward Martin, filed a response asserting that the case had been partially tried before Chancellor Williams, that certain matters were then left to be resolved, that the Chancellor had died before the case could be concluded and that Barbara had at all times been willing to close the matter, but not on the terms of the defendants. Appellee asked that the case be set for trial on December 13, 1971. It seems that a hearing on the motion had been set for some unspecified date, but according to the testimony of Blackmon, Martin caused the case to be taken off the docket, for reasons undisclosed, and it returned to a state of dormancy until March 9, 1976, when Martin was permitted to withdraw and appellee's pres-

ent attorneys were substituted. The motion to dismiss was heard and denied on April 8, 1977.

The cause of action against Helen Wellman was not revived within one year after her death, or at any time prior to trial on August 12, 1977. Appellee's present counsel appeared and announced that he was ready for trial after the motion to dismiss was denied on April 8, 1977. Appellants never amended their pleading first filed to plead adverse possession, laches, or the statute of limitations, prior to the actual trial.

We consider only one point for reversal, insofar as the disposition of this appeal is concerned. Appellants assert that appellee is barred by laches in the prosecution of her claim. Appellants admit that they have been unable to find any Arkansas case applying the bar of laches to the prosecution of a claim after suit has been filed. They rely upon the general principles of the doctrine and the decisions of other jurisdictions. We are not aware of any such decision by this court.

Of course, the court in which an action is pending is authorized by Ark. Stat. Ann. § 27-1405 (Repl. 1962) to dismiss a case, without prejudice to a future action, on motion of a defendant, where there are others whom the plaintiff fails to prosecute with diligence, where the plaintiff fails to appear for trial, or where the plaintiff has disobeyed an order concerning the proceedings in the action. None of these grounds has been clearly shown to exist, although appellants filed a motion to dismiss, as previously mentioned, and made some effort to obtain a dismissal by such a motion. In that motion, appellants alleged that, since the cause had remained dormant since they filed their answer and cross-complaint on September 26, 1958, without any further pleading or court order of record, it was subject to dismissal under § 27-1405 and Rule 10, Uniform Rules for Circuit and Chancery Courts. At a pretrial hearing on April 8, 1977, this motion was renewed. At that time, Blackmon, representing appellants, stated that an order of the court had not been carried out and that appellants had made efforts to have the case brought to a conclusion to the extent of writing letters to Chancellor Williams. He pointed out that in the response to the motion, appellee had asked that the case be set for trial on December 13, 1971. Blackmon stated that he appeared in

court on that date, but that appellee, the plaintiff, did not appear. Nothing seems to have been done at that hearing, but Blackmon pointed out that the court file contained a copy of a letter he had written in 1962 to Martin in an effort to conclude the matter. The copy had been sent to Chancellor Williams, according to Blackmon. The letter related that the case had been partially tried and that the abstract company had agreed to pay for the amount of the dower interest awarded to Barbara. In the letter, Blackmon had stated his intention to apply to the court for dismissal on a certain date. The record is devoid of any evidence of any action on that date or at any time prior to March 9, 1976, when the chancery court permitted Ward Martin to withdraw and present counsel for appellee to be substituted.

We can well understand why the trial court did not grant the motion filed on the grounds stated in it. Both the statute and the rule relied upon provide only for a dismissal without prejudice. This would permit an immediate refiling. There is every reason to believe that the case would have been refiled, because it is clear from this record that appellee's present counsel have pursued the matter aggressively and acted with reasonable diligence in bringing the matter to trial, particularly when we view the confusion that has resulted from the long delay after the hearing before Chancellor Williams.

Even though neither the statute nor the rule made the dismissal mandatory and neither would have terminated this fusty litigation, the power and duty of the court to dispose of such cases is not limited to, or by, the statute, much less the court rule, where there has been a lack of diligence on the part of a plaintiff. We recognized in *Thompson* v. *Foote,* 199 Ark. 474, 134 S.W. 2d 11, the inherent power of courts, independent of statute or rule, to dismiss a case because of failure to prosecute with due diligence. See also, *Chandler* v. *Furlow,* 209 Ark. 852, 192 S.W. 2d 764; *Cowan* v. *Patrick,* 247 Ark. 886, 448 S.W. 2d 336; *Otwell* v. *Bolen,* 261 Ark. 1, 545 S.W. 2d 634; *Chalkley* v. *Henley,* 178 Ark. 635, 12 S.W. 2d 18. In *Thompson,* we held that an order of dismissal by the trial court would not be reversed on appeal in the absence of a manifest abuse of discretion. The same rule should apply

where a motion for dismissal is denied. That it will, may at least be inferred from *Chalkley* v. *Henley,* supra.

On the motion presented to the chancellor and the showing made in its support, we could not say that the court's discretion was manifestly abused by denial of the motion. But the matter did not end there. Contrary to appellee's assertion, appellants did raise the question of laches in the trial court, even though a pleading raising that defense was never filed by them. In the opening statement, appellants' present counsel stated that they were alleging laches and adverse possession, in addition to res judicata. He specifically stated that appellants contended that the case should have been dismissed for want of prosecution on account of laches and pointed out that Helen Wellman was dead and that the Gordons had made improvements on the property. Appellee made no objection to appellants' raising these issues and did not claim surprise, even though her attorney had objected to the injection of res judicata into the case. Evidence was directed to the issue of laches in the trial. There is no indication that the trial court declined to permit the issue of laches to be raised. We find no objection during the trial to the evidence in support of the question of laches in prosecution of the suit. Objections were made and sustained on evidence in support of the plea of res judicata. Under these circumstances, we find that the issue was raised in the trial court. Ark. Stat. Ann. § 27-1160 (Supp. 1977); *Parker* v. *Jones,* 221 Ark. 378, 253 S.W. 2d 342; *Nance* v. *Eiland,* 213 Ark. 1019, 214 S.W. 2d 217. See also, *Sarber* v. *McConnell,* 64 Ark. 450, 43 S.W. 395; *Old American Life Ins. Co.* v. *Harvey,* 242 Ark. 720, 415 S.W. 2d 66.

As appellants point out, there is textbook authority, amply supported by cited cases, for application of the doctrine of laches where a plaintiff fails to prosecute his suit diligently, just as it may be applied where no suit has been begun. 30A CJS 44, Equity, § 115; Annot, 43 ALR 921, 923. It seems that the application of the doctrine of laches to a pending action where the plaintiff fails to prosecute it with diligence has wide support. Appellants appropriately place considerable reliance upon *State* v. *District Court, Lewis & Clark County,* 132 Mont. 377, 319 P. 2d 957 (1957), cert. den. 356 U.S. 931, 78 S. Ct. 773, 2 L. Ed. 2d 761 (1958). That court said:

It has long been recognized that the courts have authority to dismiss an action for lack of diligence in its prosecution. *** This is the rule throughout the country. *** [Citations omitted.]

Here the motion of Sanborn to set aside the order of Judge Horsky was not brought on for hearing until after the lapse of more than twelve years after it was filed. Courts have held a plaintiff guilty of laches in failing to prosecute his action with reasonable diligence on much shorter delay than that here. *** [Citations omitted.]

It is contended that if Sanborn was guilty of laches so was Johnstone. This contention is without merit for the courts hold that while defendant has the right to call a motion of plaintiff on for hearing it is not his obligation to do so, but the obligation to prosecute the action with diligence rests with the plaintiff. ***

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The matter may not be permitted to slumber for more than twelve years during which time Johnstone occupied the premises and during which time the claim for rentals multiplied.

We realize that ordinarily whether an action should be dismissed for want of diligence in its prosecution is a question that rests in the discretion of the court. However, here there were no facts asserted that tend in any way to furnish an excuse for the delay and hence there was nothing to move the discretion of the court. True the motion was filed in June, 1944, and Sanborn asserts that he made frequent demand upon Johnstone for possession of the land, but this does not show an excuse for not bringing the motion on for hearing.

For the unconscionable delay by plaintiff Sanborn in bringing his motion on for hearing for more than twelve years after it was filed, it must be held that he is, and has been, guilty of such laches as to bar relief and the court was in error in not sustaining Johnstone's mo-

tion to dismiss the action. It should have granted the motion with prejudice.

The Supreme Court of Alabama pointed out in *Creel* v. *Baggett Transportation Co., Inc.,* 284 Ala. 47, 221 So. 2d 683 (1969), that it always has been the practice of courts of equity to remain inactive where the party seeking relief has been guilty of unreasonable laches in making his application and that the doctrine applies with the same consequences where the person seeking relief fails in the prosecution of the suit as fully as it does when he delays the bringing of suit. In that case, the delay of eleven years was held to be unjustified on the basis of the excuse offered for it. The result reached in *Segers* v. *Ayers,* 95 Ark. 178, 128 S.W. 1045, is a close approach to the application of this doctrine.

Of course, it is well recognized that laches does not apply in such cases unless the opposing party has suffered prejudice as a result of the delay. *Lawrence* v. *Potter,* 91 W. Va. 361, 113 S.E. 266 (1922); *Creel* v. *Baggett Transportation Co., Inc.,* supra. This is in keeping with our own application of the doctrine of laches in other situations. See *Hendrix* v. *Hendrix,* 256 Ark. 289, 506 S.W. 2d 848; *Matlock* v. *McCracken,* 251 Ark. 972, 479 S.W. 2d 508; *McKim* v. *McLiney,* 250 Ark. 423, 465 S.W. 2d 911. In *Segers* v. *Ayers,* supra, we adopted language of the United States Supreme Court in *Mackall* v. *Casilear,* 137 U.S. 556, 11 S. Ct. 178, 34 L. Ed. 776 (1890), that is peculiarly appropriate here, viz:

> *** The doctrine of laches is based upon grounds of public policy, which require for the peace of society the discouragement of stale demands. And where the difficulty of doing entire justice by reason of the death of the principal witness or witnesses, or from the original transactions having become obscured by time, is attributable to gross negligence or deliberate delay, a court of equity will not aid a party whose application is thus destitute of conscience, good faith and reasonable diligence.

It is clear from our cases that the prejudice or disadvantage that makes the enforcement of a claim inequitable may lie in loss of evidence by death of principal witnesses or by

other means, or the obscuring of original transactions attendant upon passage of time, among other things.

We have no difficulty in finding that the delay in this case was unreasonable and the disadvantage to appellants was such as to make it inequitable at this late date to enforce appellee's claim to an interest in this real estate.

The issues were complex and numerous, to say the least, and the conclusion that their complexity was aggravated by the delay is inescapable. All parties to this litigation seem to agree that a hearing of sorts was held before the late Chancellor Guy Williams, soon after the case was at issue. No one seems to know just when this took place or what was done. There is testimony that some testimony was given at that time by Barbara Wellman. There is also testimony that no testimony was heard then. There was testimony that the chancellor had held that neither Helen Wellman nor the Gordons would lose the property, but that Barbara must be compensated for her interest and that the court left it to the lawyers to work out the amount. Some testimony indicated that only ten days were given. There is also testimony that indicates that no time limit was fixed. There is testimony that a representative of the abstract company that erroneously showed a relinquishment of dower by Barbara was present at the hearing and agreed to pay whatever amount was due Barbara. Blackmon testified that, as a result of this hearing, repeated assurances by Barbara's and Helen's attorneys that they would agree upon an amount, the abstract company representative's assurance in open court, and the ensuing delay, the opportunity to obtain service on the abstract company and bring it into court as a formal party had been lost. Although it is clear that there were some communications among the parties during the hibernation of the law suit, their nature and content are not shown. It is also suggested that there were other hearings of some sort during this extended period, but the record discloses nothing to indicate when they were held or what took place. There seems to have been a disagreement as to the basis for compensating Barbara. It appears that one view was that she was entitled to a life estate in a one-third interest. This question was not resolved before the trial on August 12, 1977.

It appears that the parties all agree that a court reporter was present at the hearing before Chancellor Williams, but they appear to disagree on the question whether any of the proceedings were taken down by the reporter. It is difficult to see how any of the many issues in this case could have been resolved at that time, without hearing evidence. It might be inferred that the entire hearing was only a settlement conference. One witness said that it took place in the judge's chambers.

The testimony of Longstreth and that of Martin would have been helpful. The testimony of Helen Wellman, appellants' grantor, was almost indispensable. The nature of her possession of this real estate is a critical issue. No one else was as well informed on that subject as she would have been. No one else could know what disinterested witnesses were available to testify on that question. Only Ward Martin knows why no appearance was made on the date he chose for trial of the case, after it had already been pending for 13 years. His testimony was also badly needed on another question. Harry Wellman and Barbara Wellman disagree on the circumstances surrounding the execution of the deed to Barbara. Harry said he was coerced by Martin and that he signed it in Martin's office. He also testified that Martin had discovered the error in the description of the first quitclaim deed to Helen and said so at the time, in Barbara's presence, but demanded that Harry sign the warranty deed to Barbara anyway. Barbara denied that there was any such conversation in her presence and stated that she knew nothing of any conveyance by Harry to Helen. She testified that the deed was signed in the courtroom. There is a clear indication from the record that Martin, who had retired from the practice of law before the case was tried, was physically unable to testify. It is suggested that O. D. Longstreth is dead.

The fact that time had obscured memories is clearly indicated by Gordon's reference to notes in testifying. It developed that he had, at some time, destroyed the notes he had taken at the hearing before Chancellor Williams, but he said he had copied them when he learned he was to have testified at a second trial, which had been scheduled, but not held. Later he admitted that his notes had been made some four or five years before the final hearing rather than at the

time of the first hearing. He had also written something on the notes the day he testified. He called the notes "something he had pulled back from his memory."

It was shown that appellants had built a house on the property and moved into it in 1962. This was done on assurance from Blackmon that, as a result of the first hearing, the understanding among him, Martin and Longstreth about the disposition of the case, and the commitment of the abstract company, there would be no risk involved.

This is a case which calls for the application of the doctrine of laches to appellee's lack of diligence in the prosecution of her suit.

The decree is reversed and the cause dismissed.

We agree. HARRIS, C.J., and BYRD and HICKMAN, JJ.

Eugene Leroy JOHNSON *v.* Louise Marie JOHNSON

79-14 582 S.W. 2d 32

Opinion delivered June 11, 1979
(Division II)
[Rehearing denied July 9, 1979.]

Jeff Duty, for appellant.

John E. Jennings, for appellee.

JOHN A. FOGLEMAN, Justice. This divorce suit, filed on July 30, 1976, resulted in a decree entered August 31, 1978, terminating a marriage that had existed since August, 1974. Both parties had been previously married, at least once. They had lived together in appellant's home in apparent harmony for five weeks prior to the marriage, but discord seems to have commenced shortly after the marriage. Appellant was 58 years old and appellee, 46, at the time of the trial. The suit was brought by Eugene Leroy Johnson, the husband, appellant here, upon allegations of indignities toward him which rendered married life between the parties intolerable and impossible. Appellee countered with a general denial and a counterclaim for divorce, alleging a course of conduct constituting indignities consisting of rude and abusive treatment. She alleged that she was unemployed and without means of support, and sought a division of property, along with temporary allowances. The chancery court granted a divorce to appellant, denied appellee's counterclaim and awarded appellee one-third of appellant's personal property, which the court found to have a total value of $900, and one-third of appellant's real estate for her life. Appellant contends that the court erred in awarding the wife the interest in the

husband's property permitted by Ark. Stat. Ann. § 34-1214 (Repl. 1962) where a divorce is granted to the wife.

It has long been recognized that alimony may be awarded to a guilty wife. *Pryor* v. *Pryor*, 88 Ark. 302, 114 S.W. 700; *Walker* v. *Walker*, 248 Ark. 93, 450 S.W. 2d 1. It was clearly established that the chancery courts have the power to award a part of the husband's real estate as alimony when divorce was granted to the husband by our decision in *Cook* v. *Cook*, 233 Ark. 961, 349 S.W. 2d 809. In *Cook*, we said that the award must be reasonable concerning the "nature of the case" as provided in Ark. Stat. Ann. § 34-1211 (Repl. 1962) governing alimony generally. That statute also requires consideration of the circumstances of the parties. We said in *Cook* that the amount of the award lay in the sound discretion of the trial court. Or, as put in *Ferguson* v. *Ferguson*, 251 Ark. 585, 473 S.W. 2d 869, such an award may be made when the equities call for it. It is clear from these cases that this court will reverse only for abuse of the trial court's discretion. See also, *Walker* v. *Walker*, supra.

The question then is whether the chancellor abused his discretion in the matter. As in *Cook*, the husband was not totally blameless. The chancellor, in approaching the question, indicated that he considered the wife to be the greater offender. The chancellor pointed out that appellant had been evasive about his wife's charges that he had been engaging in both selling and excessive drinking of alcoholic liquor at their home. The chancellor said that appellant was not to be complimented on his conduct and that the temper tantrums he had suffered at the hands of appellee may have been provoked by him. He felt that the equities justified the award.

It seems that during the pendency of the divorce suit, the court had directed appellant to provide Mrs. Johnson with a suitable place to live, but it seems that he did not do so. He was recalcitrant about payment of temporary alimony and seems to have paid it only when forced to do so on judgments for arrearages. At the time of the trial, more than a year had elapsed since he had made any payments at all. Mrs. Johnson testified that appellant had struck, kicked and beaten her. The only corroboration of physical violence inflicted on her

was the testimony of her mother, who said that her daughter had bruises on her legs on two occasions and that once the daughter had a black eye. She admitted that she did not know the cause of either the bruises or the black eye.

As in *Cook,* the chancellor saw and heard these people on more than one occasion and was in a superior position to assess blame and to judge the equities. The mere fact that he awarded appellee personal property worth $300 and a one-third life interest in six tracts of real estate from which appellant had rental income of $465 per month is not indicative of an abuse of the trial court's discretion.

Of course, it is clear that this decree is not affected by Act 705 of 1979 on the subject of alimony and distribution of property in divorce cases and the previous decisions of this court on alimony, such as that involved here, may have little bearing on the subject in cases affected by that act.

The decree is affirmed.

We agree. HARRIS, C.J., and HOLT and PURTLE, JJ.

BYRD, J., dissents.

Mary Lou STONER *v.* Louis B. HOUSTON et ux

78-321 582 S.W. 2d 28

Opinion delivered June 11, 1979
(In Banc)

James L. Sloan, for appellant.

John R. Elrod, of *Elrod, Elrod, Elrod & Lee*, for appellees

CONLEY BYRD, Justice. This is an appeal of an action for trespass and damage to timber that was heard in the Benton County Circuit Court. The appellant, Mary Lou Stoner, was found to have trespassed and damaged timber on the land of the appellees, Mr. and Mrs. Louis Houston. The jury awarded the Houstons damages for the timber damage in the sum of $1,000.00; for the trespass, $1.00 actual, and $10,000.00 punitive damages. The trial judge tripled the award for timber damages to $3,000.00. The judgment was for $13,-001.00.

The issues raised on appeal by Stoner are: There was no malice proved and the trial court improperly tripled the $1,-000.00 award; the punitive damages were improper because they were based on a nominal award of $1.00; the two awards were unconstitutional because they amounted to a double recovery; and, the $10,000.00 award was excessive.

We find two errors requiring reversal: The court erroneously tripled the jury's verdict of $1,000.00, and the verdict did amount to a double recovery based on the same incident. We will discuss these and the other errors alleged that might arise on a rehearing.

The relevant facts are as follows: Mrs. Stoner owned two tracts of land, a 40 acre and a 17 ½ acre tract. The 17 ½ acre tract, which she occupied, was completely surrounded by the Houstons' land. The road Mrs. Stoner used as access to her property had been a source of contention between the parties, involving several court appearances. In fact, it ran right by the Houstons' house. Their respective rights were determined by court order. Mrs. Stoner claimed access from her 40 acre tract to her 17 ½ acre tract also through the Houstons' land, over an old logging road.

Without consulting the Houstons, Mrs. Stoner hired a bulldozer and directed it to drive down two old logging roads, clearing out existing trees, saplings and brush. The dozer blade was used as a drag and the dozer was backed down the roads. Small trees along the roads were knocked down, or pushed over.

The Houstons were quite upset and there was a confrontation between the parties. According to one version of the testimony, Mrs. Stoner gave the Houstons a cursing; also, she had a pistol in evidence.

The Houstons filed this suit for damages to their trees and land. The trees were all small, but, according to one exhibit, numbered over 100. The damage to the land was claimed to be the bulldozing of dirt. The Houstons contended it was the beauty of their land that was damaged. Mrs. Stoner did not have permission to do this act; she claimed she was merely maintaining the roads.

An expert witness testified the Houstons' land was damaged $1,000.00 to $1,200.00. (Two measures of damages are allowed for an action under Ark. Stat. Ann. § 50-105 [Repl. 1975]; the value of the timber, or the damage to the market value of the land.) See *Laser* v. *Jones*, 116 Ark. 206, 172 S.W. 1024 (1915).

Mostly, Mrs. Stoner's evidence was that the roads were open, the damages were none, and she had a right to clean them out.

The Houstons offered proof that the road to the 17½ acres was grown up, impassable to the ordinary car or truck; it was only a trail, and Mrs. Stoner had no right to even use it. Mrs. Stoner offered testimony the road was grown up, but passable, and that was precisely why she ordered it cleaned out. The other logging road was more passable.

The jury agreed with the Houstons and returned a verdict totaling $11,001.00. The judge added $2,000.00 more as we had indicated.

There is substantial evidence to support the jury's finding that Mrs. Stoner acted with malice. The parties had been in court several times over one road. Both parties' rights thereto were defined by court order. There had been other confrontations over fences and acreage. Knowing all this, Mrs. Stoner proceeded to have the bulldozer go to work, widening the old logging roads. The good faith argument by

Mrs. Stoner was a question of fact for the jury. According to some testimony, Mrs. Stoner gave the Houstons a cursing and declared she would eventually own their property and they would be sorry they ever heard of Siloam Springs.

Malice, as the court instructed the jury, is the intentional doing of a wrongful act without justification or excuse.

In our judgment, the trial judge improperly tripled the jury's $1,000.00 award. The statute the Houstons claimed under authorized treble damages for malicious destruction or removal of timber. Ark. Stat. Ann. § 50-105 (Repl. 1975). However, the jury had been instructed, ". . . If you find that the Houstons' trees were maliciously destroyed by Mrs. Stoner . . . *you will triple the amount of actual damages*, if any, suffered by the Houstons and award them that amount." (Emphasis added.) The jury was given interrogatories and first found Mrs. Stoner had unlawfully destroyed trees; next they found "the damages" to be $1,000.00; and, finally, they found Mrs. Stoner's conduct malicious.

The trial judge, no doubt, decided the jury had only returned a verdict for actual damages and had not tripled them. The only evidence of monetary damages was the expert's testimony of $1,000.00 to $1,200.00. Consequently, the judge tripled the $1,000.00 award. That was an assumption that cannot be made in the fact of an unequivocal instruction for the jury to decide the damages and then triple them. A jury may return a verdict for less than the evidence shows, and we have upheld such verdicts. *Pickett Lake Farms* v. *Sullivan & Jones*, 245 Ark. 709, 434 S.W. 2d 88 (1968).

The appellees argue there was no objection to the instruction and interrogatories, and, therefore, this issue cannot be argued on appeal. There was nothing wrong with the instruction or the interrogatories. We have approved either the jury or the court tripling damages, although the better practice is for the court to triple the damages. *Memphis & Little Rock Railroad Co.* v. *Carlley*, 39 Ark. 246 (1882).

Since there was no need to object to the instruction or interrogatories, the appellees' argument is without merit.

The Houstons' lawsuit was for damages to timber under Ark. Stat. Ann. § 50-105 (Repl. 1975), and common law trespass. The statute allows triple damages, which are punitive in nature, and the Houstons sought punitive damages in connection with the trespass. They were awarded both. In this case, under the facts recited, it amounted to a double punitive recovery for the illegal act. The elements of damages were the same, and such a recovery is prohibited. 25 C.J.S. Damages, § 3. See, also, *John Mohr & Sons, Inc.* v. *Jahnke*, 55 Wis. 2d 402, 198 N.W. 2d 363 (1972).

The Houstons on a retrial may elect which remedy they want, but, unless they have other evidence, they cannot recover both.

While it is not necessary to deal directly with the argument that a $1.00 award as damages cannot support a $10,000 punitive verdict, it may arise on a rehearing. The law is settled that exemplary or punitive damages is dependent upon the recovery of actual damages. *Kroger Grocery & Baking Co.* v. *Reeves*, 210 Ark. 178, 194 S.W. 2d 876 (1946); *Williams* v. *Walker*, 256 Ark. 421, 508 S.W. 2d 52 (1974). Nominal damages will not support a punitive award. *Manhattan Credit Co., Inc.* v. *Skirvin*, 228 Ark. 913, 311 S.W. 2d 168 (1958). Was the $1.00 award in this case nominal? We would have to say yes. But this is in view of the facts of this case. We have found $10.00 to be a nominal award. *Manhattan Credit Co., Inc.* v. *Skirvin, supra*. But obviously each case is different. See *Ray Dodge, Inc.* v. *Moore*, 251 Ark. 1036, 479 S.W. 2d 518 (1972).

We do not rule on the issue of excessive damages because we cannot speculate on what a jury may decide actual damages would be on a retrial.

FOGLEMAN and HICKMAN, JJ., concur in part and dissent in part.

JOHN A. FOGLEMAN, Justice, concurring in part, dissenting in part. I agree with the majority's conclusion that the trial court erred in tripling the jury's verdict of $1,000 for timber damage. I certainly do not agree that the verdict amounted to a double recovery, and I thoroughly disagree

with the statement that it was based on the same incident. The recovery of triple damages under Ark. Stat. Ann. § 50-105 (Repl. 1971) is for damages to the value of the *thing* damaged, broken, destroyed, or carried away, with costs. The *things* covered by the statute are trees, timber, rails, wood, stone, ground, clay, turf, mold, fruit, plants, grass, grain, corn, cotton, tobacco, hemp, or flax. The statute also covers glass in a building broken by the trespasser. It does not cover any other damages resulting from a trespass. This statute covers a particular kind of damage to a particular kind of property. It does not cover other trespasses. The appellees sought to recover for appellant's trespass committed by entering their land and using a bulldozer to scrape the earth. It takes a stretch of the imagination to say that Ark. Stat. Ann. § 50-105 covers that kind of trespass.

As appellees point out, the trespass by cutting the trees lay in the act of cutting and destroying them, not in the entry on the land and the scraping with the bulldozer blade. There was testimony that Mrs. Stoner had used a bulldozer to widen the road through appellees' property, in the course of which a portion of appellees' yard had been cut out. The soil was disturbed elsewhere, according to this testimony. Mr. Houston also testified that, before the bulldozing, the property was beautiful and scenic, but that it is now scarred with two ugly gashes across it. If the jury accepted this testimony, appellees were entitled to common law damages for this damage in addition to the treble damages for destruction of trees. It is quite clear that the jury arrived at damages on the two items separately. The interrogatories submitted separated the damage to the trees and the damage for the trespass on the land. In my opinion this was proper.

I agree with my brother Hickman that the rule that nominal damages will not support a punitive award is improper and subversive of the very purposes for which punitive damages are awarded. I would point out that in *Manhattan Credit Company, Inc.* v. *Skirvin*, 228 Ark. 913, 311 S.W. 2d 168, relied upon by the majority, we were treating Texas law, not Arkansas law. In that same case we pointed out that the authorities are hopelessly in conflict on this question, but said that Texas law applied because the conversion took place in

Texas. Not only does the majority fail to cite any other case to support its position, appellant cited no other case supporting that position. Other cases cited by the appellant were cases where no actual damages were found. I do not think that we should follow our neighbor Texas in the application of an unsound and inappropriate rule.

I am authorized to state that Mr. Justice Hickman joins in this opinion.

DARRELL HICKMAN, Justice. My main disagreement with the majority is regarding its statement that punitive damages will not be awarded if only nominal damages are awarded.

Quite often punitive damages are the only remedy available to an individual to stop impermissible conduct. I would not like to preclude any litigant from being able to go to court and punish another person for outrageous conduct such as a willful trespass that might result in only nominal damages. For a more detailed explanation of the reasons for punitive damages see *Ray Dodge, Inc.* v. *Moore*, 251 Ark. 1036, 479 S.W. 2d 518 (1972).

Donald Paul FAUNA *v.* STATE of Arkansas

CR 79-7 582 S.W. 2d 18

Opinion delivered June 11, 1979
(Division II)

Michael Dabney, for appellant.

Steve Clark, Atty. Gen., by: *Robert J. DeGostin, Jr.*, Asst. Atty. Gen., for appellee.

FRANK HOLT, Justice. Following a jury trial, appellant was sentenced to 14 years for robbery and 8 additional years for the use of a firearm. For reversal he contends that the court unduly restricted his *voir dire* examination of the jurors. We must agree.

The scope of *voir dire* examination by counsel is largely within the sound judicial discretion of the trial court, and his limitation of that examination is not reversible on appeal unless it is a clear abuse of discretion. *Finch* v. *State*, 262 Ark. 313, 556 S.W. 2d 434 (1977). See also Ark. Stat. Ann. § 39-226 (Repl. 1962). This rule has not been materially affected by Ark. Stat. Ann. 4A, Rules of Crim. Proc., Rule 32.2 (Repl. 1977), which requires that the trial judge permit such questions by the defendant or his attorney as the judge deems reasonable and proper. *Finch* v. *State*, *supra*.

Here the appellant interposed insanity as a defense. Appellant's attorney sought to elicit from individual jurors their attitude toward this defense and the required proof. The court sometimes curtailed this examination by asking the juror or jurors if they would follow his instructions as to the law. In *Griffin* v. *State*, 239 Ark. 431, 389 S.W. 2d 900 (1965), we said:

> The court should have permitted counsel to question the veniremen as indicated. The mere fact that they stated that they would follow the law as given by the court was not necessarily sufficient to enable counsel to determine whether peremptory challenges should be exercised. There are very few people bold enough to say that they will not follow the law . . . In many instances, counsel decides whether to use a peremptory challenge not so much on what a venireman may say, but on how he says it.

See also *Cochran* v. *State*, 256 Ark. 99, 505 S.W. 2d 520 (1974).

Here we are of the view that the jurors' assurances to the court that they would follow the law did not focus their attention or attitude upon the issue of insanity sufficiently to permit trial counsel to exercise his right of peremptory challenges.

Appellant also asserts that the court erred in instructing the jury concerning the crime of robbery. No objection was made to the instruction. In the absence of an objection, we do not reach this assignment of error. Ark. Stat. Ann. Vol. 3A, Uniform Rules for Circuit and Chancery Courts, Rule 13 (Supp. 1977); and *Bousquet* v. *State,* 261 Ark. 263, 548 S.W. 2d 125 (1977). However, since it is possible that the alleged error might occur again at retrial, we observe the instruction was an incorrect statement of the law. Other alleged errors are not likely to reoccur and, therefore, we need not reach them.

Reversed and remanded.

We agree: HARRIS, C.J., and FOGLEMAN and PURTLE, JJ.

Paul LEONARD *v.* STATE of Arkansas

CR 78-148 582 S.W. 2d 15

Opinion delivered June 11, 1979
(Division II)

McArthur & Lassiter, P.A., for appellant.

Steve Clark, Atty. Gen., by: *Robert J. DeGostin, Jr.*, Asst. Atty. Gen., for appellee.

JOHN I. PURTLE, Justice. Appellant was convicted in the Sebastian County Circuit Court of possession of marijuana with intent to deliver, a violation of Ark. Stat. Ann. § 82-

2617, on March 29, 1978. He was sentenced to 10 years in the Arkansas Department of Correction. From the verdict and judgment appellant brings this appeal.

In cooperation with the Sebastian County sheriff a confidential informant named Paul Miller contacted appellant and arranged to purchase marijuana from him. During the course of the conversation the informant initiated a conversation as to whether or not appellant was interested in pills. This conversation, of course, had no specific relation to the agreement to sell marijuana even though it was during the same conversation that it was discussed. The recording of this conversation was introduced at the trial, and over the objection of the appellant the conversation relating to possible purchase of "pills" was presented to the jury. Appellant also requested that the jury be instructed not to consider the portion of the conversation relating to pills. The court overruled this request. Also, the state presented information showing Paul Miller, the confidential informant, had been convicted of the sale of marijuana. The information about the informant was to the effect that the informant would rendezvous with a certain party in Fort Smith in order to pick up a load of marijuana. All of the details of this transaction were given. The evidence included the fact that the informant and one Mendoza were arrested for this episode. At the time this evidence was presented the state indicated it would put on evidence showing relevancy at a later time. No such evidence was presented, unless you consider the informant's testimony that he had known appellant all his life as connecting the incident to the facts of this case. The court allowed this testimony although it admonished the prosecutor that he must tie in the testimony or run the risk of a mistrial. The testimony included the fact that the informant had been in jail for several months on a charge of possession with intent to deliver marijuana.

At the time of appellant's arrest he was asked if he had a weapon and responded in the affirmative. The weapon was delivered to the sheriff and later introduced in evidence at the trial.

Appellant contends that the pistol should not have been

introduced as it bore no relevancy to the charge of possession with intent to deliver. We have previously held that the introduction of a handgun was not prejudicial when it was found in the possession of one accused of possession with intent to deliver. *Freeman* v. *State*, 258 Ark. 496, 527 S.W. 2d 623 (1975), and *Derrick* v. *State*, 259 Ark. 316, 532 S.W. 2d 431 (1976). Appellant relies upon another line of cases wherein we held the introduction of handguns constituted error. He cites the cases of *Everett* v. *State*, 231 Ark. 880, 333 S.W. 2d 233 (1960); *Rush* v. *State*, 238 Ark. 149, 379 S.W. 2d 29 (1964); and *Botany* v. *State*, 258 Ark. 866, 529 S.W. 2d 149 (1975). We understand appellant's contention in this case because there is a rather fine line of distinction between the two types of cases. We have decided each case in the light of its relevancy to the offense committed. In *Freeman* and *Derrick* we held the handguns were relevant to show the intent to deliver when considered in view of all of the circumstances. In *Everett*, *Rush* and *Botany* the offenses charged were of an entirely different nature and the handguns offered into evidence under the circumstances in these cases bore no relation to the intent of the accused for the offense charged. Here we believe the reasoning in this case is controlled by the facts and is more closely related to *Freeman* and *Derrick*. Therefore, we hold there was no reversible error in admitting the handgun into evidence.

The second point appellant argues is that the portion of the tape relating to the conversation about the pills should have been deleted. The reasoning is based upon *Alford* v. *State*, 223 Ark. 330, 266 S.W. 2d 804 (1954), and other cases holding that evidence of other crimes and criminal activity is not relevant for the purpose of showing intent. Although we do not see the relevancy of the conversation about the pills, we cannot say it was prejudicial error. Rule 401, Uniform Rules of Evidence, states:

> "Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

We cannot see where the testimony about the pills made

the act of possession of marijuana with intent to sell more probable or less probable than it would have been without the testimony. Nevertheless, we do not deem it prejudicial error.

The third point argued by appellant for reversal is that the court erred in admitting the testimony of past criminal involvement of the informant, Paul Miller. This appears to be a case of first impression insofar as it relates to the detailed information of the past criminal activities of a witness for the prosecution. We consider it in light of Rule 401. We fail to see the relevancy of the details of the prior criminal activities of informant Paul Miller to the case being tried. If there is any relevancy it seems to us that such relevancy would be outweighed by the prejudicial effects it likely had on the jury. Since the only purpose of the introduction of Paul Miller's past criminal activity would be to show the intent of the appellant, such relevancy escapes us. Paul Miller's past criminal activities, which did not involve appellant, simply do not shed any light on the intent of the appellant; neither do they tend to make the facts more probable nor less probable than they would be without such testimony. Under the circumstances of this case we feel this testimony, coupled with Miller's testimony that he had known appellant all his life, tends more to show the bad character of appellant than it does to prove intent. Therefore, under the circumstances of this case, we hold that such testimony was irrelevant and constituted prejudicial error. Therefore, for this reason the case is reversed and remanded for a new trial.

Reversed and remanded.

We agree. HARRIS, C.J., and FOGLEMAN and HOLT, JJ.

Charles O. FINNIE *v.* STATE of Arkansas

CR 79-42 582 S.W. 2d 19

Opinion delivered June 11, 1979
(Division II)

James E. Davis, for appellant.

Steve Clark, Atty. Gen., by: *Catherine Anderson,* Asst. Atty. Gen., for appellee.

JOHN I. PURTLE, Justice. Appellant was convicted of second degree murder in the Miller County Circuit Court on September 19, 1977. During the trial he was defended by counsel of his own choosing. After the sentencing the appellant and retained counsel obtained approval by the trial court of an appeal bond. The trial court very meticulously explained to the appellant that he had the right to appeal his conviction within 30 days from entry of judgment. The appellant informed the court he understood his right of appeal. Being unable to post the appeal bond at the time, appellant was placed in the county jail where he remained for some time. During the time he was in jail his retained counsel attempted to get approval of a bondsman on the appeal bond but was unable to do so. Counsel then wrote appellant at the county jail that this particular bondsman was unable to make the bond and requested the appellant to get in touch with him for further instructions concerning the appeal. Also, retained counsel wrote appellant's wife and asked her to come in to discuss the appeal. Subsequently, appellant was transferred to the Cummins Unit of the Arkansas Department of Correction where he was immediately transferred to the hospital in Pine Bluff. The record reveals no further efforts on the part of anyone to perfect the appeal to the supreme court. After appellant was released from the hospital and returned to Cummins he learned that he might be entitled to appointed counsel for appeal purposes. More than 30

days had elapsed when the appellant requested a transcript at public expense. The request was dated November 9, 1977, and filed in the court on November 29, 1977. The trial court denied the request for a transcript on December 5, 1977. No appeal was taken from this ruling. On February 3, 1978, appellant filed a motion pursuant to Rule 37 in which he sought a belated appeal. On the same date the court entered an order appointing an attorney to represent appellant on his Rule 37 request. The appointed attorney filed a motion for a new trial on August 23, 1978. On November 7, 1978, the court considered both motions and denied them. The order denying the motions was dated December 5, 1978, and it is from this order this appeal is taken.

When an accused is represented by retained counsel at the trial, he should be notified if counsel intends to withdraw from the case. In the present case the retained counsel was successful in getting an appeal bond set. However, neither counsel nor appellant were able to obtain the appeal bond and appellant remained in jail until he was transferred to the Department of Correction. Subsequent testimony at the Rule 37 hearing indicated the retained counsel offered to handle the appeal for $2500 but the appellant was unable to pay the fee. In fact, the record discloses appellant was unable to finish paying the agreed fee for his attorney's services at the trial. It would appear from the record that appellant became indigent prior to time to lodge the appeal. We think that a fair interpretation of Rule 11 (h) of the Rules of the Supreme Court of Arkansas places upon the attorney representing an accused at the trial the duty to do certain things if he intends to withdraw from the case. Part of the duties of such attorney is to obtain permission from the trial court to withdraw from the case and such request to withdraw should contain a statement of the reasons therefor. The appellant should receive a copy of the request for withdrawal and, if granted, a copy of the order allowing the withdrawal. In the present case retained counsel apparently made no request to the trial court for permission to withdraw nor did he notify the appellant he was withdrawing from the case. Neither was appellant told by the court, which had no specific duty to do so, nor retained counsel, that he might be entitled to be represented by appointed counsel for the purpose of his appeal. Effective

assistance of counsel is a fundamental requirement which cannot be denied any person accused of or convicted of a serious crime.

We agree with the learned trial judge that he had no authority to accept an appeal or appoint counsel for appellant for the purpose of appeal after the expiration of 30 days. However, this does not mean that appellant has lost his right of appeal. Rule 36.9, Rules of Criminal Procedure, states:

> . . . Notification of the filing of the notice of appeal shall be given to all other parties or their representatives involved in the cause by mailing a copy of the notice of appeal to the parties or their representatives, but failure to give such notification shall not affect the validity of the appeal. Failure of the appellant to take any further steps to secure the review of the appealed conviction shall not affect the validity of the appeal but shall be ground only for such action as the Supreme Court deems appropriate, which may include dismissal of the appeal. The Supreme Court may act upon and decide a case in which the notice of appeal was not given or the transcript of the trial record was not filed in the time prescribed, when a good reason for the omission is shown by affidavit . . .

Even though the trial court was without authority to grant the appeal, this Court had such authority. No request has previously been made to this Court for belated appeal. We held in *Goodwin* v. *State*, 261 Ark. 926, 552 S.W. 2d 233 (1977) that filing of notice of appeal within the time prescribed by Rule 36.9 is not jurisdictional as to this Court. See also *Harkness* v. *State*, 264 Ark. 561, 572 S.W. 2d 835 (1978), wherein we held that tardiness of counsel in filing an appeal amounted to ineffective assistance of counsel and would be a denial of appellant's constitutional rights if we fail to grant the appeal.

It is apparent that appellant did not learn he may have been entitled to appointed counsel on appeal until it was too late to perfect his appeal under the Rules of Criminal

Procedure. It is likewise clear that so far as appellant is concerned he had a good reason for not filing the notice in the time required. He was without money, had no knowledge of his rights, and was physically in the hospital when time for notice expired. We believe under these circumstances he was and is entitled to a belated appeal.

We do not reach the points argued in the present appeal in view of the fact we are treating this appeal as a request for belated appeal. Therefore, the request of appellant for belated appeal is hereby granted.

Belated appeal granted.

We agree. HARRIS, C.J., and FOGLEMAN and HOLT, JJ.

Harold Eugene ROGERS *v.* STATE of Arkansas

CR 74-59 582 S.W. 2d 7

June 11, 1979
(In Banc)

[redacted]

Howard & Jameson, by: *George Van Hook, Jr.*, *Nathaniel R. Jones* and *James I. Meyerson*, New York; and *George Howard, Jr.*, for petitioner.

No brief for respondent.

PER CURIAM

Petitioner Harold Eugene Rogers was convicted by a jury of rape and was sentenced to life imprisonment in the Arkansas Department of Correction. We affirmed, *Rogers* v. *State*, 257 Ark. 144, 515 S.W. 2d 79 (1974), and the Supreme Court of the United States denied certiorari, *Rogers* v. *Arkansas*, 421 U.S. 930 (1975). Several years later petitioner filed a petition for writ of habeas corpus in the United States District Court, Eastern District of Arkansas, alleging, *inter alia*, the allegations contained in his present petition filed in this Court. The district court dismissed with prejudice petitioner's claims attacking his conviction; however, the court reserved its ruling regarding petitioner's claim attacking his sentence, pending the outcome of his application to state courts, for failure to exhaust state remedies. 28 U.S.C.A. § 2254 (c). On April 13, 1979, petitioner filed his present petition for permission to proceed in circuit court under Criminal Procedure Rule 37 for postconviction relief in

this Court presenting a two-pronged argument attacking the validity of his sentence. Petitioner invokes jurisdiction under Rule 37.2(a), *Rules of Criminal Procedure* (1976) and the opinion and order of the United States District Court dated March 7, 1979, which is attached as an exhibit. Petitioner's application for postconviction relief is denied for the reasons hereinafter discussed.

On December 18, 1978, we amended Rule 37.2, *Rules of Criminal Procedure*, by adding the following:

> (c) A petition claiming relief under this rule must be filed in circuit court or, if prior permission to proceed is necessary as indicated in paragraph (a), in the Supreme Court within three (3) years of the date of commitment, unless the ground for relief would render the judgment of conviction absolutely void.

The basis for the promulgation of this rule at once becomes obvious upon the filing of the present petition. The information recites that the rape occurred on October 31, 1972. Petitioner was sentenced and committed on November 5, 1973. More than five years have passed since petitioner's commitment, and it has been almost four years to the day since the United States Supreme Court denied certiorari, *Rogers* v. *Arkansas, supra.* We take judicial notice of the fact that the circuit judge who presided over petitioner's trial, Honorable Paul Wolfe, is deceased and, therefore, is unavailable to testify regarding petitioner's allegations. If a grave injustice was committed, why did petitioner wait so long to file his petition? Petitioner is not claiming relief under some new law that has been applied retroactively but his allegations could easily have been raised five years ago in a motion for new trial. He could have filed his petition for postconviction relief as soon as the mandate affirming the judgment was issued by this Court. We would be hesitant to encourage the practice of vacating judgments upon the basis of allegations relating to matters that cannot be defended against, not because of substance or truth but because witnesses are unavailable, memories are faulty and, in some cases, records are destroyed, when a petitioner waits an *unnecessary* and *unexplained* length of time to file his petition.

However, due to the fact that petitioner's allegations can be disposed of by reading the record and our original opinion, *Rogers* v. *State, supra,* and applying existing state law, we address the substance of the allegations. However, we question the invoking of jurisdiction in this Court on the basis of the order of the United States District Court.

We also note at the outset that the record discloses that petitioner was represented at the trial, which extended over a seven day period, by three capable and competent attorneys, two of which continue to represent petitioner in this proceeding. The transcript contained 951 pages.

Petitioner first alleges that, prior to sentencing, the trial court failed to afford his right to allocution, as provided in Ark. Stat. Ann. § 43-2303 (Repl. 1977). We disagree.

Ark. Stat. Ann. § 43-2303, *supra*, provides:

> *Proceedings before pronouncing judgment.* — When the defendant appears for judgment, he must be informed by the court of the nature of the indictment, his plea and verdict thereon, if any; and he must be asked if he has any legal cause to show why judgment should not be pronounced against him.

We have held that failure of the trial court to afford the right of allocution is error. *Tate* v. *State*, 258 Ark. 135, 524 S.W. 2d 624 (1975) and *Smith* v. *State*, 257 Ark. 781, 520 S.W. 2d 301 (1975). However, in this case petitioner was afforded the opportunity to address the court before sentencing, and we find the procedure used was in substantial compliance with Ark. Stat. Ann. § 43-2303, *supra*. After the jury returned its verdict, the following transpired:

> THE COURT: Mr. Howard, Mr. Myerson, and Mrs. Miller, what I have in mind at this moment is — under the law a defendant, after a jury trial and a finding of guilty, is entitled to forty-eight hours, I believe it is, from the time of the announcement of the verdict to the time of sentencing. I am wondering, in view of the fact that each of you are from a distant place, if you would desire

to waive that forty-eight hour period and have the sentence imposed at this time.

MR. HOWARD: May I confer with my associates.

THE COURT: Yes, sir.

MR. HOWARD: If it pleases the Court, I have checked with my associates, I have also checked with the defendant and I checked with his mother and grandmother. At this time it is the desire of all concerned to have the Court impose sentence at this time, and we would therefore waive the forty-eight hours.

THE COURT: Thank you, Mr. Howard, Mr. Rogers, would you and your attorneys please come before the Court? Mr. Rogers, you have heard the verdict of the jury, and it now becomes my duty, as you understand, to impose sentence in conformity with the verdict of the jury. I would ask you first if you have anything to say before sentence is pronounced?

MR. ROGERS: No, sir.

THE COURT: I do wish to note at this time that throughout the past week, as we progressed with this trial, and today and at the moment, that I have observed Mr. Rogers' behavior. I feel that he has shown perfect composure and understanding of this situation and the proceedings. That is, I feel that you understand what this has all been about throughout. Am I correct in this, Mr. Rogers?

MR. ROGERS: Yes.

THE COURT: I would ask counsel if they've seen anything to the contrary.

MR. HOWARD: We have not.

THE COURT: You have nothing to say of record before sentence is pronounced, and it is therefore my

duty to say, sir, that having been found guilty as charged, that it is the judgment and sentence of the Court that you serve in the State Penitentiary under the Department of Correction for the State of Arkansas, for the period of your natural life. Mr. Rogers, you know, I'm sure, that you have a right to appeal this verdict, this judgment, this sentence that you received here today. And I'm glad you have such fine counsel. And I would like to compliment each of you, Mr. Howard, Mrs. Miller and Mr. Myerson, for the fine manner in which you have represented Mr. Rogers. Mr. Rogers, regardless of everything, you owe a debt of gratitude to these three people who have endeavored so much in your behalf. Do you agree with me about this?

MR. ROGERS: Yes.

. . .

The sentencing procedure in this case is remarkably similar to the procedure in our recent case of *Clark* v. *State*, 264 Ark. 630, 573 S.W. 2d 622 (1978). In *Clark* appellant was convicted of two counts of capital felony murder and sentenced to death by electrocution. On appeal he alleged he had been denied his right to allocution. After the verdicts were returned, the trial court had asked appellant: "Do you have anything that you wish to say?" After a discussion about appeal, the court then inquired: "You understand everything that is going on?" When appellant responded affirmatively, the court pronounced sentence. Holding appellant had demonstrated no prejudicial error regarding allocution, we stated:

> The purpose of a statute such as ours is to give the accused, upon sentencing, an opportunity to show any cause why sentence should not be pronounced. Where a question is addressed to the defendant which affords him an opportunity to express why sentencing should not be pronounced, it is unnecessary that the precise language of the statute be used. [Citations omitted] Here the question asked by the court upon sentencing of the appellant gave him the unfettered right to state any

cause, legal or otherwise, as to why sentence should not be pronounced. The appellant's response was not restricted in any manner.

For the reasons enunciated in *Clark* coupled with the fact that the trial court afforded petitioner with more than ample opportunity to be heard, we find that petitioner was not denied his right to allocution.

Furthermore, as we also noted in *Clark*, petitioner was present with counsel at sentencing, and there was no objection raised to the procedure. In addition, no objection was raised by motion for new trial or on direct appeal. Even now petitioner has failed to allege the *cause* of his failure to object to the procedure employed by the trial court and to demonstrate the *prejudice* that resulted, which are required when raising an underlying constitutional issue for the first time in a postconviction proceeding when no objection was raised at trial. *Wainwright* v. *Sykes*, 433 U.S. 72 (1977). Petitioner does not, even now, state what he desired to have presented to the trial court.

Secondly, petitioner alleges that he was arbitrarily, capriciously and freakishly sentenced to life imprisonment without parole and that the imposition of such a sentence in the context of his rape conviction is cruel and unusual punishment. Petitioner's allegation is inaccurate. He was not sentenced to life imprisonment without parole, a sentence that was not within the range of punishment for the offense or submitted to the jury for its consideration, but to life imprisonment.

Petitioner was convicted of first degree rape, in violation of Ark. Stat. Ann. § 41-3401 (Supp. 1973), as having engaged "in sexual intercourse with a female: (a) by forcible compulsion; . . . " Ark. Stat. Ann. § 41-3401, *supra*, was a codification of Act 362, 1967 Ark. Acts, which also provided punishment as follows: "Any male, upon conviction of first degree rape, shall be subject to death or thirty (30) years to life imprisonment in the State Penitentiary." Ark. Stat. Ann. § 41-3403 (Supp. 1973). However, Act 438, 1973 Ark. Acts, codified as Ark. Stat. Ann. §§ 41-4701 — 16 (Supp. 1973), which was in

effect at the time petitioner was sentenced, abolished the death penalty for first degree rape and also established a new classification of felonies and a new sentencing procedure called "life imprisonment without parole." However, this new sentence was not included in the range of punishment for first degree rape. Ark. Stat. Ann. § 41-4701 (Supp. 1973) reclassified felonies in the following manner:

> *Categories of felonies.* — Felonies are classified for the purpose of sentence, and for any other purpose specifically provided by law, into the following categories:
>
> (a) capital felony;
>
> (b) life felony without parole;
>
> (c) life felony; and
>
> (d) felony

Ark. Stat. Ann. § 41-4702 (Supp. 1973) defined capital felonies, and rape was not included as a capital felony. Ark. Stat. Ann. § 41-4703 (Supp. 1973) provided that when any person was convicted of a capital felony defined in § 41-4702 and the jury found that existing mitigating circumstances, which were set forth in § 41-4712, precluded the imposition of the death penalty, the crime should be a life felony without parole and punishable as provided in § 41-4707, as follows:

> *Conviction of life felony without parole — Punishment.* — A person convicted of a life felony without parole shall be imprisoned in the Arkansas State Penitentiary for the remainder of his life and shall not be released except pursuant to a commutation, pardon, or reprieve of the Governor, conducted and granted in accordance with Section 14 [§ 41-4714] hereof.

Furthermore, Ark. Stat. Ann. § 41-4706 (Supp. 1973) provided that a sentence of life imprisonment without parole could be imposed on a person convicted of a capital felony, under a procedure set out in § 41-4710 which provided for

aggravating *and* mitigating circumstances. So it can be seen that Act 438 created a capital felony, which was subject to a sentence of life imprisonment without parole, and a life felony without parole. Ark. Stat. Ann. § 41-4715 (Supp. 1973) provided:

> *Parole — Persons ineligible.* — A person sentenced for a capital felony to life without parole or for a life felony without parole shall not be eligible for parole and shall not be paroled.

Ark. Stat. Ann. § 41-4716 (Supp. 1973) provided:

> *Parole — Sentence commuted to a term of years — Effect.* — If a person sentenced to life without parole or for a life felony without parole has his sentence commuted by the Governor to a term of years, such person shall not be paroled, nor shall the length of his incarceration be reduced in any way to less than the full term of years specified in the order or commutation or in any subsequent orders of commutation.

We have taken the time to distinguish between a capital felony, with a sentence of life imprisonment without parole, and a life felony without parole only to emphasize the fact that petitioner was not charged, tried, convicted or sentenced under either.

Petitioner was sentenced under Ark. Stat. Ann. § 41-4704 and § 41-4708 (Supp. 1973) which provided, respectively:

> *Life felonies.* — All other offenses for which life imprisonment or death in the electric chair is presently prescribed by Arkansas law shall be life felonies and shall be punishable as provided in Section 8 [§ 41-4708] hereof.

> *Conviction of life felony — Punishment.* — A person convicted of a life felony shall be imprisoned in the State Penitentiary for the remainder of his life and shall not be released except pursuant to a commutation, pardon, or

reprieve of the Governor or pursuant to parole procedures now or hereafter established by law.

Petitioner may be released on parole under the conditions of Ark. Stat. Ann. § 43-2807 (Repl. 1977), which provides:

> (b) Life Imprisonment. (1) Individuals sentenced to life imprisonment prior to March 1, 1968, and those sentenced to life imprisonment after the effective date [February 12, 1969] of this Act, shall not be eligible for release on parole unless such sentence is commuted to a term of years by executive clemency. When such life sentence has been commuted to a term of years, the individual shall be eligible for release on parole after having served one-third (1/3) of the time to which the life sentence was commuted, with credit for good time allowances.

Hopefully, any confusion that may exist regarding petitioner's actual sentence is eliminated.

We turn now to petitioner's allegations, substituting the sentence of life imprisonment, as if petitioner had made the same allegations as to that sentence as he made to a sentence of life imprisonment without parole. Petitioner alleges that imposition of the sentence in the context of his rape conviction is cruel and unusual punishment. To support his allegation petitioner states that he was a "youth of tender age" (16 years old when the crime was committed and 17 years old when he was convicted) and had no prior involvement with the law. He further states that the victim was an adult (21 years old at the time of the conviction, so apparently 20 years old at the time of the offense) and sustained no permanent injuries — physical or psychological, which is apparently a matter of speculation. He further states that the victim was "not tortured or subjected to any vile or inhuman treatment." Assuming *arguendo* that we will review the sufficiency of the evidence in this case, which we will not, *Houser v. United States*, 508 F. 2d 509 (8th Cir. 1974), we can think of few offenses more vile than the offense of rape.

We think it necessary to point out that petitioner is not challenging the constitutionality of the statute under which he was sentenced, which imposes a maximum sentence of life imprisonment, as being cruel and unusual punishment, which would be a ground of relief cognizable under postconviction proceedings. *Houser* v. *United States*, *supra*. Petitioner is alleging that the imposition of a life sentence by a jury under the facts and circumstances of this particular case is cruel and unusual punishment.

Postconviction relief was not designed to permit an attack upon a sentence which is within the statutory limits, *Credit* v. *State*, 247 Ark. 424, 445 S.W. 2d 718 (1969). The constitutional prohibition of cruel and unusual punishment is directed toward the kind of punishment, not its duration. The fact that punishment is severe does not make it cruel and unusual. *Hinton* v. *State*, 260 Ark. 42, 537 S.W. 2d 800 (1976). 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 (1949). As we stated in our original opinion, *Rogers* v. *State*, *supra*, "if a sentence is within the limits established by the legislature, it is valid even though it is insisted that the punishment is unconstitutionally excessive."

Petitioner broadens his allegation that the punishment imposed was cruel and unusual by stating that due to a lack of guidelines to assist the jury in its sentencing determination, the discretion of the jury in imposing the sentence resulted in an arbitrary, capricious and freakish sentencing. Petitioner is apparently trying to avail himself of the dicta enunciated in *Collins* v. *State*, 261 Ark. 195, 548 S.W. 2d 106 (1977), and the other cases involving the death penalty that followed. We do not think *Collins* went that far. In the first place, *Collins* addressed the constitutionality of our death penalty statute, which we consider to be a unique situation. We there stated that our statute complied with the necessary safeguards required to prevent an arbitrary, capricious, wanton or freakish imposition of the death penalty by a jury. The substance of our opinion was directed to the constitutionality of the statute itself. We find no requirement that a jury be given guidelines for the imposition of any sentence other than when an accused is charged with a capital felony. As long as the sentence

is within the range of punishment authorized by statute, the jury may exercise its discretion in imposing the sentence.

In *Collins* we recognized the power of the trial court, Ark. Stat. Ann. § 43-2310 (Repl. 1977) and this Court, Ark. Stat. Ann. § 43-2725.2 (Repl. 1977), to modify or reduce sentences. Ark. Stat. Ann. § 43-2310, *supra*, provides:

> *Reduction of verdict.* — The court shall have power, in all cases of conviction, to reduce the extent or duration of the punishment assessed by a jury, if, in the opinion of the court, the convicion is proper, and the punishment assessed is greater than, under the circumstances of the case, ought to be inflicted, so that the punishment be not, in any case, reduced below the limit prescribed by law in such cases.

There can be no doubt that the trial court had the power to reduce petitioner's sentence after the verdict was returned, but it did not do so. However, after petitioner's valid sentence had been put into execution and an appeal was taken to this Court, the trial court was without jurisdiction to modify, amend or revise it, either during or after the term at which it was pronounced. *Shipman* v. *State*, 261 Ark. 559, 550 S.W. 2d 424 (1977). The trial court now would only have jurisdiction to review petitioner's sentence, if prior permission were granted by this Court, under Rule 37, *Rules of Criminal Procedure, supra,* not under Ark. Stat. Ann. § 43-2310, *supra*. In other words, the scope of review would be limited to the provisions found in Rule 37, and the jurisdiction of the trial court to reduce petitioner's sentence under Ark. Stat. Ann. § 43-2310 has expired. Again, we call attention to the fact that neither petitioner nor his attorneys invoked Ark. Stat. Ann. § 43-2310 at any time after the verdict was rendered, either before or after sentencing.

In *Collins* we also discussed the power of this Court to reduce a sentence on appeal. Ark. Stat. Ann. § 43-2725.2, *supra*, provides that a sentence of an appellant may be reduced if it is deemed excessive. However, reiterating our holding in *Abbott* v. *State*, 256 Ark. 558, 508 S.W. 2d 733 (1974), we emphasized the fact that reduction of a sentence deemed to

be excessive by this Court must be predicated on legal error and preserved the distinction between executive clemency and appropriate judicial review where there is error pertaining to the sentence. In *Abbott* we stated that the statutory provisions whereby we are vested with authority to reduce an excessive sentence, Ark. Stat. Ann. § 43-2725.2, *supra*, do not empower this Court to reduce a sentence that is otherwise proper and within statutory limits. The power to reduce a sentence must have legal justification, and

> [t]here is a vast difference in reviewing a sentence for error (including error resulting from insufficient evidentiary support) in the sentencing procedure and reviewing a sentence resulting from a proper and legal sentencing procedure where sufficiency of the evidence is not a basis for review. *Collins* v. *State*, *supra*.

Subsequent to *Collins*, in *Giles* v. *State*, 261 Ark. 413, 549 S.W. 2d 479 (1977), we reduced a capital felony conviction imposing the death penalty to a conviction of life felony-murder without parole with a sentence of life imprisonment without parole.[1] This was not done because *in our judgment* the facts of the case did not warrant the death penalty, but because the jury found no existing mitigating circumstances when the evidence clearly indicated appellant was impaired as a result of mental disease or defect. We stated that the jury was not free to arbitrarily disregard testimony where there was no conflicting testimony and there was no issue of credibility to be resolved. Since in our judicial capacity we could not weigh the mitigating circumstance and the existing two aggravating circumstances, as that function is for the jury, we reduced the conviction and sentence. However, the reduction was based upon objective evaluation of legal error and not on a subjective determination that the facts of the case did not warrant the imposition of the death penalty.

In *Collins* we stated that the arbitrary, capricious, wanton or freakish imposition of the death penalty would seem to be a ground for modification of sentence under Rule 37. However, the penalty is, as we stated earlier, unique, and

[1]Unless the Attorney General had requested, within 17 days, a remand for a new trial.

Collins did not create an extended review under Rule 37 of all sentences that are alleged to be excessive under the particular facts of the case. If the penalty assessed against petitioner is too severe under the facts of the case, it is a matter that addresses itself to executive clemency and not to this Court. *Randle and Wright* v. *State*, 245 Ark. 653, 434 S.W. 2d 294 (1968). Most importantly, however, this issue, including an argument that the jury did not arrive at a determination devoid of passion and prejudice, was raised on appeal, decided adversely to petitioner, *Rogers* v. *State*, *supra*, and is not cognizable in a petition for postconviction relief. *Houser* v. *United States*, *supra*.

In conclusion, we address the opinion of the United States District Court wherein petitioner's second allegation in this Court was discussed. The district court said:

> A sentence to life imprisonment without parole may not literally be 'life without hope,' as Rogers argues, but it is close. He is an exile from life, forever excluded from its enjoyment. He may hope for clemency — either pardon, or far more likely, commutation — but the hope is a thin reed. Executive clemency is a matter of grace. It is a prerogative that need never be exercised, and the chance that it will be exercised in any given case cannot be measured. There is no right to parole, either, and life with the possibility of parole can turn out in practice to be literally imprisonment for life, but parole is a much less remote contingency than clemency. Parole is granted in most cases before the expiration of a full term of imprisonment. The death penalty is unique, but so is life without parole. It is the loss, not of life itself, but all that makes life worth living.

Apparently, the district court was also under the mistaken impression that petitioner's sentence was life imprisonment without parole instead of life imprisonment. It is true that before petitioner can be subject to be released on parole, his sentence must be commuted to a term of years by executive clemency, Ark. Stat. Ann. § 43-2807, *supra;* however, that possibility is not a "remote contingency." We take judicial notice of the fact that 30 life sentences have been commuted

to a term of years by the Governor of Arkansas in less than five years. See Governor's Clemency Proclamations, November 19, 1974, to March 15, 1979, Nos. 2579, 2580, 2583, 2586, 2587, 2588, 2589, 2591, 2599, 2610, 2611, 2612, 2613, 2614, 2615, 2618, 2619 & 2632, 2621, 2624, 2625, 2637, 2642, 2644, 2659, 2695, 2704, 2705, 2740, 2762 and 2767. Office of the Secretary of State of Arkansas.

It appears to us that the number of years petitioner will have to serve on his life sentence now rests, first, in his hands, in relation to his conduct while imprisoned, and, second, in the hands of the executive branch, not the judicial branch, of government.

Accordingly, petitioner's present petition for permission to proceed under Criminal Procedure Rule 37 is hereby denied.

Petition denied.

[redacted]

[redacted]

[redacted]